BACON's

ABRIDGMENT.

By GWILLIM.

VOL. IV.

A

NEW ABRIDGMENT OF THE LAW.

By MATTHEW BACON,
OF THE MIDDLE TEMPLE, ESQ.

THE FIFTH EDITION, CORRECTED;
WITH CONSIDERABLE ADDITIONS,
INCLUDING THE LATEST AUTHORITIES;
By HENRY GWILLIM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

IN SEVEN VOLUMES.

VOL. IV.

LONDON:

PRINTED BY A. STRAHAN,
LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
For T. Cadell, C. Dilly, G. G. and J. Robinson, J. Johnson, R. Baldwin, A. Strahan, W. Otridge, E. and R. Brooke, F. and C. Rivington, J. Butterworth, E. Newbery, W. Clarke and Son, J. Stockdale, T. Payne, J. Walker, R. Baniſter, R. Pheney, T. N. Longman, R. Bickerſtaff, and J. White.

1798.

PK
MVSEVM
BRITANNICVM

Leaſes and Terms for Years.

A LEASE for years is a contract between leſſor and leſſee, for the poſſeſſion and profits of lands, &c. on the one ſide, and a recompence by rent, or other conſideration, on the other, [1 Term Rep. 598-9.]

This is eſteemed in law a middle kind of intereſt between an eſtate for life and a tenancy at will; for thoſe who held large diſtricts and tracts of lands, being unacquainted with the arts of huſbandry and tillage, found it their intereſt to leaſe out their demeſnes, which for want of care and cultivation lay waſte, and afforded them little or no profit; and this way of letting for years was thought beſt to anſwer the deſign and intentions of the lord, as well as the expectations of the tenant; for if they had let them for life, this had given the tenants too great a power over the lord, becauſe then they would have had a property in the freehold, and by ſuffering diſſeiſins, or feigned recoveries to be had againſt themſelves, might have ſhaken or endangered the inheritance of the owner; and on the other ſide, if they had leaſed their land only at will, few would have been willing to beſtow any great pains or induſtry upon ſo precarious a poſſeſſion, which the arbitrary will and pleaſure of a peeviſh lord might have defeated. Spelm. Rem. 2.

Originally, leaſes for years were but of little regard, the tenant having only *utile*, not *directum dominium*, and being ſaid *tenere nomine alieno*: and as he had only the perception of the profits, whoever recovered the freehold reduced likewiſe the poſſeſſion, whether ſuch recovery were true or feigned; and the leſſee had no other remedy but an action of covenant againſt the leſſor; and this, at leaſt, was thought a juſt conſtruction, that he who had deveſted himſelf of the profits of his lands for a time, by giving them to another, ſhould be obliged to maintain that gift, or be liable to make ſatisfaction if he did not; and this was the more reaſonable, becauſe the leſſee was equally bound to anſwer and make good the rent during the term; and if he did not, the law allowed the leſſor to maintain an action of covenant, as well as of debt againſt him, for with-holding thereof; and as it made this conſtruction for the leſſor upon the words *yielding* and *paying*, which were no expreſs covenant in themſelves, it was but reaſonable it ſhould make the like conſtruction for the leſſee upon the word *dimiſit*, which in itſelf no more imported an expreſs covenant on his part: but by making this conſtruction mutual, the courts did juſtice to both; and by making it at all, they plainly *Vide* tit. *Covenant*, and Salk. 137. pl. 1.

ſhewed their opinions of the leaſe to be no other than a contract or agreement between the parties, and not ſuch an act as transferred any property to the leſſee: and this is one reaſon why leaſes for years are conſidered as chattels, and go to (*a*) executors.

(*a*) Therefore, if a leaſe be made to a biſhop, abbot, parſon, or any other ſole corporation, and his ſucceſſors, for ſuch a number of years, yet it ſhall go to the executors or adminiſtrators of the leſſee, and not to his ſucceſſors, becauſe a term for years being looked upon as a chattel, the executors or adminiſtrators are the only perſons the law allows to ſucceed thereto; and this ſucceſſion to the chattel cannot be altered or controuled by any limitation of the party: but yet in ſuch caſe it ſeems, that the executors or adminiſtrators of the leſſee ſhall hold it in the right of, and as truſtees for the ſucceſſors; for the book ſays, they ſhall have it in *auter droit*. Co. Lit. 9. a. 46. b. 90. a.—But this rule, as to the ſucceſſion of chattels, hath two exceptions: 1. In caſe of the king, who by his prerogative may take any chattels in ſucceſſion, and, conſequently, a leaſe made to him and his ſucceſſors for years is good, and ſhall go accordingly, and not to his executors or adminiſtrators. Co. Lit 90. a. 11 Co. 92. a.——The ſecond exception is in caſe of the chamberlain of London, who, by cuſtom of the city, confirmed by divers acts of parliament, may take chattels in ſucceſſion for the benefit of orphans; but *quære*, if this cuſtom extends to leaſes for years, for the books only mention recognizances, obligations, &c. which are given or entered into to the chamberlain and his ſucceſſors, by way of ſecurity for orphans portions; *quære*, therefore, if a leaſe may be made to the chamberlain and his ſucceſſors for years. Cro. Eliz. 464. 4 Inſt. 249. 4 Co. 65. Fulwood's caſe.

Co. Lit. 45. b. Mirror, 164. 293. Vent. 53.

Another reaſon was, becauſe at firſt theſe leaſes were made but for a ſmall number of years, (for my Lord *Coke* tells us, that by the ancient law of *England*, no man could have made a leaſe for above forty years at the moſt,) and the reaſon thereof ſeems to be, becauſe they were only made to ſerve the occaſions and exigencies of the lord in cultivating and improving his demeſnes, not to borrow money on or raiſe portions for daughters, or ſuch other uſes as are now made thereof; therefore there was no need to extend them to any great length of time, ſince they might be renewed as often as occaſion required; beſides, the leſſees, if they were evicted, being only to recover damages, it would have been fruitleſs to prolong leaſes for the term of 1000 years, when the perſons who are to poſſeſs under ſuch leaſes had no remedy for their damages but by recourſe to the repreſentatives of the original leſſor.

Vide title *Fines and Recoveries.*

Alſo, another reaſon might be, becauſe theſe leaſes for years were under the power of the freeholder to deſtroy by a recovery; for the perſon coming in by the recovery, was ſuppoſed to come in by title paramount, and ſo was not bound or obliged by them, and, by conſequence, few could be willing to take leaſes for any longer term, which they might ſo eaſily be defeated of.

Bro. tit. *Leaſes*, 26. F. N. B. 198. 220. Vaugh. 127. 4 Co. 80. Lev. 46. 2 Mod. 18.

But though in the reign of *H.* 7. it was reſolved, that the leſſees ſhould not only recover damages as a recompence for the poſſeſſion loſt, but ſhould alſo recover the poſſeſſion itſelf; and the ſtatute 21 *H.* 8. *cap.* 15. gives the termor power to falſify all manner of recoveries had againſt the tenant of the freehold, upon feigned and untrue titles; from whence men began to limit long leaſes, becauſe by ſuch purchaſes they eſcaped the wardſhip, relief, and other burdens that were annexed to the ancient tenures; yet no alteration was made in the ſucceſſion to them, the law having been formerly ſettled as to that point; and if they had not carried the ſucceſſion in the manner they formerly did, they had loſt the end of ſuch limitation.

And

And though at this day terms for years are multiplied to a much longer duration than they were formerly, and there is now ample remedy to recover the term itſelf, yet the ſucceſſion continues the ſame; for beſides the reaſons already given, it would be inconvenient to have had one rule of property for ſhort terms, and another for thoſe that were longer, being all of the ſame nature, and ſtill no more than leaſes for years; beſides the difficulty of fixing the juſt bounds to any preciſe determinate number of years, ſince one or two years, more or leſs, would have made very little difference in reaſon, and long or ſhort are only terms of compariſon; as a leaſe for forty years is long with reſpect to one of eight or ten years, and yet ſhort with reſpect to another of a hundred years; therefore, that there might be an uniformity in the law, all leaſes for years are holden to be of leſs value than eſtates for life, as being originally of much ſhorter duration, and alſo becauſe they were under the power of the tenant of the freehold to deſtroy, and therefore are conſidered only as chattels, and caſt upon the executors.

[Long terms, as for 2000 years, are conſidered (at leaſt after part of the time has elapſed) not as leaſes, but as terms to attend the inheritance. Cowp. 597.]

We ſhall conſider this head under the following diviſions:

(A) Of what Things Leaſes may be made for Years. 7.

(B) Of the Perſons by whom Leaſes may be made: And herein, firſt, of Leaſes by Infants. 11.

(C) Of Leaſes made by Huſband and Wife: 13. And herein,

1. Of Leaſes made by Huſband and Wife by the Common Law.
2. Of Leaſes made by them purſuant to the Statute of 32 *H.* 8. *cap.* 28.

(D) Of Leaſes by Tenant in Tail: 18. And herein,

1. What Leaſes Tenant in Tail might have made by the Common Law.
2. What Leaſes Tenant in Tail may now make to bind his Iſſue, ſince the 32 *H.* 8. *cap.* 28. 30.
3. When and in what Caſes the Iſſue in Tail, or Strangers, ſhall be bound by voidable Leaſes made by Tenant in Tail. 33.

(E) Of Leaſes for Lives or Years by Eccleſiaſtical Perſons: 39. And herein,

1. What Leaſes they might have made by the Common Law, and of the ſeveral enabling and diſabling Statutes, with ſome general Obſervations on them. 39.
2. Of the Rules to be obſerved, and Qualifications requiſite to the Perfection of ſuch Leaſes: 50. And herein,

Rule 1. *Where an Indenture or Deed is neceſſary.* 56.
Rule 2. *When ſuch Leaſes are to begin:* 55. *And herein,*

1. When ſuch Leaſes as have no Date at all, or a void or impoſſible Date, are to begin. 55.
2. Such Leaſes as have a good Date, and are delivered on the ſame Day; in what Caſes the Day of the Date or Delivery is to be taken incluſive, and in what Caſes excluſive. 55.
3. Such Leaſes as have a good Date, but are not delivered till a Week or Month, &c. after, when they are to begin, and how the Declaration on ſuch Leaſes is to be framed. 57.

Rule 3. *Within what Time the old Leaſe is to be ſurrendered; and herein of concurrent Leaſes.* 61.
Rule 4. *That ſuch Leaſes are not to exceed three Lives, or twenty-one Years.* 69.
Rule 5. *Of what Things Leaſes may be made to bind the Succeſſor.* 70.
Rule 6. *What ſhall be ſaid a uſual Letting to Farm upon the ſeveral Statutes, and by what Perſons.* 74.
Rule 7. *What Rent is to be reſerved:* 78. *And herein,*

1. That there muſt be a Rent reſerved. 78.
2. That this Rent muſt continue due, and be payable to the Leſſors and their Succeſſors. 78.
3. That ſuch Rent muſt be the ſame, or more in Quantity than hath been reſerved within twenty Years next before ſuch Leaſe made. 79. And herein,
   1. What ſhall be ſaid to be the ancient Rent, where Variety of Rents have been reſerved, or ſomething formerly reſerved now omitted or varied. 79.
   2. In what Manner ſuch Reſervation is to be made. 81.
   3. Where the Addition of more Land, with or without the Addition of more Rent, ſhall avoid ſuch Leaſes. 84.
   4. Where a Reſervation of the whole Rent, or only *pro Rata* on a Leaſe of Part, ſhall be good. 85.

Rule 8. *That ſuch Leaſes muſt not be made without impeachment of Waſte.* 87.

(F) Of Leaſes by Parſons, Vicars, and others, with reſpect to other Qualifications. 100.

(G) Of the Conſent or Confirmation of others to Leaſes made by Eccleſiaſtical Perſons: 108. And herein,

1. Where

1. Where Confirmation is neceſſary either in reſpect of the Leaſes or Eſtates made, or of the Perſons making the ſame. 96.
2. What Perſons are to confirm ſuch Leaſes or Eſtates, and in what Manner. 99.
3. What Eſtates they who make ſuch Confirmation are to have. 111.
4. At what Time ſuch Confirmation is to be made. 114.
5. How far a Regard is to be had to the true naming of the Corporation or Perſons who do confirm. 117.

(H) Of void or voidable Leaſes by Eccleſiaſtical Perſons: And herein, 117

1. Againſt whom Leaſes not purſuant to the Statutes, or otherwiſe defective, are void or only voidable.
2. By what Means and in what Caſes ſuch voidable Leaſes may be made good.
3. The Manner of avoiding ſuch Leaſes as are only voidable.

(I) Of Leaſes made by thoſe who have but a particular Eſtate or Intereſt in the Lands leaſed: And herein,

1. Of Leaſes made by Tenant in Dower or Curteſy. 126.
2. Of Leaſes made by Tenant for Life. 126.
3. Of derivative Leaſes, or by one who is but a Leſſee for Years himſelf. 127.
4. Of Leaſes made by a Diſſeiſor or Diſſeiſee. 129.
5. Of Leaſes made by Joint-tenants or Tenants in Common. 130.
6. Of Leaſes made by Copyholders. 132.
7. Of Leaſes made by Executors or Adminiſtrators.
8. Of Leaſes made by a Bailiff of a Manor. 137.
9. Of Leaſes made by a Guardian. 138.
10. Of Leaſes made purſuant to Authority.
11. Of Leaſes made purſuant to Powers in private Conveyances and Settlements. 143.

(K) By what Form of Words Leaſes may be made.

(L) What Certainty is requiſite to Leaſes for Years as to their Beginning, Continuance, and Ending; And herein,

1. With regard to the Date of the Leaſe.

2. With regard to other Circumſtances taken notice of in the Deed of Leaſe, whereby to aſcertain the Commencement thereof.
3. The Certainty of Leaſes for Years as to their Continuance.
4. The Certainty of Leaſes for Years as to their Duration and Ending.

(M) In what Caſes, and to what Reſpects an Entry by the Leſſee is requiſite to the Perfection of his Leaſe.

(N) Leaſes for Years, when to take Effect as a Reverſion, when as a future Intereſt, and when neither the one nor the other.

(O) Leaſes for Years by Eſtoppel, how far and againſt whom ſuch Leaſes are good.

(P) Leaſes for Years and future Intereſts, how far they may be barred or deſtroyed, and how far not, and where an Entry before the Term begun is a Diſſeiſin.

(Q) How far, and by what Means, Leaſes for Years in Truſt to attend an Inheritance may be barred or deſtroyed.

(R) Leaſes for Years, when merged by Union with the Freehold or Fee.

(S) Of Surrenders of Leaſes for Years: And herein, 209.

1. Of Surrenders in Fact or Expreſs: And here again,
   1. *By what Words ſuch Surrender may be made.* 209.
   2. *Upon what Eſtate ſuch Surrender may operate.* 211.
2. Of Surrenders in Law, or implied Surrenders: And herein,
   1. *With regard to Leaſes in Poſſeſſion.* 212.
   2. *With regard to Leaſes* in Futuro. 216.
   3. *With regard to the Thing itſelf ſo ſurrendered.* 216.

(T) Leaſes when determined by cancelling the Deed.

(T. 2) When forfeited. 219.

(U) Of the Renewal of Leaſes. 221.

(A) Of what Things Leaſes may be made for Years.

AFTER ſuch time as leaſes for years began to be looked upon as fixed and permanent intereſts, and that the leſſees were ſufficiently provided to defend themſelves, and their poſſeſſions, againſt the acts and incroachments as well of the leſſor as of ſtrangers, men found it their intereſt to improve and encourage this ſort of property, and therefore extended it to all ſorts of intereſts and poſſeſſions whatſoever, being led thereto by that known rule, that whatſoever may be granted or parted with for ever, may be granted or parted with for a time; and therefore not only lands and houſes have been let for years, but alſo goods and chattels, though the intereſt of the leſſee therein differs from the intereſt he hath in lands or houſes ſo let for years: for if one leaſe for years a ſtock of live cattle, ſuch leaſe is good, and the leſſee hath only the uſe and profits of them during the term; but yet the leſſor hath not any reverſion in them to grant over to another, either during the term or after, till the leſſee hath re-delivered them to him, as he would have of lands in caſe of ſuch leaſe for years, for the leſſor hath only a poſſibility of property in caſe they all outlive the term; for if any of them die during the term, the leſſor cannot have them again after the term; and during the term he hath nothing to do with them, and, conſequently, of ſuch as die, the property reſts abſolutely in the leſſee: ſo, whether they live or die, yet all the young ones coming of them, as lambs, calves, *&c.* belong abſolutely to the leſſee as profits ariſing and ſevered from the principal, ſince otherwiſe the leſſee would pay his rent for nothing; and therefore this differs from a leaſe of other dead goods and chattels; for there, if any thing be added for the repairing, mending, or improving thereof, the leſſor ſhall have the improvements and additions, together with the principal, after the leaſe ended, becauſe they cannot be ſevered without deſtroying or ſpoiling the principal; neither is the ſucceſſion of young ones, in caſe any of the old ones die, to be reſembled to a corporation aggregate, whereof when any die, thoſe that ſucceed ſhall be ſaid part of the ſame corporation, for the corporation, in its publick capacity, never dies; but this being a leaſe of ſuch and ſuch individual cattle, when any of them die, the poſſibility of reverting property, which was left in the leſſor, is determined and at an end. But the leſſee in ſuch caſe cannot kill, deſtroy, ſell, or give them away, during the term, without being ſubject to an action of treſpaſs, as it ſhould ſeem; but in caſe of a leaſe of a houſe, together with goods, it is uſual to make a ſchedule thereof, and affix it to the leaſe, and to have a covenant from the leſſee to re-deliver them at the end of the term, and without ſuch covenant the leſſor could have no other remedy, but trover or detinue for them after the leaſe ended.

Godb. 112. Leon. 42. Owen, 139. 5 Co. 16, 17. Dyer, 56. a. 110. a. 212. b. Bro. tit. *Leaſes*, 23. 2 Bulſ. 7.

Lit. § 72. Co. Lit. 57. a.

Bro. tit. *Leaſes*, 40.

If one hath a corody for life, he may let it to another, or to the grantor himſelf; ſo may the grantee of houſe-bote, or hay-bote; but in caſe ſuch leaſe be to the leſſor himſelf, rendering rent, he can only have them by way of retainer, being to ariſe out of his own proviſion, or his own land.

Hard. 357.

But as to lands or other things of inheritance, as they may be granted or departed with for ever, ſo they may for a time, and, conſequently, may be leaſed for years in all caſes where no inconvenience or injury to the publick is like to enſue; for then mens private intereſts muſt give way to the publick, and what might otherwiſe in its own nature be good and allowable, muſt upon that account be diſallowed and ſtand condemned; wherefore it having been ſettled, that all leaſes for years were but chattels, and as ſuch ſhould go to executors or adminiſtrators, the firſt caſe wherein we find any objection to a leaſe for years is, that of the office of Marſhal of the King's Bench Priſon, for that being an office of great truſt, concerning the adminiſtration of juſtice in the keeping of priſoners, if it ſhould be granted for years, it might be injurious to the publick, by being in ſuſpence till probate of the will or adminiſtration taken out; and if the officer ſhould die indebted, ſo that none would prove his will, or take out adminiſtration, then there would be no officer at all, and executors or adminiſtrators would be in by act of law, without allowance of the court: alſo, it might be a queſtion, if ſuch office ſhould not be forfeited by outlawry, or be aſſets in the executor's hands; and many other inconveniencies would follow, if ſuch grant for years were allowed: for the ſame reaſon it was holden likewiſe, that the offices of *cuſtos brevium*, chirographer, clerk of the pipe, of the king's ſilver or of the crown, remembrancer or chamberlain of the Exchequer, prothonotaries, and other offices in the ſeveral courts of juſtice, cannot be granted for years; and though the offices of ſheriff and coroner were granted for years, till reſtrained by 14 *E.* 3. *cap.* 7. yet it was never debated what inconveniences might enſue by allowing thereof. And theſe reaſons held equally good againſt granting the office of warden of the *Fleet*, or any other (*a*) gaolerſhip.

9 Co. 97. Roll. Abr. 847. 2 Roll. Abr. 153. Sir George Reynold's caſe. Cro. Car. 587. Jon. 563. Hob. 153. 3 Mod. 145.

(*a*) In 2 Cha. Ca. 70. it is ſaid by my Lord Chancellor, that he thought the caſe of a gaolerſhip not grantable for years too eaſily ſlipt over.

And although it hath been reſolved, that the office of Marſhal of the King's Bench priſon cannot be granted for years, yet it hath been holden, that a leaſe thereof for years during the life of the grantee is good; for hereby the danger of the office going to executors is avoided, which the book ſays is the ſole reaſon why the office is not abſolutely grantable for years.

6 Mod. 57. Sutton's caſe. [But ſee ſt. 8 & 9 W. 3. c. 27. and 27 G. 2. c. 17, with reſpect to this office.]

Alſo it appears, that the dean and chapter of *Weſtminſter* made a leaſe for years of the Gatehouſe-priſon, and the leſſee had committed ſeveral offences which amounted to a forfeiture, for which the office was ſeized, but no (*b*) objection made to its being let for years.

Raym. 216. 2 Lev. 71. 3 Keb. 32. The King v. Lady Broughton.

(*b*) *Note*: There ſeems a difference between Sir George Reynolds's caſe and this, becauſe in Sir George Reynolds's caſe the grant for years was from the crown, in whom all offices, in relation to the adminiſtration of juſtice, are originally and inherently lodged; and therefore, for the crown to grant out ſuch office for years,

years, may be liable to the objections before mentioned; but in this caſe the dean and chapter are the immediate grantees of the crown, and they have the office to them and their ſucceſſors for ever in fee, and are perpetual gaolers themſelves, and anſwerable to the crown, notwithſtanding any ſuperior leaſe to another; and therefore they always take ſecurity of ſuch under-leſſee for their own indemnity.

But ſuch offices as do not concern the adminiſtration of juſtice, but only require ſkill and diligence, may be granted for years, becauſe they may be executed by deputy, without any inconvenience to the publick: Therefore, where a grant for years was made of the office of garbler of ſpices in *London*, it was adjudged to be a good grant, or at leaſt a good appoinment for years, within the intent of the ſtatute 1 *Jac.* 1. *cap.* 19. Hard. 46. Jones and Clerk.

The office of printer was granted for years, 6 *Car.* 1. and held a good grant, being but an employment: So, the office of poſtmaſter was granted to the Lord *Stanhope* for years, and held good. Hard. 352.

The office of regiſtrar of policies of aſſurance in *London* concerning merchants was granted by the king for years, and adjudged to be a good grant, becauſe it did not concern the adminiſtration of juſtice in any court, but required only the ſkill of writing after a copy: So, the office of making and ſealing *ſubpœnas* was granted for years, and allowed to be good; and there ſeveral precedents are cited of offices granted for years; as, firſt, offices in which the ſafety of the realm was concerned, as the office of the warden of a haven or port by *H.* 6. of gunpowder by 1 *Car.* 1. of making gunpowder by *Car.* 2. Alſo, offices concerning the trade of the realm have been granted for years; as 1 *H.* 7. of the exchange of money; 18 *H.* 8. of gager; 17 *Rich.* 2. of aulnager, though a ſeal belongs to it, with which the officer is intruſted; of the letter-office, 3 *Car.* 1. Alſo, offices in courts of juſtice have been granted for years; as the office of ſurveyor of the green wax, of the ſixpenny writs in Chancery and *ſubpœnas*, of comptroller and cuſtomer, and of making out proceſs in *C. B.* All theſe, and ſeveral others, have been granted for years; but no diſpute having been made of the validity of them, how far ſome of them would hold at this day, may be a queſtion. Hard. 351. 354. 357. Dyer, 303. Hob. 146. 3 Keb. 80.

But where one made a grant for years of the ſtewardſhip of a court-leet and court-baron, this was holden void as to the court-leet, being a judicial office, but good as to the court-baron, being only miniſterial, and the ſuitors judges thereof; but the grant appearing afterwards to be for years determinable upon the death of the leſſee, it was holden good for both, becauſe there was no danger of its coming to executors or adminiſtrators. 2 Lev. 245. 2 Jon. 116. Howard and Wood.

One Mrs. *Dennis* was found by office to be an idiot *a nativitate*; the king grants the cuſtody of body and eſtate to Sir *Alexander Frazier*, his executors and adminiſtrators, during the idiotcy; Sir *Alexander* dies, and then the king grants the cuſtody to Mr. *Prodgers*; and whether he or the executrix of Sir *Alexander* had the better title, was the queſtion. It was ſaid to be a truſt in the king, and therefore not grantable to executors or adminiſtrators, and that if the grantee die inteſtate, there would be none to take care of the idiot. On the other ſide it was ſaid, that the king had not only a truſt, but an intereſt, and might have diſpoſed of the 2 Chan. Ca. Prodgers v. Lady Frazier, Vern. 9. 137. S. C.

the profits to his own uſe, or have granted them over as he thought fit, in caſe of an idiot, though it was otherwiſe in caſe of a lunatick; and that being a chattel, it ſhould naturally go to executors; and to this opinion my Lord Chancellor inclined, but directed the validity of the patent to be tried at law: and (*a*) in *B. R.* the grant to Sir *Alexander* was holden good; for the king has the ſame intereſt in an idiot that he had in his ward, which always went to the executor of his grantee, though it was otherwiſe in the caſe of a lunatick.

(*a*) 3 Mod. 43. Vern. 192. S. C.

The office of park-keeper was granted for years, and no objection made to it; for this does not concern the adminiſtration of juſtice, but only requires diligence and care.

2 Roll. Rep. 274. Godb. 413.

Dignities or honours cannot be granted for years; as to be earl, duke, baron, *&c.* becauſe then they muſt go to the executors or adminiſtrators, whilſt the eſtate that ſhould ſupport them would go to the heir, and ſo introduce confuſion and abſurdity.

Co. Lit. 16. b. 9 Co. 97. b.

By the 23 *H.* 6. *cap.* 10. it is provided, "That no ſheriff ſhall "let to farm in any manner his county, nor any of his bailiwicks, "hundreds, or wapentakes;" which proves that before this ſtatute it was not unuſual to let them to farm.

By the 12 *Car.* 2. *cap.* 23. § 27. the lord treaſurer, or commiſſioners of the treaſury for the time being have power to let to farm all or any the rates or duties of exciſe upon beer, ale, cyder, and other liquors therein mentioned, ſo as the ſame exceed not the term of three years; without which clauſe the treaſurer or commiſſioners of the treaſury could not have made ſuch leaſe, though perhaps the king himſelf might, having the abſolute intereſt and ownerſhip therein.

By the 12 *Car.* 2. *cap.* 25. § 3. power is given to the king's agents for the granting of wine licences to any perſon or perſons for any time or term not exceeding twenty-one years, if ſuch perſon or perſons ſhall ſo long live, upon ſuch rent as ſhall be agreed on, to be paid half-yearly; ſuch licences are not to be granted to any but thoſe who perſonally uſe the trade of ſelling by retail, or to the landlord of ſuch houſe, nor ſhall the ſame be aſſignable, or of any benefit but only to the firſt taker.

By the 22 *&* 23 *Car.* 2. *cap.* 14. § 6. power was given to the maſter and chaplains of the *Savoy*, to encourage the rebuilding thereof, to demiſe any of the lodgings for any term not exceeding forty years, under ſuch rents as they could procure, without renewing.

[By the 27 *G.* 3. *c.* 26. the lord treaſurer, or commiſſioners of the treaſury for the time being are empowered to let to farm for any term, not exceeding three years, the duties upon poſt-horſes.]

(B) Of the Perſons who may make Leaſes: And herein, firſt, of Leaſes made by Infants.

AS to leaſes made by infants, or ſuch as are under the age of twenty-one years, what ſeems moſt conſiderable is, whether any, and what leaſes for years made by ſuch are abſolutely and *ipſo facto* void, or only voidable by them; about which the opinions of the books ſeem a little unſettled.

Some opinions are, that all leaſes for years made by infants (*a*) without reſervation of rent, are abſolutely void, and not merely voidable. Moor, 105. 2 Leon. 218. Hutton 102. Roll. Rep. 441.

(*a*) So, if a tiſſe only had been reſerved, as a pepper corn. Mod. 263.—But that a leaſe made by an infant to try his title is good, though no rent be reſerved. Moor, 105. 2 Leon. 216. Noy, 130.

Other opinions there are, that leaſes for years in general by infants are only voidable, and not void, without taking notice whether any rent were reſerved on ſuch leaſes or not; and ſome even ſeem to hold, that though no rent at all be reſerved, yet the leaſes are not thereby abſolutely void, but only voidable by the infants when they come of age, and that they may confirm the ſame at their full age by accepting fealty, which is at leaſt incident to every leaſe. Lit. § 547. Co. Lit. 45. b. 308. a. Lev. 6. Moor, 78. [This opinion hath been confirmed by what fell from the court in the caſe of Zouch v. Parſons, 3 Burr. 1806.]

Alſo, moſt of the books agree, that if a rent were reſerved on ſuch leaſe for years, then it would be only voidable by the infant at full age, without ſaying how it would be if no rent at all were reſerved, unleſs by implication that it would be void in ſuch caſe. Bro. tit. *Leaſes*, 50. Moor, 663. Roll. Abr. 729, 730. 3 Mod. 307. 3 P. Wms. 210.

But all the books agree, that if an infant make a leaſe for years, he cannot plead *non eſt factum*, but muſt avoid it by pleading the ſpecial matter of his infancy; which ſeems to favour the opinion of thoſe who hold, that the leaſe is not abſolutely void; for if the leaſe were abſolutely void, there does not ſeem to be any good reaſon why he might not plead *non eſt factum*, as a feme covert certainly may do in ſuch caſe, whoſe leaſe is abſolutely void, ſo that no acceptance of rent after her huſband's death can make it good. 5 Co. 119. 2 Inſt. 483. Moor, pl. 132. Cro. Eliz. 127. 857. Poph. 178. 10 Co. 43. *Vide* head of *Infancy and Age*, vol. 3. 610.

An infant copyholder without licence of the lord made a leaſe for years by parol, rendering rent, and at full age was admitted, and accepted the rent, and then ouſted the leſſee: and in this caſe, though it was agreed, that a leaſe for years, rendering rent, by an infant, of freehold lands was only voidable, yet it was urged that in caſe of a copyhold it would be otherwiſe, becauſe the leaſe not being warranted by the cuſtom would be a diſſeiſin to the lord, and, conſequently, a forfeiture of his copyhold, which being a great miſchief to the infant, the court ought rather to help him, by adjudging ſuch leaſe to be abſolutely void: but, notwithſtanding this, it was adjudged that the leaſe was a good leaſe till avoided, and that a leaſe for years by a copyholder without licence Latch. 199. Godb. 364. Aſhfield and Aſhfield. Noy, 92. and Jon. 157. S. C. which laſt book ſays, that it was held to be no forfeiture as to the lord, but that admitting it were, yet it

was a good leaſe as to all ſtrangers, and that for this reaſon principally it was adjudged, ſuch acceptance made it good.

licence is not a diſſeiſin; and admitting it ſhould be a forfeiture in this caſe, yet if the lord enters for it, the infant may re-enter upon him, and ſo is at no miſchief; and that the infant having accepted the rent at full age, he had made it good and unavoidable.

Cro. Jac. 320. Kettley and Elliot, Brownl. 320. 2 Bulſ. 69. Roll. Abr. 731. S. C. adjudged.

If an infant takes a leaſe for years of lands, rendering rent, which is in arrear for ſeveral years, then the infant comes of age, and ſtill continues the occupation of the land, this makes the leaſe good and unavoidable, and, by conſequence, makes him chargeable with all the arrears incurred during his minority; for though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the leſſor ſuffered to incur during his minority, yet his continuance of poſſeſſion after his full age ratifies and affirms the contract *ab initio*, and ſo gives remedy for the arrears of rent incurred from the time of the contract made.

Dalſ. 64. *Curiam.*

But if an infant poſſeſſed of a term for years ſells it for money, and after he comes of full age receives part of the money for it, he ſhall avoid the grant notwithſtanding; for the contract, as ſaid, being void in the commencement, it cannot be made good by any ſubſequent act.

Co. Lit. 45. b.

By cuſtom in ſome places an infant ſeiſed of lands in ſocage may at the age of fifteen years make a leaſe for years, which ſhall bind him after he comes of age; for the cuſtom makes fifteen his full age for that purpoſe.

4 Leon. 4.

An infant made a leaſe for years, and at full age ſaid to the leſſee, *God give you joy of it;* this was holden by *Mead* a good affirmation of the leaſe; for this is a uſual compliment to expreſs one's aſſent and approbation of what is done.

Anon: 2 Leon. 220. 1.

[The father of an infant leaſed his ſon's lands for 20 years, and at full age the ſon, upon the back of the indenture, releaſed all his right to the defendant: it was holden by *Wray*, J. that this leaſe was made by the father, as guardian, and voidable by the ſon; and that the indorſement by the ſon was a good aſſignment.]

Plow. 212. Dyer, 209. Caſe of the Duchy of Lancaſter.

If the king within age makes a leaſe for years, this is binding preſently, and cannot be avoided by him, either during his minority or when he comes of age; for the politick rules of government have thought it neceſſary that he, who is to govern and manage the whole kingdom, ſhould never be conſidered as a minor, incapable of governing himſelf and his own affairs.

(C) Of Leaſes made by Huſband and Wife: And herein,

1. Of Leaſes made by Huſband and Wife by the Common Law.

IT is clearly agreed, that if a huſband, ſeiſed of lands in right of his wife, make a leaſe thereof by indenture or deed poll, reſerving rent, that this is a good leaſe for the whole term, unleſs the wife, by ſome act after the huſband's death, ſhews her diſſent thereto; for if ſhe accepts rent, which becomes due after his death, the leaſe is thereby become abſolute and unavoidable; the reaſon whereof is, that the wife, after her intermarriage, being by law diſabled to contract for or make any diſpoſition of her own poſſeſſions, as having ſubjected herſelf and her whole will to the will and power of her huſband, the law thereupon transfers the power of dealing and contracting for her poſſeſſions to the huſband, becauſe no other can intermeddle therewith, and without ſuch power in the huſband they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both; but to prevent the huſband from abuſing ſuch power, and leſt he ſhould make leaſes to the prejudice of his wife's inheritance, the law has left her at liberty after his death either to affirm and make good ſuch leaſe, or to defeat and avoid it, as ſhe finds moſt ſubſervient to her own intereſt. Bro. tit. *Acceptance*, 10. tit. *Leaſes*, 24. Cro. Jac. 332. Jordan and Wilkes. 2 And. 42. Plow. 137.

So, if the wife join in ſuch leaſe for years by indenture, if not made purſuant to the 32 *H.* 8. *cap.* 28. ſhe is after her huſband's death at liberty either to affirm it by acceptance of rent, or to diſſent to and avoid it by bringing treſpaſs, *&c.* in the ſame manner as if ſhe had been no party thereto; for her joining during the coverture, when ſhe was not *ſui juris*, but under the power of the huſband, will not bind her after his death; and if ſhe chooſes to avoid ſuch leaſe, notwithſtanding her joining therein, then it is ſo abſolutely defeated *ab initio* as to her, that ſhe may plead *non demiſit*, becauſe as to any intereſt that paſſed from her ſhe did not demiſe, nor in truth had any power to contract, but the whole intereſt paſſed from the huſband, and the leſſee is in merely by virtue of the huſband's contract; and yet, becauſe the leſſee by his acceptance of ſuch leaſe admitted them both to have power to join therein, he muſt accordingly, during the coverture, declare of the leaſe by them both, as an eſſential part of the deſcription of the leaſe whereby he makes title. Cro. Jac. 563. Cro. Car. 165. 406. Cro. Jac. 617. Yelv. 1. Cro. Eliz. 769. Roll. Abr. 350.

But the indenture or deed poll, whereby ſuch leaſe was made, being no eſſential part either of the deſcription or leaſe itſelf, becauſe the huſband during the coverture might have made it by parol only; therefore, it is neither neceſſary nor uſual for the leſſee in his declaration to make any mention thereof. 2 Co. 61. 3 Co. 21. Plow. 431. a. Leon. 192. Cro. Eliz. 438. 482. Sav. 109, 110. 112. Cro. Car. 527.

So alſo, if the wife's part in ſuch leaſe were merely void, and her joining therein would have no effect to help the deſcription of Yelv. 1. Wilſon and Rich. Cro.

Car. 155. Hopkins's caſe; and the S. C. 2 Bulſ. 13. obſcurely put, ſeem cont.

of the leaſe, then the leſſee ought in his declaration upon ſuch leaſe to leave out the wife, otherwiſe his inſerting of her as one of the leſſors will vitiate his declaration: therefore, where the huſband and wife ſealed a leaſe for years of the wife's lands, and at the ſame time executed a letter of attorney to a third perſon to deliver ſuch leaſe as their deed to the leſſee, which he did accordingly, and then the leſſee brought an ejectment, and declared of this by baron and feme; to which not guilty being pleaded, this ſpecial matter was found; the court, after argument, gave judgment that the plaintiff had failed in his declaration, becauſe, as this caſe was, it was only the leaſe of the huſband; for the delivery of the deed being eſſential to make it a complete deed, this ought to have been done by the wife herſelf in perſon; for ſhe not being *ſui juris* could not by ſuch letter of attorney delegate any power or authority whatſoever to another, but ſuch delegation was merely null and void; and, by conſequence, the attorney's delivering it in her name was to no purpoſe, but it was only the leaſe of the huſband, as being only effectually delivered by him; and, therefore, the plaintiff ought to have declared accordingly; for upon the matter it was no leaſe by the huſband and wife, and then the plaintiff declaring upon it as ſuch, hath failed in his deſcription of the leaſe whereon he was to recover.

Cro. Jac. 617. Gardiner and Norman.

Accordingly in another caſe, where in ejectment the plaintiff declared on a leaſe by the huſband only, and not guilty pleaded, the like ſpecial matter was found as in the former caſe, and exception taken to the declaration, becauſe the wife was omitted; yet the court held the declaration good, and diſallowed the exception, becauſe her manner of joining in the leaſe was merely void, as if ſhe had not been named therein, and then the plaintiff in his deſcription of ſuch leaſe did well to omit her.

Cro. Eliz. 656. Walſall and Heath, Cro. Jac. 563. Dyer, 91. 146. Leon. 192. 204.

But now if the huſband and wife join in a leaſe for years by parol of the wife's lands, rendering rent, or if the huſband ſolely make ſuch parol leaſe, rendering rent, this determines abſolutely by his death, ſo that no acceptance of rent, or other act done by the wife, will prevent its avoidance; the reaſon whereof given in the books is, that her aſſent ought to appear to be given at the time when the leaſe was made, which without ſome deed or inſtrument in writing it cannot do; but this ſeems a very indifferent reaſon, when in the caſe of a leaſe for years by the huſband, ſolely by deed, her aſſent appears not at all, but rather the contrary; and yet ſhe may affirm ſuch leaſe, if ſhe thinks fit, after his death, as well as if ſhe had joined therein; therefore a better reaſon for this diſtinction ſeems to be, that the inheritance and right of the eſtate continuing ſtill in the wife, notwithſtanding the intermarriage, if the huſband does nothing to diſcontinue or deveſt that eſtate, all charges of his thereout fall off with his death, which determines his power and intereſt over the eſtate; but a leaſe for years being an immediate contract for or diſpoſition of the land itſelf, if the ſame appears in writing duly executed, ſo that there can be no variation or deviation therefrom attempted by the leſſee after the huſband's death; the law ſo far gives countenance to

ſuch

ſuch leaſe, for the encouragement of farmers and huſbandmen, that the ſame ſhall continue in force till the wife's actual diſſent or diſagreement thereto; but becauſe there can be no ſuch certainty of the terms of a parol leaſe, when nothing appears in writing to manifeſt them; therefore they, like other charges of the huſband, fall off and drop with his eſtate or intereſt therein.

If the huſband and wife make a leaſe for years of the wife's land, without reſervation of any rent, yet it hath been adjudged that this is a good leaſe by them both during the coverture, and that the wife, after the huſband's death, may affirm the ſame by acceptance of fealty, or bringing an action of waſte; ſo that the reſervation of rent is not eſſential to the exiſtence or continuance of ſuch leaſe after the huſband's death, but only a writing atteſting the ſame, and the wife's allowance and approbation thereof; for as the huſband made ſuch leaſe at firſt, without any reſervation of rent; ſo the wife, if ſhe thinks fit, may continue the leſſee in poſſeſſion, after his death, upon the ſame terms. Hut. 102. Cro. Eliz. 112. Jackſon and Morcant.

The huſband being ſeiſed of copyhold lands in right of his wife in fee, makes thereof a leaſe for years, not warranted by the cuſtom, which is a forfeiture of her eſtate; yet this ſhall not bind the wife, or her heirs, after the huſband's death, but that they may enter and avoid the leaſe, and thereby purge the forfeiture; and the diverſity ſeems between this act, which is at an end when the leaſe is expired or defeated by the entry of the lord, or the wife, after her huſband's death, and ſuch as are a continuing detriment to the inheritance; as wilful waſte by the huſband, or ſuch acts as tend to the deſtruction of the manor, as non-payment of rent, denial of ſuit or ſervice; ſuch forfeitures as theſe bind the inheritance of the wife after her huſband's death; but in the other caſes the huſband cannot forfeit by his leaſe more than he can grant, which is but for his own life. 2 Roll. Rep. 344. 361. Cro. Car. 7. Savern and Smith. Cro. Eliz. 149. Head and Chaloner, 4 Co. 27.

If the huſband, ſeiſed of a copyhold manor in right of his wife, lets copyhold land, parcel thereof for years, by indenture, and dies, this ſhall not deſtroy the cuſtom of demiſing by copy, becauſe the wife may enter and avoid that leaſe, the huſband having no power by his own act or diſpoſition to bind the inheritance of the wife. Cro. Eliz. 459. Coningſby v. Ruſkey.

A man ſeiſed of lands, in right of his wife, makes a leaſe for years thereof by parol, and then he and his wife levy a fine to a ſtranger, and die: it was adjudged, that the conuzee of the fine ſhould avoid this leaſe; for being made by parol only, it was abſolutely void as to the wife, ſo that no acceptance, or act of hers, after his death, could make it good; and then the conuzee, who came in wholly by the wife, ſhall take advantage thereof as the wife herſelf ſhould have done, for the huſband's joining in the fine was only for conformity; for the whole eſtate and inheritance paſſed from the wife, and nothing from the huſband; and of void acts, or when they begin to be ſo, ſtrangers may have the benefit. Cro. Eliz. 216. Leon. 247. 2 Co. 77. Harvey and Thomas.

But where the huſband and wife by indenture made a leaſe for ninety-nine years of the wife's lands, though without reverſion of rent, 3 Leon. 153. Cro. Eliz. 152. Cadee

and Oliver. *Adjourn.* according to both reporters.

rent, and after joined in levying a fine of the reverſion to a ſtranger; the better opinion was, that the conuzee ſhould hold ſubject to this leaſe, for being by indenture, it was not abſolutely void, but only voidable by the wife after her huſband's death; and then when ſhe joins in a fine of the reverſion, before her time of election for avoidance thereof comes, this deſtroys her own power of election, becauſe now ſhe has nothing more to do with the eſtate; and it cannot transfer a like power of election to the conuzee, becauſe that was a thing merely in action, and peculiar to the wife, in regard of her coverture, and, conſequently, the leaſe is become abſolute, and the conuzee ſhall hold ſubject thereto.

Cro. Jac. 417. Roll. Rep. 401. 441. 3 Bulſ. 272. Roll. Abr. 592. 3 Mod. 300. *Quære*, if the huſband in this caſe has any, and what remedy for the rent incurred after the

A. and *B.* joint-tenants for their lives; *A.* takes *C.* to huſband; and they, by indenture, let their moiety for twenty-one years, reſerving rent; then the wife dies, and *B.* the ſurviving joint-tenant, would have avoided this leaſe, as the wife might have done if ſhe had ſurvived her huſband: but it was adjudged, that the leaſe being only voidable, and not void, *quoad* the wife, by her death this power of avoiding it is gone, and cannot be transferred to the ſurviving joint-tenant, who claims not under, but paramount her; and then the leaſe is become unavoidable during the life of the other joint-tenant, for the leaſe being good at firſt, the wife's diſagreement to make it void, was more neceſſary than her agreement was to make it good.

wife's death, for the reverſion to which it was incident goes to the ſurviving joint-tenant, but he being in of that by title paramount, the leaſe has nothing to do with the rent, and the huſband, for want of a reverſion, can neither diſtrain nor avow for the ſame. But *quære*, if he may not maintain an action of debt or covenant in law, or expreſs covenant for payment of the rent, if there were any; & *vide* Bro. tit. *Leaſes*, 4. Det. 7. Dyer, 28. b. 29. a. Roll. Rep. 442.

Cro. Eliz. 287. Moor, pl. 514. Grule and Locroft. Co. 155. S. C.

Huſband and wife, joint-tenants for ſixty years, if they or either of them ſo long live, the huſband by indenture lets the land for fifty years, to commence immediately after his deceaſe, and dies, the wife ſurvives; and if this was a good leaſe to bind the wife, was the queſtion. It was objected, that it could not bind the wife, becauſe it was not to commence till after the huſband's death; that he might have outlived the whole term; and therefore it was as if he had granted the term to commence after his death; which being but a grant of bare poſſibility, had been clearly void. 2. It was objected, that the huſband dying before the leaſe took effect, the intereſt in the whole term veſted in the wife by ſurvivorſhip, and then the huſband's diſpoſition, which took not effect till his death, came too late to prevent it. But, notwithſtanding, it was adjudged to be a good leaſe, and not like the caſe put of a grant of his term after his death, for there nothing paſſed till his death but a bare poſſibility only; but here a good term is created in intereſt preſently, to take effect in poſſeſſion after his death. As to the ſecond point, the huſband having an intereſt to diſpoſe of, he might in his life-time, have diſpoſed of the whole term, and it would have bound his wife; then here when he hath, by an act executed in his life-time, diſpoſed of an intereſt in part of the term; this, by the ſame reaſon, muſt be good, and binding upon his wife.

Huſband and wife made a leaſe for years, by indenture, of the wife's lands, reſerving rent; the leſſee enters; the huſband, before any day of payment, dies; the wife takes a ſecond huſband, and he at the day accepts the rent, and dies: it was holden, that the wife could not now avoid the leaſe, for by her ſecond marriage ſhe transferred her power of avoiding it to her huſband, and his acceptance of the rent binds her, as her own before ſuch marriage would have done; for he by the marriage ſucceeded into the power and place of his wife, and what ſhe might have done, either as to affirming or avoiding ſuch leaſe, before marriage, the ſame may the huſband do after the marriage. Dyer, 159. Roll. Abr. 475. 2 Roll. Rep. 132. S. C. cited.

A woman, guardian in ſocage, marries and joins with her huſband, by indenture, in making a leaſe for years of the ward's lands, yet after her huſband's death ſhe may avoid the ſame; for though the huſband has abſolute power to diſpoſe of all chattels, either real or perſonal, whereof he is poſſeſſed in right of his wife, and the wardſhip of the body and land, in this caſe, is but a chattel; yet the wife being poſſeſſed of it in right of the infant, and accountable to him for the profits when he comes of age, the huſband's diſpoſition ſhall not bind her after his death, but that ſhe may avoid it in right of the infant, whoſe guardian ſhe ſtill continues to be; and her own joining in the leaſe was not material, becauſe ſhe was then under coverture, and had no diſpoſing power at all. Plow. 293; Oſborn and Jay. Co. Lit. 351. a. Roll. Abr. 343.

As the wife's acceptance of rent or fealty, &c. will make good and unavoidable leaſes for years, made by her and her huſband, or by her huſband ſolely, if they be by indenture or deed poll; ſo if the wife die before her huſband, the ſame election and power of affirming or avoiding ſuch leaſes deſcends to her iſſue or heir; for ſuch leaſes are good, till thoſe who ſucceed to the eſtate defeat and avoid them by their diſagreement thereto. 3 Bulſ. 274. Roll. Rep. 403.

Therefore, where a woman tenant in tail, having iſſued by a former huſband, after his death married a ſecond huſband, and they, by indenture, joined in a leaſe for years of the wife's lands, rendering rent, and then the wife died without iſſue by the ſecond huſband, ſo that he was not entitled to be tenant by the curteſy, it was holden, that till the iſſue by the firſt huſband entered, this leaſe remained good; and therefore, the huſband there recovered in an action of covenant againſt the leſſee, upon iſſue found for him, that there was no entry made by the wife's iſſue, becauſe till then the leaſe was ſtill ſubſiſting, and conſequently, the leſſee bound by his covenants in ſuch leaſe. Yelv. 78. Jeffery and Guy.

So, where a man, ſeiſed of land in right of his wife, makes a leaſe for years, rendering rent, and then his wife dies without iſſue by him, whereby he is not tenant by the curteſy, but his eſtate determined; yet he may avow for the rent till the heir hath made his actual entry, becauſe the leaſe was at firſt good, and drawn out of the ſeiſin of the wife; and therefore, till the entry of the heir, remains good between the leſſor and leſſee, ſo that the leſſee may maintain an action of covenant, and the leſſor diſtrain and avow for the rent, till the heir hath entered. 9 H. 6. 43. Bro. tit. *Avowry*, 123. Vaugh. 46.

Of Leaſes made by Huſband and Wife purſuant to 32 *H.* 8. *c.* 28.

32 H. 8. c. 28.

This ſtatute hath made an alteration in the common law, and enabled all huſbands, ſeiſed of lands in right of their wives, to make leaſes for twenty-one years, or three lives, obſerving the directions therein mentioned; which leaſes bind the wives and their heirs, ſo that they cannot now, after the huſband's death, avoid ſuch leaſes as they might have done at the common law; but if the directions in that ſtatute are not obſerved, then the common law takes place, and the wives and their heirs are at liberty to avoid ſuch leaſes in the ſame manner as they might have done before.

But as to the ſeveral qualifications requiſite to make ſuch leaſes good and binding, they being treated of at large under the head of Leaſes by Eccleſiaſtical Perſons, letter (E), we ſhall here only inſert one caſe for the better underſtanding of the ſtatute.

Cro. Car. 22. Smith v. Trinder. [This caſe was never decided, for, in conſequence of Lord Hobart's doubts, a ſpecial verdict was found, and the matter was afterwards ended by arbitrament.]

Huſband and wife, the huſband purchaſed land to him and his wife, and their heirs, and afterwards he, without his wife, lets this land for ſixty years, (*a*) if they ſhould ſo long live, rendering 280 *l. per ann.* rent at the two uſual feaſts, during the term; then the huſband dies; and if this leaſe ſhould bind the wife, by the 32 *H.* 8. *c.* 28. was the queſtion? And it was holden by three juſtices that it ſhould; for the words of the act are, *That all leaſes to be made by any perſon or perſons having any eſtate of inheritance in fee-ſimple or fee-tail, in the right of their wives, or jointly with their wives, of an eſtate of inheritance, made before the coverture or after, ſhall be good, provided that the wife be made a party to every ſuch leaſe to be made by her huſband of any manors,* &c. *being the inheritance of the wife; and that every ſuch leaſe be made by indenture in the name of the huſband and wife, and ſhe to ſeal the ſame, and that the rent be reſerved to the huſband and wife, and to the heirs of the wife, according to her eſtate of inheritance therein;* ſo that the wife is appointed to join only when ſhe hath the ſole inheritance by the appointment of the rent, to be reſerved to the heirs of the wife, and not when ſhe hath a joint eſtate, as in this caſe; and then clearly, by the body of the act, the leaſe by the huſband ſolely is good, and the proviſo doth not extend to it.

(*a*) Note; there was no queſtion made upon theſe words, if, &c. as to the continuance of the leaſe, which, as it ſeems, determined by the death of either of them. Cro. Jac. 378. 5 Co. 9.

(D) Of Leaſes by Tenant in Tail: And herein,

1. What Leaſes Tenant in Tail might have made by the Common Law.

Co. Lit. 45. b.

IF tenant in tail after the ſtatute *de donis* had made a leaſe for years, and died, this leaſe was not abſolutely determined by his death, but the iſſue in tail was at liberty either to affirm or avoid it as he thought fit; and the reaſon why ſuch leaſes for years were not holden to be abſolutely determined by the death of the tenant in tail, who made them, was, either becauſe they were drawn out of

of an eſtate of inheritance, which by poſſibility might continue for ever, and therefore was capable of enduring ſuch a leaſe for years thereof; or becauſe, being executed by the entry of the leſſee, there ought to be an act of equal notoriety to defeat and undo it; which if the iſſue in tail thought fit to wave, the leſſee then continued his poſſeſſion in virtue of the firſt contract and entry. And this was but a reaſonable liberty given to the iſſue in tail, becauſe it might well be ſuppoſed that his anceſtor was not qualified to keep all his poſſeſſions in his own manurance and occupation, but muſt neceſſarily let them out to farmers and huſbandmen, who, by their ſkill and underſtanding in the arts of agriculture and huſbandry, would be beſt able to preſerve and improve the ſoil; and by their yielding an annual rent or income to the leſſor or tenant in tail himſelf, would enable him equally to provide for the neceſſities and exigencies of himſelf and his family; and ſince the iſſue in tail, who was to ſucceed to the inheritance and poſſeſſions of his anceſtor, might be ſuppoſed equally ignorant of the way and manner of improving and managing them to the beſt advantage, and would therefore be under the like neceſſity of letting them out to others, and yet, perhaps, not be able to get ſo good a rent or income for them; therefore, to prevent the charge and trouble of renewing ſuch leaſes, or the difficulty of finding out new tenants upon every death, the law thought fit not to intermeddle one way or another therewith, but left it to the choice of the iſſue in tail, whether he would continue them or not. Another reaſon why the law would not condemn ſuch leaſes as abſolutely void by the death of the tenant in tail, might be, the diſcouragement that would thereby ariſe to farmers and huſbandmen, who would not be eaſily induced to take leaſes, or beſtow any great pains or labour upon poſſeſſions, which they were to hold by ſo precarious a title as the life of the tenant in tail only; and therefore, for theſe and other reaſons, ſuch leaſes for years were not looked upon to be abſolutely void and determined by the death of the tenant in tail who made them; but the iſſue in tail ſucceſſively, as each came into the eſtate, was at liberty either to continue or avoid them, as they found convenient; and by this liberty the iſſue in tail was ſufficiently ſecured againſt any injury or inconvenience ariſing from the contracts or leaſes of his anceſtor, and the ſtatute *de donis* in no danger of being impeached, ſince it was in the iſſue's own choice to conſider thereof, and to govern himſelf accordingly, either in the affirmance or avoidance of ſuch leaſes, as he found moſt for his advantage; therefore, (*a*) acceptance of the rent, or fealty, or bringing an action for recovery thereof, or an action of waſte, were ſuch acts as amounted to a confirmation of the leaſe, becauſe theſe plainly manifeſted his intent to continue the leſſee in poſſeſſion upon the terms of his leaſe; and by conſequence, ſuch iſſue could never afterwards avoid it during his own life.

(*a*) 7 Co. 8. b. Count of Bedford's caſe. Bro. tit. *Acceptance*, 10. Dyer, 46. a. 51. b. 95. pl. 40. Bro. tit. *Acceptance*, 13.

If tenant in tail makes a leaſe to *A.* for twenty years, and the leſſee makes a leaſe to *B.* for ten years, and then the tenant in tail dies, and the iſſue accepts the rent of *B.* this is no affirmation of

the leaſe, becauſe *B.* was under no obligation of paying his rent to him, and is anſwerable for it over again to *A.* and therefore his payment to the iſſue in tail was voluntary, and in his own wrong, and the iſſue's acceptance thereof not concluſive more than if he had received it of a mere ſtranger; and, by conſequence, the iſſue in tail, notwithſtanding ſuch acceptance, may enter and avoid the leaſe: but if the iſſue had accepted the rent from *A.* this had amounted to a confirmation of the leaſe made to *A.*, and, by conſequence, he could not after avoid the leaſe to *B.*, which was derived thereout. But if *A.* had aſſigned five acres of the land in leaſe to *B.* for the reſidue of twenty years, and the iſſue in tail had accepted the rent from *B.*, this would amount to a confirmation of the entire leaſe to *A.*, becauſe the rent iſſuing out of the whole, and out of every part of the land, *B.* as to theſe five acres, ſucceeded in the place of *A.* by having his whole intereſt therein; and then the iſſue in tail, by acceptance of the rent from one, whoſe part, as to him, was equally chargeable with the whole rent, hath given his conſent, that the whole eſtate chargeable therewith ſhall continue, though he choſe to take his rent out of part only; for otherwiſe he would do injuſtice to *A.*, who would be liable to make recompence to *B.* for the overplus of the rent, and yet have no recompence himſelf, if the iſſue might defeat the reſidue of the leaſe remaining in his hands.

Dyer, 51. b. 7 Co. 9. a. 1 Roll. Rep. 260. 3 Leon. 154. 2 Bulſ. 44. 4 Mod. 5.

Tenant in tail, before 27 *H.* 8. *c.* 10. of uſes, made a feoffment in fee to the uſe of himſelf and his heirs: and, after, he and his feoffees made a leaſe for years, rendering rent, and after the ſtatute made, tenant in tail dies ſeiſed, and his iſſue aliens the land by fine before entry upon the leſſee, or receipt of the rent: the great queſtion was, if he might after avoid this leaſe; and by the better opinion of the juſtices of both benches, *præter Sanders*, the alienee could not avoid it, whether he received the rent or not, for the leaſe was not abſolutely void by the death of the tenant in tail, but only voidable by the iſſue by his entry; then when the iſſue, before ſuch entry, conveys over the land to a ſtranger, the leaſe, being not then avoided, continues ſtill a charge upon the eſtate, and the ſtranger cannot enter to avoid it, becauſe a right of entry can no more be transferred to a ſtranger than a right of action, and by conſequence, the conuſee muſt hold ſubject thereto, having no means to avoid it.

Co. Lit. 349 a. Moor, 315. Dyer, 51. b.

If tenant in tail enfeoffs his eldeſt ſon within age, and he after full age makes a leaſe for years, and then the father dies, whereby he is remitted to the eſtate-tail, yet he ſhall not avoid the leaſe: ſo, if the ſon had diſſeiſed his father, and had made a leaſe for years, and then the father had died, by which the diſſeiſin was purged, yet the leaſe would continue good and unavoidable; becauſe in theſe caſes the eſtate, out of which the leaſe was derived, is not defeated, but only the nature of it altered and changed; and the leaſe for years being an immediate diſpoſition of the land itſelf, ſo long as that continues in the ſame perſon that made the leaſe, ſo long there is an eſtate capable of enduring the leaſe, and conſequently, the leſſor ſhall not avoid it; but if the

the ſon after ſuch feoffment or diſſeiſin had at full age granted a rent-charge, common of paſture, *&c.* and then the father had died, this remitter and alteration of the nature of the eſtate would diſcharge the land of thoſe charges; becauſe being granted at firſt out of a defeaſible eſtate, they were of courſe liable to be defeated with that eſtate, and when that eſtate is defeated and gone, ſuch collateral charges drop and fall off with it; but the leaſe for years, in the other caſe, carries the very poſſeſſion of the land itſelf, and then the alteration that is made by the remitter can only work upon the reverſion which was left in the leſſor, not upon the poſſeſſion of the leſſee, which was divided and taken out of the eſtate before that remitter took effect; and the leaſe being made when he was at full age, prevents the operation of the remitter as to that leaſe, which was his own act.

Tenant in tail made a feoffment in fee to the uſe of himſelf and his heirs, and after made a leaſe for years, rendering rent, and died; the iſſue accepted the rent: it was holden, that this did not affirm the leaſe, becauſe the iſſue was remitted to the eſtate-tail by deſcent, and ſo the leaſe utterly void, being made by the father, then tenant in fee-ſimple; and the difference between this caſe and the caſe next but one above-mentioned, ſeems to be, that the leaſe there being before 27 *H.* 8. *cap.* 10. the poſſeſſion paſſed from the feoffees, and not from the tenant in tail himſelf, and then when that ſtatute came, it could not execute the poſſeſſion to the uſe, as to the reverſion which was left in the feoffees; and ſo the poſſeſſion of the leſſee continued untouched by that ſtatute, and drawn out of the legal poſſeſſion of the feoffees, and and then the bare remitter of the iſſue, as to the reverſion, could not defeat the poſſeſſion of the leſſee, which was not drawn out of any eſtate his anceſtor had then in poſſeſſion; but he muſt avoid it by entry upon the aid and conſtruction of the ſtatute *de donis:* but in this, the leaſe for years is drawn out of the fee-ſimple and eſtate, which the tenant in tail had in poſſeſſion himſelf; and then the remitter, which is wrought by the deſcent, defeating that eſtate, avoids the leaſe likewiſe. Moor, pl. 1143.

If tenant in tail makes a leaſe for ten years to begin ten years hence, and dies, and the iſſue within the ten years enters and makes a feoffment in fee, the feoffee, at the end of the ten years, ſhall have election either to affirm and make good ſuch leaſe, or to avoid it; for upon the death of tenant in tail the poſſeſſion was become vacant, and none had a right to enter but the iſſue in tail, for the time of the leſſee's entry was not yet come; then, when the iſſue enters generally, his primary right was, in reſpect of the inheritance, deſcended to him as iſſue in tail, and he had no occaſion to direct his entry at that time to any other purpoſe; and therefore his entry ſhall be intended, in reſpect of the eſtate-tail deſcended to him; and when after ſuch entry he makes a feoffment in fee to a ſtranger, this transfers the poſſeſſion juſt in the ſame plight as the iſſue in tail himſelf had it, without any thing done to determine his election one way or another; and then the ſame power of election paſſes incorporated in the feoffment; Dyer, 279. 2. Plow. 436.

ment; and the feoffee, when the time for making uſe thereof is come, may uſe it either to determine the leaſe by ouſting the leſſee, or to affirm or make it good by acceptance of rent from him.

Dyer, 279. a. Plow. 436.

If tenant in tail makes a leaſe for years, to begin after his death, rendering rent, and dies, and the iſſue accepts the rent, yet *Manwood* was of opinion, that he might notwithſtanding enter, and avoid the leaſe; and the reaſon he gave was, becauſe the leaſe did not take effect in poſſeſſion during his life; *ſed* Catlyn *hoc negavit;* and it ſeems with good reaſon; for ſince the eſtate-tail is an eſtate of inheritance, capable of enduring ſuch a leaſe, where the difference is between letting it to begin preſently, and letting it to begin after his death, or, as it is in the next preceding caſe, to begin ten years hence, when he himſelf dies in the mean time, does not at all appear; for the leaſe binds from the time of the making in one caſe, as well as in the other, though the time of their commencement in poſſeſſion be different; and ſince the iſſue in tail is no more bound by the one than the other, it ſeems hard and inconſiſtent to take from him his power of election to continue the one leaſe, and yet allow it him in the other; therefore it ſhould ſeem, the leaſe in either caſe is (*a*) abſolutely void, but that the iſſue hath election to continue or avoid it, as he himſelf thinks fit, and, by conſequence, his acceptance of the rent hath determined his election to continue the leaſe, and then he can never enter after to avoid it.

(*a*) But *qu.*; for in Carth. 258. in the caſe of Symonds and Cudmore, it is ſaid to be agreed, and reſolved by the court, that if tenant in tail makes a leaſe of any of the lands entailed to commence after his death, this is void *ab initio*.

7 Co. 14. a. Co. Lit. 349. a. Co. 147. Moor, 325.

If a tenant in tail makes a leaſe for life, by which he gains a new reverſion in fee during the life of tenant for life, and after he grants a rent-charge, or makes a leaſe for years, and then the tenant for life dies, whereby he is become again tenant in tail, and the reverſion in fee, out of which the rent-charge or leaſe for years were to take effect, defeated, yet ſhall the leaſe or rent continue good againſt himſelf, becauſe though they were granted out of a defeaſible poſſeſſion, yet they were granted likewiſe by him who had the true and ancient right in him, and ſuch grant or leaſe would have bound both, if the defeaſible poſſeſſion had been in one hand, and the ancient right in another, and both had joined therein: ſo, by the ſame reaſon, when ſuch defeaſible poſſeſſion and ancient right are conjoined in one perſon, and he makes ſuch leaſe or grant, though the one fails, yet the other will be called in to ſupport them: ſo, if ſuch tenant in tail had made a feoffment in fee upon condition to the uſe of himſelf and his heirs, and then had made ſuch leaſe, or granted ſuch rent-charge, and after the condition were broken, yet the leaſe or grant would ſtill continue good againſt him during his own life, becauſe made by one who had all the right, both ancient and new, in him at the time of making or granting thereof.

Vent. 357. Anonymous.

A. tenant in tail, remainder to *B.* in tail, *A.* makes a leaſe for the life of the leſſee not warranted by the ſtatute of 32 *H.* 8. *cap.* 28. and dies, leaving *B.* in remainder his heir; *B.* by indenture makes a leaſe for 99 years, to commence after the death of the tenant for life, rendering rent; then the tenant for life ſur-

renders to *B.* upon condition and dies; *B.* ſuffers a common recovery with ſingle voucher, and dies; the leſſee for years enters, and the heir of *B.* diſtrains for the rent; and if this diſtreſs was lawful, was the queſtion? For the leſſee it was argued, that it was not; for either *B.* was remitted by the ſurrender, or he was not; if he was remitted, then the leaſe for 99 years, which was derived out of the new reverſion in fee, and deſcended to him from *A.* was by ſuch remitter determined; the reverſion out of which it was derived being vaniſhed and gone; and then he could not diſtrain for rent where no leaſe was in being: if he was not remitted, the acceptance of the ſurrender being his own act, and but upon condition, then he was ſtill in of the defeaſible eſtate deſcended to him from *A.*, and, by conſequence, his recovery with ſingle voucher could not bind his entail, nor the remainder over; and then when he died without iſſue, (as to make it a caſe it ſhould ſeem he muſt,) both his defeaſible eſtate by the death of the tenant for life, and his own eſtate-tail were determined and gone; and conſequently, admitting the leaſe continued, (which it did not,) yet his heir was not entitled to the rent, but thoſe in remainder. But it was adjudged in *C. B.* that the diſtreſs was lawful; for the leaſe for life made by *A.* could be a diſcontinuance no longer than during the life of the leſſee; then when *B.* after the death of *A.* made a leaſe for 99 years by indenture, he having then the right of the entail in him, clothed with a defeaſible fee-ſimple, this leaſe, when the diſcontinuance was at an end, (as it was by the ſurrender of the tenant for life, or at leaſt by his death,) is good againſt himſelf by eſtoppel, if not in point of intereſt; and then, he being tenant in tail, the recovery with ſingle voucher binds that eſtate-tail and remainder, and, by conſequence, his heir has a good title to the rent, and his diſtreſs well taken for it. *Note;* A writ of error was brought of this judgment in *B. R.* and the caſe argued, but no judgment appears, nor are the reaſons before-mentioned taken notice of in the report; but yet they ſeem eaſily deducible from the report, and are the chief reaſons (as it ſhould ſeem) upon which the judgment in *C. B.* could be founded.

A. tenant for life, remainder to *B.* in tail, *B.* lets to *C.* for years, to commence after the death of *A.*, then *B.* ſuffers a recovery to *D.* and dies; the leaſe for years holds good againſt *D.* In this caſe it muſt be intended, that the recovery was ſuffered after the death of *A.*, for during his life *B.* was not tenant to a *præcipe;* then admitting the recovery to be after the death of *A.*, this was after ſuch time as the leaſe took effect againſt *B.* ſo as to be abſolutely binding upon him; and when he afterwards ſuffers a recovery, this bars the eſtate-tail, in reſpect of which only the leaſe was violable, and, by conſequence, the recoverer, who has not that eſtate-tail, muſt hold ſubject to the leaſe, and can no ways avoid it. Dyer, 51. b. in margin.

So tenant in tail, with power to make leaſes, *&c.* made a leaſe for twenty-one years not purſuant to his power, and then levied a fine, and died, leaving iſſue; and if the conuſee ſhould avoid Lev. 167. Sid. 260. Raym. 132. Keb. 778.

this leaſe, as the iſſue might have done, if the fine had not been levied, was the queſtion? for the leaſe did not take effect during the life of the tenant in tail; and it was agreed, that (*a*) if tenant in tail grant a rent, or acknowledge a ſtatute, or make a leaſe for years to begin after his death, that theſe are void as to the iſſue, and not merely voidable; but if tenant in tail makes a leaſe for years without reſervation of any rent, this is not void, but only voidable, becauſe the iſſue may affirm it by acceptance of fealty. And by all, except *Twiſden*, the leaſe in the principal caſe was holden not to be abſolutely void upon the death of the tenant in tail, but only voidable, becauſe it was an immediate diſpoſition of the land itſelf, and therefore differed from the caſes of collateral charges granted thereout; and they held it to be for the benefit of the iſſue to have ſuch leaſes only voidable; and ſo indeed it is, as appears by all the caſes and reaſons before mentioned: then this leaſe not being abſolutely void, but only voidable, when the tenant in tail levies a fine, by which he binds the eſtate-tail, and bars the iſſue before the time of election for avoidance thereof is come; this does not make the leaſe indefeaſible, but transfers the eſtate chargeable with the future leaſe juſt in the ſame manner it was in the hands of the tenant in tail, without any act done either to affirm or avoid it; and then the conuſee, when the leaſe is to commence in poſſeſſion, muſt have the ſame election of avoiding or affirming it, as the iſſue in tail would have had; for if the leaſe was voidable, and the levying of the fine before its commencement had no influence upon it one way or other, then it muſt continue voidable ſtill, and it muſt continue ſo only as to the conuſee; for the tenant in tail, or his iſſue, have nothing to do therewith, and, by conſequence, if it does not continue voidable as to the conuſee, then he may uſe his power either to affirm or avoid it, as he ſees moſt convenient: and a diverſity was taken between a voidable leaſe by tenant in tail, which is to commence *in præſenti*, and ſuch voidable leaſe as is to commence *in futuro*; for (*b*) if tenant in tail makes a leaſe for years to begin preſently, which is not warranted by 32 *H.* 8. *c.* 28. and, conſequently, is voidable by his iſſue, if he in the mean time conveys over the land by fine, the conuſee ſhall hold ſubject to that leaſe, and ſhall never after avoid it, becauſe the leſſee was then actually in poſſeſſion of his leaſe, and ſo that poſſeſſion divided and taken out from the inheritance which the conuſee purchaſed; and then the right of entry, which would have come to the iſſue, and was neceſſary to the avoidance thereof, cannot by the fine be transferred to the conuſee, who is a ſtranger; and the iſſue is bound by the fine from making any uſe of that right of entry, and, by conſequence, the leſſee ſhall take advantage thereof, and hold his leaſe without avoidance from either; but where ſuch voidable leaſe is to commence *in futuro*, and before the commencement of it the tenant in tail levies a fine to a ſtranger, there the election to avoid or continue it paſſes incorporated in the fine, and it cannot be ſaid to be either a right of entry or a right of action; for the leſſee not being yet in poſſeſſion, no entry is needful or can be made to avoid his leaſe, and the fine has no effect upon it one way or other,

(*a*) Opey and Thomaſius. 4 Mod. 6. S. C. cited, and there ſaid by Juſtice Dolben, that it was neither well ſtated nor well reported in the books; for upon the roll it was thus: A man ſeiſed in fee made a leaſe for 99 years, if three perſons ſo long lived; then he ſettled the reverſion upon himſelf in tail, with power to make leaſes for 21 years, and then he made ſuch a leaſe, and died; the ſon, who was the iſſue in tail, and not the father, (as it is reported in the books,) levied a fine, and ſold the reverſion; the firſt leaſe determined, and the court thought the conuſee might avoid the ſecond leaſe, becauſe it never was in the election of the tenant in tail, or his iſſue, to avoid it, they having conveyed away their eſtates before this ſecond leaſe was to commence; for

other, but leaves it juſt as it was; and, by conſequence, being voidable after the fine as much as it was before, the conuſee only can uſe the power of avoiding or continuing it, ſince the iſſue is bound by the fine, and has nothing to do with it, and it muſt continue the ſame after the fine as it was before, becauſe the time for its commencement was not then come; and it could not be either affirmed or avoided before it had a beginning; and ſo it ſhould ſeem to be: and for the ſame reaſons, where tenant in tail makes a leaſe for years, to begin expreſsly after his death, this is not abſolutely (*c*) void by his death, but only voidable, notwithſtanding the opinion at the beginning of the caſe.

if tenant in tail makes a leaſe to commence *in præſenti*, and conveys away his eſtate by fine, the conuſee muſt hold it charged with ſuch leaſe; *ſecùs*, where it is to commence *in futuro*, becauſe it cannot be avoided before its commencement; but no judgment was given.

(*a*) *Vide* Cro. Jac. 455. Griffin and Stanhope. (*b*) For which *vide* 2 Lev. 27, 28. Mod. 109. Benſon v. Baron and Hudſon. (*c*) But *quære*, & *vide ſupra*.

Tenant in tail of a manor before 27 *H.* 8. *c.* 10. made a feoffment in fee to his own uſe, and died, and in the time of the iſſue the ſtatute of uſes is made, and after the iſſue makes a leaſe for years of a tenement, parcel of the manor, rendering rent, and dies, whereby his iſſue was remitted by the deſcent of the fee and freehold in law, without entry, though the firſt iſſue was not remitted, by reaſon of the ſtatute of uſes, which executed the poſſeſſion in the ſame manner as he had the uſe (and that was in fee) before entry; and his iſſue makes a feoffment in fee of the manor, and livery in another part, not in the tenement leaſed, in the name of the whole: and if this was a diſcontinuance of this tenement, was the queſtion? *Coventry* was of opinion it was not, becauſe the iſſue who made the leaſe granted it out of the fee and right of the tail, which was in himſelf at the time of the leaſe made; and therefore by the remitter of his iſſue the leaſe was not void before entry, but only voidable; for he might have made it good by acceptance of the rent from the leſſee; and, by conſequence, if this was a leaſe continuing at the time of the feoffment of the manor, this tenement could not paſs by the livery made in another part of the manor. But at laſt the whole court held, that this tenement paſſed by the feoffment, becauſe by the remitter of the iſſue the leaſe for years was abſolutely defeated and gone, and the leſſee become tenant at ſufferance; and if the iſſue had accepted the rent, this would not have made the leaſe good, becauſe the reverſion and inheritance, out of which it was derived, was by the remitter vaniſhed and gone; and then the continuance in poſſeſſion of the tenant at ſufferance at the time of the feoffment of the manor is no impediment to the operation of the livery upon that tenement, and therefore the remitter deſtroyed the leaſe in this caſe.

Roll. Rep. 260. Bridgman and Charlton.

Tenant in tail, reverſion in the crown, makes a leaſe for years, rendering rent, and dies, leaving *B.* his ſon and heir in tail, who accepts the rent, and hath iſſue *C.*; then *B.* commits treaſon, and is attainted thereof, and by act of parliament all his lands and poſſeſſions are forfeited, and given to the king; and if the king was concluded by this acceptance of the rent by the iſſue ſo that he ſhall be adjudged in by him, and could not avoid the leaſe ſo long as

Dyer, 107. b. 115. a. 332. b. Plow. 560. Hob. 324. 346. Cro. Eliz. 519. Yelv. 150. Godb. 324. 2 Roll. Rep. 491.

as there was any iſſue in tail, was the queſtion? And it was adjudged, that by the attainder the eſtate-tail was determined, and the king in, in point of reverter, and then all leaſes, charges, &c., of the tenant in tail are determined as if he were dead without iſſue; the reaſon whereof, given in the books, is, that if it ſhould be otherwiſe, the king would have two fees in him, which the law will not allow; and this may be a good reaſon; but it is ſuch a one as wants another reaſon to explain it; for the ſame books agree, that if tenant in tail with the reverſion in the king had made a leaſe for years, and after had levied a fine to the king, that the king in that caſe ſhould not avoid the leaſe for years, no more than he ſhould if the remainder in fee had been in a ſtranger, or in the tenant in tail himſelf, and yet in theſe caſes the king hath two fees in him, and the law allows them to conſiſt well together; therefore the reaſon of the difference between the caſes ſeems to be, that where the reverſion is in the crown, the crown, by conſequence, muſt be the donor, and give out the eſtate-tail: now all donations created a tenure between the donor and donee, to which homage, fealty, and other duties and ſervices were incident and annexed, as the conditions whereby the tenant was to hold and continue the enjoyment of his land. Now treaſon was the greateſt violation poſſible of theſe duties of fidelity, obedience, and ſervice, whereto the tenant was obliged, as the very terms and conditions upon which the king at firſt was prevailed upon to give him the land, and which he, when he accepted thereof, undertook to obſerve, by the ſolemnity of an oath; ſo that when the donee commits treaſon, he breaks the condition whereby he holds his eſtate, and the king is in for that condition broken, and, by conſequence, his title by virtue of that condition is paramount all leaſes, grants, or charges of the tenant in tail: for they being derived out of his conditional eſtate can ſubſiſt no longer than that does, and by his attainder of treaſon the condition is broken, and that eſtate forfeited and gone to the king in reverſion who gave it; and, by conſequence, all derivative leaſes or charges thereout are determined likewiſe: but now when the king has only the remainder in fee, there is no immediate tenure of the king, nor is the tenant obliged to any particular duties or ſervices of homage or fealty to the king, as annexed to his donation, more than any other of his ſubjects; for he had not his eſtate of the gift of the king, but of his own immediate donor; and then though the law has given the forfeiture of all eſtates for treaſon to the king, of whomſoever held, yet this is a poſitive law, introduced but lately, and the king in ſuch caſe is in under or by way of conveyance of the eſtate-tail, and his title thereto begins but from the time of the treaſon committed, and, by conſequence, he ſhall hold ſubject to all leaſes or charges made by the tenant in tail before that treaſon committed, as the tenant in tail himſelf ſhould have done: and in the principal caſe, where the iſſue in tail by acceptance of the rent had made good the leaſe of his anceſtor, as againſt himſelf, if the remainder in fee had been in the crown, and the iſſue in tail had been after attainted of treaſon, though the king ſhould have the forfeiture, yet he ſhould

hold

hold it ſubject to the leaſe, which the iſſue by ſuch acceptance had made good againſt himſelf; and it ſhould ſeem likewiſe, that the king being a ſtranger, and coming in under the eſtate-tail, ſhall be bound by that leaſe, not only during the life of the iſſue who accepted the rent, but alſo as long as there were any iſſue of the body of the donee; for the king being a ſtranger cannot have the right of the ſucceeding iſſue to avoid it; and whether the right of entry or action, which ſuch ſucceeding iſſue would have to avoid the leaſe, be transferred to the king, depends upon the words and conſtruction of the act of parliament which gives the forfeiture in ſuch caſe. So, in the caſe of the fine, where the tenant in tail makes a leaſe for years, and after conveys the lands by fine to the king, though the king in that caſe was the immediate donor, and had the reverſion in him at the time of the fine levied, yet he ſhould be bound by ſuch leaſe, becauſe the fine was only a conveyance of record, and paſſes the eſtate to the king, as it would do to any other perſon, and, conſequently, the king ſhall take ſubject to that leaſe, as any other perſon muſt do; and in the principal caſe, *where the reverſion was in the crown*, though the leaſe for years had been in every thing warranted by 32 *H.* 8. *c.* 28. and the iſſue in tail after the death of his anceſtor had accepted the rent, and then been attainted of treaſon, yet the king ſhould hold diſcharged thereof; becauſe by the attainder the eſtate-tail was forfeited, determined, and gone, as if the tenant in tail had died without iſſue, and the king was in of his old or immediate reverſion.

If tenant in tail makes a leaſe for years, and dies without iſſue, the leaſe is abſolutely determined by his death, though it were in all things purſuant to the 32 *H.* 8. *c.* 28. ſo that no acceptance of the rent by him in the remainder or reverſion can make it good; for the eſtate, out of which it was derived, being determined, that likewiſe muſt fall off with it; and the intent of the ſtatute was only to enable the tenant in tail by ſuch leaſes to bind his *iſſue*, which in no caſe before he could do, not to bind or any ways affect thoſe in *remainder* or *reverſion* after the eſtate-tail determined.

8 Co. 34. Moor, 133. Co. Lit. 44. a. Cro. Eliz. 602. Bro. tit. *Acceptance*, 19.

So, if tenant in tail makes a leaſe for three lives according to 32 *H.* 8. *c.* 28. this is no diſcontinuance, but determines with the eſtate-tail; and where *Cro. Car.* 156. *Salwin* and *Clerk* holds that it is a diſcontinuance, all the other (*a*) books are againſt it; and (*b*) *Vaughan* ſays, that caſe is all falſe and miſreported, and that ſuch leaſe being warranted by the ſtatute cannot be a diſcontinuance; becauſe the parliament, to which every man is party, allows of ſuch leaſes; which, if they were tortious, as all diſcontinuances are, the parliament would never have allowed; and, therefore, if a warranty was annexed to ſuch leaſe, yet it would make no diſcontinuance, becauſe that determines with the eſtate likewiſe.

(*a*) As 8 Co. 34. a. Cro. Eliz. 602. Co. Lit. 333. a. Noy, 66. Sav. 77. (*b*) Vaugh. 383.

But if ſuch leaſe for three lives were not warranted by 32 *H.* 8. *c.* 28. then it would be a diſcontinuance, becauſe it was a greater eſtate than the tenant in tail had power to make, and paſſed by livery, which took out the eſtate from the tenant in tail, and turned

3 Co. 50. 9 Co. 140. b. 2 Roll. Abr. 59. Walter and Jackſon.

turned it into a reverſion in fee, determinable upon three lives: ſo, if ſuch leaſe for three lives, not warranted by that ſtatute, were made of parcel of the demeſnes of a manor, and then the tenant in tail ſhould leaſe for life, or convey the manor in fee to another, and the leſſee attorn, yet the reverſion thereof would not paſs, becauſe the firſt leaſe was a diſcontinuance of that parcel, ſo as the reverſion thereof for the time was no parcel of the manor.

Godb. 9. pl. 12. Tenant in tail, the remainder in fee, the tenant in tail makes a leaſe for lives, according to 32 *H.* 8. *c.* 28. and after dies without iſſue, and before any entry he in the remainder grants over his remainder by fine; and if the conuſee of the fine might enter upon the leſſee and avoid his leaſe, was the queſtion? *Fenner* argued that he could not, becauſe where a freehold is given by livery, it cannot be defeated without entry; and cited a caſe where a man made a leaſe for life, remainder in fee, the tenant for life granted over his eſtate; then a *formedon* was brought againſt the grantee, or aſſignee, and the tenant for life died, pending the ſuit; and it was holden by all the juſtices, (except *Littleton* and divers ſerjeants,) that the writ ſhould not abate, unleſs he in the remainder had entered: ſo here, and then when before entry, he in the remainder grants over his remainder, the grantee ſhall have it but as a remainder, for ſo is his grant, and ſo the eſtate of the tenant for life, which was not voidable, is made good; and of this opinion were *Wyndham* and *Periam:* but *Mead* and *Dyer* held, that, by the death of tenant in tail without iſſue, the leaſe made by him, though for life, was abſolutely void, and not merely voidable, becauſe by his death without iſſue, the eſtate, out of which the eſtate for life was derived, is determined and gone; and ſo muſt the eſtate for life be alſo, for *ceſſante cauſâ ceſſat & effectus;* and this ſeems the better opinion and moſt conſonant to the caſes before put; for the death of the tenant in tail, without iſſue, was, in law, as much a determination of the leaſe for life, as if it had been expreſsly ſo limited; and then, when that time comes, the operation of the livery, and the end for which it was made ceaſes, and there needs no entry to avoid that which by effluxion of time and operation of law is already ſpent and run out; and therefore the conuſee of the fines comes immediately to the poſſeſſion both in law and right, and the leſſee's continuance of poſſeſſion after is a wrong and treſpaſs to him, and cannot be by force of the leaſe which is run out and expired, and, by conſequence, muſt have determined the operation of the livery with it.

Jon. 61, 62. 2 Roll. Rep. 498. But if tenant in tail makes a voidable leaſe for years or life, and dies, and the iſſue, before entry on the leſſee, levies a fine to a ſtranger, the conuſee ſhall not avoid the leaſe, becauſe ſuch leaſe being only voidable by entry, when the iſſue before entry conveys over the land by fine, the power of entry, which was the only means of avoiding ſuch leaſe, is by the fine deſtroyed and gone; for a right of entry cannot be transferred to a ſtranger, any more than a right of action: ſo, if the tenant in tail himſelf,

ſelf, after ſuch leaſe, had levied a fine to a ſtranger, or even to the reverſioner, and died, yet they could not avoid the leaſe ever after, becauſe if they could, it muſt be by reaſon of the right of entry transferred by the fine, which would have come to the iſſue if no ſuch fine had been levied; and the law abſolutely condemns all alienations of right only, whether it be right of entry or of action, and conſequently in theſe caſes, by ſuch alienation, the leaſe is become abſolute and unavoidable.

A woman, tenant in tail, makes a leaſe for years, not warranted by 32 *H.* 8. *c.* 28. and after takes huſband, and they have iſſue, and then the wife dies; the iſſue cannot avoid this leaſe during the life of the huſband, becauſe he is tenant by the curteſy of the freehold and reverſion expectant thereupon; and though he ſhould ſurrender his eſtate by the curteſy to the iſſue, yet this would not help him to avoid the leaſe till his death, becauſe his eſtate, as tenant by the curteſy, is a continuance of his wife's eſtate, and ſo long as that laſts, the iſſue's time for avoiding the leaſe is not come, and notwithſtanding the ſurrender, yet as to the leſſee, who is a ſtranger, the eſtate by the curteſy has ſtill an exiſtence and continuance, as if no ſurrender had been made; for he being a ſtranger ſhall not ſuffer by ſuch voluntary act of the tenant by the curteſy; and (*a*) *Walſh* was of opinion, that the power of avoiding ſuch voidable leaſes runs ſo in privity to the iſſue in tail, that if ſuch iſſue ſhould marry, and his wife, after the death of the anceſtor in tail, be endowed of the reverſion of the lands in leaſe, that ſhe ſhould not avoid the leaſe, as her huſband, the iſſue in tail, might have done; becauſe though ſhe be in, in conſequence of the eſtate-tail, yet ſhe is not privy to her huſband as to that purpoſe. Alſo, it was further held in the principal caſe, that if the woman, tenant in tail, had before marriage acknowledged a ſtatute, and then married, and died, that this ſtatute ſhould be extendible in the hands of the tenant by the curteſy, and of the iſſue too, if he came in by ſurrender of the tenant by the curteſy during his life; but if after ſuch ſtatute the woman had made a leaſe for years, rendering rent, and then married, and died leaving iſſue, the ſtatute ſhould not be extended upon the leſſee; for as the ſtatute was abſolutely void and determined as to the iſſue, and the leaſe voidable by him likewiſe, the ſtatute ſhall never be ſet up againſt the leſſee, though the iſſue in tail thinks fit to wave his power of avoiding the leaſe; for then that would take away from him the rent, which might be the chief inducement that prevailed on him to affirm ſuch leaſe; or if ſuch leaſe were in all reſpects warranted by 32 *H.* 8. *c.* 28. and ſo not voidable by the iſſue; yet ſince the ſtatute fell off, and became void by the death of the tenant in tail, as to the iſſue it ſhall never take place againſt the leſſee, becauſe that would take from the iſſue the rent, which 32 *H.* 8. *c.* 28. never intended to permit, but on the contrary, made the iſſue's enjoyment of the rent the principal reaſon of their inveſting the anceſtor with power by ſuch leaſe to bind the iſſue.

Dyer, 46. b. in margin. 51 b. in margin. 363. b. Co. Lit. 326. a. 338. a. b. & *vide* Moor, 38.

(*a*) In 2 Bendl. 65. but *q.*

But

2 Roll. Rep. 499. Mod. 110.

But if tenant in tail grants a rent-charge, and after makes a leaſe for years, or lives, warranted by 32 *H.* *c.* 28. the leſſee ſhall hold the land charged during the leaſe, not only in the life-time of the leſſor, but alſo after his death; by *Jones* and *Yelverton*: For this rent-charge meddles not with the poſſeſſion, as the ſtatute in the other caſes does; and therefore the leſſee, in reſpect of the poſſeſſion which he hath, ſhall be liable to pay the rent reſerved to the iſſue; whereas in the other caſe, if the ſtatute ſhould prevail, this would deprive the iſſue from diſtraining for the rent, by deveſting the leſſee of the poſſeſſion whereon the diſtreſs ought to be made.

2. What Leaſes Tenant in Tail may make to bind his Iſſue, ſince the 32 *H.* 8. *c.* 28.

Co. Lit. 44.

Here we ſhall premiſe, that the ſtatute 32 *H.* 8. *c.* 28. is an enabling ſtatute, and was made purpoſely to give the tenant in tail (amongſt others) power, by obſerving the directions therein ſpecified, to bind his iſſue; ſo that they ſhall not now, after his death, avoid ſuch leaſes as they might have done before by the common law, which was found to be very inconvenient, and a great diſcouragement to farmers and leſſees, who, after they had paid great fines, and been at great coſts and charges in building, and otherwiſe improving the lands and tenements ſo leaſed to them, were, after the death of their leſſors, cruelly expulſed and put out (as the ſtatute ſpeaks) by the heirs of the leſſors, by reaſon of private gifts in tail, &c. to their great impoveriſhment and undoing; therefore to prevent ſuch miſchiefs for the future, that ſtatute provides, that all leaſes to be made of any manors, lands, tenements, or other hereditaments, by writing indented, under ſeal for term of years, or for term of life, by any perſon or perſons being of full age of twenty-one years, having any eſtate of inheritance, either in fee-ſimple or fee-tail, &c. ſhall be good and effectual againſt the leſſors and their heirs, &c. provided that the ſaid act ſhall not extend to any leaſes to be made of any manors, lands, &c. being in the hands of any farmer or farmers, by virtue of an old leaſe, unleſs the ſame old leaſe be expired, ſurrendered or ended, within one year next after the making of the ſaid new leaſe; nor to any grant to be made of any reverſion of any manors, lands, &c. nor to any leaſe of any manors, lands, &c. which have not been moſt commonly letten to farm, &c. by the ſpace of twenty years next before; nor to any leaſe to be made without impeachment of waſte, or which ſhall exceed the number of twenty-one years, or three lives, from the day of the making thereof; and that upon every ſuch leaſe there be reſerved yearly, during the ſame leaſe, due and payable to the leſſors and their heirs, &c. to whom the ſaid lands, &c. after the death of the leſſors, would have come if no ſuch leaſe had been made, ſo much yearly farm or rent, or more, as had been moſt accuſtomably yielden or paid for the manors, lands, &c. ſo letten within twenty years next before ſuch leaſe thereof made, &c.

Theſe

Theſe are the ſeveral qualifications requiſite to all leaſes to be made by tenant in tail to bind his iſſue within the ſtatute, the particular branches whereof being conſidered under the next head, letter (D), I ſhall here only mention ſome ſcattered caſes, not ſo eaſily reducible to the method there uſed.

Tenant in tail, to him and the heirs male of his body, had iſſue two ſons by divers venters, and died, the eldeſt ſon entered and made a leaſe for twenty-one years, reſerving rent generally to him and his heirs and aſſigns, and died without iſſue, leaving two ſiſters, his heirs at law; and if by this reſervation the rent belonged to the ſecond brother, to whom the reverſion deſcended as heir male of the body of the father, was the queſtion? for if not, then the leaſe could not bind him within 32 *H.* 8. *c.* 28. and it was ſtrongly urged, that the rent could not go to him, becauſe he was neither heir general nor ſpecial to the leſſor; that the reſervation being to the heirs of the leſſor, it could not go to the brother of the half blood: but, notwithſtanding, it was adjudged to be a good leaſe, and that the rent ſhould go along with the reverſion; for the words of the ſtatute are, that the rent ſhall be reſerved to the leſſor and his heirs, or *to thoſe to whom the lands would go if no ſuch leaſe had been made*; and judges are to expound ſtatutes, ſo as not to fruſtrate the deſign and intent of them; and here the intent was, that *the rent ſhould go along with the reverſion*; and ſo it may here, for the rent naturally follows the reverſion, and the ſecond brother is heir to the entail and reverſion, though not to the leſſor, and heirs *dicuntur ab hæreditate*, and therefore ſhall be taken *ſecundum ſubjectam materiam*, & *ut res magis valeat*, to comply with the intent of the ſtatute; and they cited (*a*) *Auſten*'s caſe as a caſe in point, and ſo judgment was given accordingly. Hard. 89. Cother and Merrick. (*a*) Dyer, 115.

Two coparceners tenants in tail, the huſband of one of them, after her death, being tenant by the curteſy, joins with the other in a leaſe for years, rendering rent to them and their heirs: this was held no good leaſe within 32 *H.* 8. *c.* 28. becauſe it is not reſerved to the donee and his heirs, but to the tenant by the curteſy, jointly with the other; for rent goes ſtrictly as it is reſerved by the leſſor, and not otherwiſe; and perhaps as this reſervation is, if the tenant by the curteſy ſhould ſurvive, the whole rent would go to him by ſurvivorſhip, and ſo the iſſue of the other coparcener have no recompence for his part of the lands leaſed; or if the rent ſhould not ſurvive, in regard of their ſeveral intereſts in the lands leaſed, yet ſince heirs, in caſe of the coparcener who joined, muſt be intended heirs of the body, to bring it within 32 *H.* 8. *c.* 28.; ſo muſt it likewiſe be in the caſe of the tenant by the curteſy, and that may not happen to be the iſſue inheritable by force of the gift, becauſe he may have iſſue a ſon by a former venter, who would be heir of his body; and therefore this ſeems to differ from the former caſe, becauſe the ſame word *heirs*, being applied to both indifferently, cannot be intended to mean one ſort of heirs in one caſe, and another in the other; and the tenant by the curteſy can have no heirs of his body inheritable as heirs of Latch. 45. Thompſon's caſe.

his

his body to the entail, for he had no eſtate-tail in him; and therefore heirs of his body, if it ſhould be ſo conſtrued, cannot be reſtrained or governed by the ſame reaſoning as will prevail n the caſe of the coparcener.

Palm. 484. Latch. 257. Stacy v. Clerke. So, if tenant by the curteſy, and the heir in reverſion in tail join in a leaſe for years, rendering rent to them and their heirs; this leaſe is not warranted by 32 *H.* 8. *c.* 28. by reaſon of ſuch general reſervation, which will carry a moiety of the rent, at leaſt, to the heirs general of the tenant by the curteſy, and ſo may cut off the iſſue in tail from that recompence the ſtatute intended them as the conſideration of their anceſtors being allowed by ſuch leaſes to bind them.

Godb. 102. pl. 119. Lands were given to baron and feme, and to the heirs of their two bodies; the baron dies, leaving iſſue by his wife, who makes a leaſe for years according to 32 *H.* 8. *c.* 28. and if this leaſe was good by that ſtatute, was the queſtion? The objection againſt it was, that the ſtatute ſays, the leaſe ſhall be good againſt the leſſor and his heirs, and the iſſue does not claim as heir to the wife only, but as heir to them both; but *Wyndham* and *Rhodes*, Juſtices, agreed clearly, that the leaſe ſhould bind the iſſue within the intent of that ſtatute, for between baron and feme there are no moieties, and the wife ſurviving is perfect and abſolute tenant in tail, and, conſequently, may make all ſuch leaſes as that ſtatute empowers tenants in tail to make.

Dyer, 123. 304. a. pl. 53. 2 Roll. Rep. 403. 407. Ley. 78. Tenant in tail makes a leaſe for years, rendering 20 *s.* rent, and after releaſes all the rent except 12 *d.* and dies, and his iſſue accepts the 12 *d.*, and the queſtion was, if thereby he were concluded to diſtrain for the other 19 *s.* reſerved upon the leaſe? And *Sanders* and *Catlyn* were of opinion that he was concluded, but *Whiddon* and *Dyer contra*; and put this caſe, that if the leſſor after ſuch leaſe, ſhould grant to the leſſee that he ſhould hold his leaſe without impeachment of waſte, yet the iſſue may maintain an action of waſte againſt him, of which there ſeems no doubt; or that the iſſue, if he had not accepted the 12 *d.*, might have diſtrained for the whole 20 *s.*; for if ſuch releaſe, either of rent or waſte, ſhould prevail, the ſtatute 32 *H.* 8. *c.* 28. would be totally eluded; but it ſhould ſeem, the iſſue's own acceptance of the rent hath concluded him, for his own time, to diſtrain for any more.

Hard. 93. If tenant in tail makes a leaſe for years, reſerving the uſual rent to his iſſue, without any reſervation to himſelf, this is not purſuant to the words of the ſtatute; yet *Fleming*, Chief Juſtice, held it to be a good reſervation, and the leaſe not voidable, for this reaſon, within 32 *H.* 8. *c.* 28. becauſe the iſſue, for whom the ſtatute chiefly intended to provide, ſuſtains no prejudice.

3 Co. 64. b. An eſtate is made to huſband and wife, and the heirs of the body of the huſband, the huſband makes a leaſe for forty years, rendering rent, and dies, the iſſue accepts the rent, yet this ſhall not bind him, becauſe his time for acceptance thereof was not come, the whole being veſted in the wife for her life by ſurvivorſhip.

Tenant in tail makes a leaſe for *twenty* years, rendering the uſual rent, *habendum* from *Michaelmas* next enſuing: this ſeems a good leaſe, though it did not begin from the making of the leaſe, according to the proviſo 32 *H.* 8. *c.* 28. for the intent of the ſtatute was only that the leaſe ſhould not exceed the number of twenty-one years from the making, which this leaſe did not; and the caſe of (*a*) *Thompſon* and *Trafford*, 35 *Eliz.* in *B. R.* was cited, where ſuch a leaſe was adjudged by the whole court to be good, and well warranted by the ſtatute; though my Lord *Coke* lays it down for one of his (*b*) rules, that leaſes upon that ſtatute are not good, if they do not commence from the day of the making, which perhaps may be reconciled upon the ſame diverſity, where they are under twenty-one years, and where not ſo; that from the time of the ſealing and executing the leaſe, till the expiration thereof, there does not intervene more than twenty-one years; for if the commencement of the leaſe be at ſuch a diſtance, that between the time of the ſealing and executing thereof, and the expiration, there do intervene above twenty-one years, then ſuch leaſe ſeems to be without any aid from this ſtatute, though the time for continuance thereof in the poſſeſſion of the leſſee be under twenty-one years; for otherwiſe the tenant in tail might ſo procraſtinate the commencement of the leaſe, as to have always the greateſt part of the twenty-one years running out in the time of his iſſue, which the ſtatute never intended to countenance.

Dver, 246. a. Leon. 148. & *vide* 2 Bendl. 74. pl. 58.

(*a*) Poph. 8.

(*b*) Co. Lit. 44. a. 45. b.

So, where one made a leaſe for ten years, and after made another leaſe for eleven years, both theſe leaſes are good, becauſe they do not in all exceed twenty-one years, and ſo the inheritance not charged with more than a leaſe for twenty-one years, which the ſtatute allows.

Leon. 148.

Leaſes by tenant in tail, or huſband ſeiſed in right of his wife of copyhold lands, are not within this ſtatute of 32 *H.* 8. *c.* 28. but remain perfectly as at common law.

Cro. Car. 44.

Tenant in tail made a leaſe to a feme covert for life, the huſband ſurrenders, and then the tenant in tail makes a leaſe for three lives and dies; the wife, after the death of her huſband, entered, claiming her leaſe, and dies; and (*c*) held, that the iſſue ſhall not avoid the leaſe for three lives: and yet a conditional ſurrender of a former leaſe hath been expreſsly held not to be a ſufficient ſurrender to make good any new leaſe to be made by virtue of this ſtatute; *quære* therefore the difference.

Moor, pl. 1084. Sydnam and Capps.

(*c*) 5 Co. 2. Co. Lit. 44. b.

3. When and in what Caſes the Iſſue in Tail, or Strangers, ſhall be bound by voidable Leaſes made by Tenant in Tail.

As this has already been in ſome meaſure cleared under the firſt branch of this head, there remain but a few caſes here to be inſerted.

Baron and feme, tenants in ſpecial tail, with reverſion in fee to the baron, the baron dies; *A.* his ſon and iſſue in tail having alſo the reverſion in fee, by indenture, in the lifetime of the wife, makes a leaſe to *B.* for forty years, to begin after the death of the wife,

2 Bulſ. 42, 43. Errington v. Errington. 4 Mod. 3. S. C. cited.

wife, rendering rent, and dies without iſſue; *C.* his ſiſter, to whom the reverſion deſcended in the lifetime of her mother, levies a fine *come ceo, &c.*, with proclamations to *J. S.*, then the wife, tenant in tail, dies; and if *J. S.*, the conuſee of the fine, was bound by this leaſe, was the queſtion? no judgment is given in the caſe, but the opinion of the court, upon the firſt and ſecond argument, ſeemed to be, that the conuſee could not avoid this leaſe; and the reaſon they went upon was, becauſe this leaſe, at firſt, took its effect out of the eſtate-tail by way of concluſion, and out of the reverſion in fee by way of intereſt; but the taking effect by way of concluſion was at an end by the death of the iſſue who made it, becauſe he died before the eſtate-tail came to him; and ſo it reſted barely upon the reverſion in fee, which was well charged therewith; then when *C.*, the ſiſter, inheritable likewiſe to both the entail and reverſion in fee, levied a fine in the lifetime of the mother; this paſt the reverſion in point of intereſt charged with that leaſe, and it likewiſe carried the eſtate-tail; (not as an eſtate-tail, for that none could have but the donees and their iſſue, inheritable by force of the gift; much leſs when the iſſue who levied it had then nothing in the entail, her mother, who had the whole eſtate-tail in her, being then living;) but it paſſed the eſtate-tail by way of bar or extinguiſhment, ſo that the leaſe which would have taken place out of the eſtate-tail by way of concluſion, if it had ever come to the leſſor, and which did take place out of the reverſion in point of intereſt, now that the eſtate-tail is put out of the way by virtue of the fine, then takes place out of the reverſion preſently, and by conſequence the conuſee, who has that reverſion by conveyance ſubſequent to the leaſe, muſt hold it ſubject thereto; and the ſiſter could not by the fine convey over the poſſibility of avoiding the leaſe, which ſhe herſelf would have had if the eſtate-tail had come to her. And ſome held, that if either the brother or ſiſter, after the father's death, had acknowledged a ſtatute, and then after levied the fine, and then the mother had died, that the eſtate-tail would be ſo barred and gone, *quoad* the conuſee of the ſtatute, that he might lay on his ſtatute againſt the conuſee of the fine, who hath the fee-ſimple abſolute in him, out of which the leaſe or ſtatute were to take place; and the iſſue in tail only is inheritable to the privilege of avoiding ſuch charges by virtue of his eſtate-tail, not the conuſee, who is a ſtranger, and cannot have that eſtate. But afterwards when *Coke* came to be chief juſtice, he was clear of opinion, that the conuſee of the fine was not bound by this leaſe, for he held the leaſe to be clearly and abſolutely void as againſt the ſiſter and her conuſee, and not merely voidable; indeed if the ſon had come to the eſtate-tail, it would have bound him, and ſo it would his conuſee, if he had levied the fine in the life of his mother; but he dying in the lifetime of the mother, who was perfect tenant in tail, the ſiſter was not at all bound by this concluſion, but the leaſe, as to her, was abſolutely void; and then of all *void charges* a *ſtranger* may take advantage, though of ſuch as are only *voidable*, *privies only*, and *not ſtrangers*, can take advantage. And

he

he divided the caſe, and put it as if the reverſion in fee had been in the donor, and ſuch donor had made a leaſe for years, or granted a rent-charge, and then the iſſue in tail, in the life of the tenant in tail, had levied a fine, and then the tenant in tail had died, clearly the conuſee of the fine ſhould hold the land ſo long as there were any iſſue in tail; for during that time the conuſee hath a fee-ſimple; and though the iſſue in tail here had the reverſion in fee, which he paſſed to the conuſee, together with a fee determinable on the failure of iſſue, and that the conuſee cannot have two fee-ſimples in him, yet he hath ſuch a fee-ſimple as ſhall be diſcharged of the leaſe during the continuance of the eſtate-tail, if it had not been barred, and the one fee-ſimple ſhall not determine or drown the other, but both ſhall have continuance *quoad* ſtrangers, as if they were in ſeveral and diſtinct perſons. And he alſo held, that if the daughter in this caſe had entered, and accepted the rent, yet clearly this acceptance would not have bound her, or made good the leaſe, becauſe, as to her, it was abſolutely void, and not merely voidable; and this ſeems the moſt reaſonable opinion; but no judgment was given, but the caſe ended by agreement.

A., tenant in tail, with reverſion to himſelf in fee, makes a leaſe for 99 years, if two lives ſhould ſo long live, to commence after the determination of a leaſe for years then in being; *A.* dies, leaving *B.* his eldeſt ſon and heir, who being the iſſue in tail levied a fine to the uſe of himſelf and his heirs; the firſt leaſe determines, then *B.*, enters upon his father's leſſee; and if his entry was lawful, was the queſtion? and it was adjudged, that it was not; for this was an intereſt derived out of the eſtate-tail, and alſo out of the reverſion, and being made by tenant in tail was not abſolutely void as againſt his iſſue, but only voidable; then when the iſſue, without taking the advantage the law gave him in reſpect of his eſtate-tail to avoid this leaſe, levies a fine of the eſtate, his eſtate-tail by ſuch fine is extinguiſhed or barred and gone, and, by conſequence, his power to avoid this leaſe in reſpect of that eſtate-tail is gone likewiſe; and the conuſee has no power to avoid it, becauſe he is a mere ſtranger, and no ways in privity of the eſtate-tail; nor could this power to avoid the leaſe be transferred to the conuſee, when the iſſue in tail had it only in reſpect of his eſtate-tail, which is now barred, or rather extinguiſhed, as it was held to be, and ſo the leaſe took place of the reverſion in fee. *Note;* This caſe ſeems to differ from that of *Errington's ſupra*, where the ſon, who had made the leaſe, died without iſſue in the lifetime of his mother, who was perfect tenant in tail.

Symonds v. Cudmore, 4 Mo. 1. Salk. 338. pl. 3. S. C. Carth. 257, 258. S. C. Show. 370. S. C. 3 Danv. 196. pl. 10, 11. S. C. Skin. 284. 317. 328. S. C. 3 Salk. 335. S. C. 12 Mod. 32. S. C. Holt. 666. pl. 1. S. C. 1 Freem. 503. S. C.

Huſband and wife tenants in ſpecial tail, with remainder to the huſband in fee, by conveyance made by the huſband, during the coverture have iſſue a ſon, the huſband dies, the ſon in the lifetime of his mother levies a fine to the uſe of himſelf and his heirs; the wife after makes a leaſe for twenty-one years without reſerving the antient rent, and ſo not warranted by 32 *H.* 8. *c.* 28. and dies, the ſon hath iſſue, and by his will deviſes theſe lands to the defendant, and dies, the defendant enters upon the leſſee, who

Roll. Abr. 842. Jon. 60. Hutton, 84. Cro. Jac. 688. 2 Roll. Rep. 490. 498. Croker and Kelſey. Sid. 63.

Keb. 182. S. C. cited.

brings ejectment; and it was adjudged in *B. R.* for the plaintiff, and that judgment afterwards affirmed in error in the exchequer-chamber, after divers arguments; and in the caſe two points were made: 1. If this leaſe, being made by a jointreſs within 11 *H.* 7. *c.* 20. and not warranted by 32 *H.* 8. *c.* 28. be voidable by the iſſue in tail, upon the ſtatute 11 *H.* 7. *c.* 20. in caſe no ſuch fine had been levied? 2. If the conuſee of the fine ſhould have the ſame power to avoid the leaſe, either in reſpect of the eſtate-tail or the remainder in fee, as the iſſue ſhould have had, if no ſuch fine had been levied? As to the firſt point, it was reſolved, that this leaſe was not within the 11 *H.* 7. *c.* 20. for it was no diſcontinuance, but only an ordinary leaſe for years, which the wife might ſurvive; and therefore this differs from a leaſe for life or lives made by a ſole jointreſs, not warranted by 32 *H.* 8. *c.* 28. for that makes a diſcontinuance preſently, and is expreſsly within 11 *H.* 7. *c.* 28. alſo this differs from the caſe put in (*a*) Sir *George Brown*'s caſe, that if a woman jointreſs in tail accepts a fine *come ceo*, &c., and grants and renders the land for 500 or 1000 years, to evade the act, that yet this is an alienation within the meaning of that act, as much as if ſhe had expreſsly levied a fine for 500 or 1000 years, becauſe in both caſes, after her death, ſuch fine would bind the iſſue in tail, which that ſtatute intended to prevent; but becauſe ſuch fines paſſing only an intereſt for years, and not meddling with the freehold, make no diſcontinuance, nor can be forfeited with collateral warranty, therefore during the life of the jointreſs they continue good, ſhe continuing ſtill tenant in tail, as ſhe was before, at leaſt in caſe of the fine levied by her for years; but after her death the iſſue in tail may avoid them, becauſe otherwiſe they would be prejudicial to him in binding his inheritance, and ſo would be equivalent to a diſcontinuance; and therefore after the death of the jointreſs in ſuch caſe the iſſue in tail may avoid them by 11 *H.* 7. *c.* 20. but not before; but this leaſe for twenty-one years being made in the ordinary form, by indenture, is not within the ſtatute 11 *H.* 7. *c.* 20. and therefore if the jointreſs in this caſe had made a leaſe for 100 or 1000 years by indenture only, this would be no alienation within 11 *H.* 7. *c.* 20. becauſe the iſſue might avoid it by the ſtatute *de donis*; ſo that there appears a manifeſt difference between leaſes for life or lives, and leaſes for years, and alſo between leaſes for years made by fine, and leaſes for years made only by indenture or deed poll; but if ſuch leaſe, either for lives or years, were in all things warranted by 32 *H.* 8. *c.* 28. then they would be good and binding upon the iſſue. As to the ſecond point, if the conuſee of the iſſue in tail ſhould have the ſame power of avoiding the leaſe, either in reſpect of the eſtate-tail or the remainder in fee, as the iſſue himſelf ſhould have had if no ſuch fine had been levied; it was reſolved, that he ſhould not, but that the leaſe was good, and unavoidable; for notwithſtanding the fine levied by the ſon, the mother continued perfect and abſolute tenant in tail; and therefore the leaſe made by her would not have been abſolutely void againſt the iſſue, but only

(*a*) 3 Co. 51. 2 Roll. Rep. 401. *& vide* 3 Keb 333. 436. 448.

voidable, if he had levied no fine; but now having levied a fine, this hath barred the iſſue and the entail, ſo that the iſſue himſelf cannot avoid this leaſe; for he hath nothing to do with the entail; and the conuſee cannot avoid it, becauſe he is a ſtranger to the entail, which could not be transferred to him by the fine, but only be extinguiſhed as an eſtate-tail; and the ſtatute *de donis* helps only the iſſue and thoſe in reverſion or remainder; and though the fine carried likewiſe the remainder in fee, and after the death of the wife the entail was not *in eſſe*, but determined; yet this was only between the conuſor and conuſee; for as to the feme, and all ſtrangers, the eſtate-tail continues ſo long as there is any iſſue, and no diverſity when the fine of the iſſue is precedent to the leaſe, and where ſubſequent; for the leaſe is good againſt all but thoſe who were aided by the ſtatute *de donis*; and when the iſſue in tail by his own act hath extinguiſhed or barred the eſtate-tail, and deſtroyed the privity, the leaſe continues good and unavoidable ſo long as any of the iſſue in tail are in being: and if the feme in this caſe, after the fine levied by the iſſue, had made a feoffment in fee, and died, the feoffee ſhould have held the land againſt the iſſue and his conuſee, ſo long as there were any iſſues in tail. And if tenant in tail makes a leaſe for years, and after levies a fine to him in the reverſion, and dies, leaving iſſue, though in this caſe he in reverſion ſhall be in of his antient reverſion, yet he ſhall not avoid the leaſe during the lives of the iſſues in tail; for as to ſtrangers, the eſtate-tail hath continuance in right, though as to other purpoſes he ſhall be in of an eſtate in fee; and therefore the difference between this and Sir *George Brown*'s caſe is, that the leaſe there for three lives was a diſcontinuance, and then 11 *H.* 7. *c.* 20. gives title of entry to him to whom the intereſt after the death of the feme ſhould appertain to avoid it; but here this leaſe for years was no diſcontinuance, nor at all within that ſtatute; and then it remains at common law, where none but the iſſue in privity of the eſtate-tail, or thoſe in reverſion or remainder, ſhall avoid it; and here the eſtate-tail, as to all ſtrangers, hath continuance, and then the iſſue cannot avoid it, becauſe he hath no eſtate-tail; nor the conuſee, becauſe a ſtranger to the entail; and ſo the leaſe remains abſolute and unavoidable.

If tenant in tail makes a future leaſe, and dies before it is to commence, ſuch leaſe is merely void, without more circumſtances; but the iſſue in tail has his election to make it good by accepting the rent, or by diſtraining and avowry, which amounts to an admittance of the leaſe, and ſo eſtops and concludes the iſſue to deny it; ſo that the election of the iſſue in that caſe is only to ſupport and make good the leaſe of ſome act of his own concluſion, and not an election to avoid it by his own act, becauſe there is no ſuch act neceſſary; for the law eſteems it void *ipſo facto* by the death of the tenant in tail, unleſs the iſſue doth by ſome act make it good.

Carth. 260. in the caſe of Symonds and Cudmore, by Holt, C. J. againſt the three others, who doubted.

Where leaſes are voidable only, the ſame may in ſome caſes be avoided by one perſon, and yet revived and made good by another, and in ſome caſes an avoidance of ſuch leaſes by one perſon con-

cludes all others to revive or ſet them up again; wherein the diverſity is between thoſe who at the time of the avoidance have the abſolute fee and inheritance in them, and thoſe who have only a temporary and particular eſtate or intereſt therein.

7 Co. 35. Co. Lit. 46. a. Therefore, if tenant in tail, or biſhop, make a leaſe for years not warranted by the ſtatute, ſo that the iſſue in tail or ſucceſſor may avoid them, if during theſe leaſes the temporalities come into the hands of the king by the vacancy of the biſhoprick, or the wardſhip of the iſſue, and his lands come to the king, or any other, upon the death of the tenant in tail, by reaſon of a tenure by knight's ſervice; in theſe caſes the king, or other guardian, may avoid theſe leaſes in right of the biſhoprick or iſſue, whether made by the anceſtor within age, or by the ward himſelf; but yet the ſucceſſor, or iſſue, when they come to the actual poſſeſſion of theſe lands themſelves, may by the acceptance of the rent, &c., and waver of the poſſeſſion, re-eſtabliſh and ſet up ſuch leaſes again: ſo, where the king for his *primier* ſeiſin avoided a leaſe for years made by a tenant in tail, yet it was adjudged, that after livery had, the iſſue in tail had election either to defeat or abide by ſuch avoidance; and therefore if he accepted the rent from the leſſee, and waved the poſſeſſion, this ſet up the leaſe again.

7 Co. 9. Co. Lit. 46. a. So, if the wife of tenant in tail being endowed of thoſe lands, avoids a leaſe made by her huſband during the coverture, for thirty or forty years, yet after her death the iſſue in tail, by acceptance of rent, and waver of the poſſeſſion, may ſet up ſuch leaſe again.

7 Co. 9. Godb. 325. So, if tenant in tail makes a leaſe for thirty or forty years, rendering rent, and dies without iſſue, his wife *privement enſeint* with a ſon, and the donor enters, and as to himſelf avoids the leaſe; then the ſon is born, and the leſſee re-enters; the ſon at full age may either affirm or avoid ſuch leaſe, as he thinks fit; for the leaſe was not abſolutely determined or avoided, more than the eſtate-tail itſelf, out of which it was derived, but only *ſecundum quid*, and ſubject to be ſet up again upon the birth of the iſſue, which revived the eſtate-tail; but if ſuch leaſe were made by the tenant in tail before marriage, rendering rent, and then he married, and died, leaving his wife *privement enſeint*, and the donor enters, and as to himſelf avoids the leaſe, yet if the wife be after endowed, the leaſe is revived as againſt her, becauſe her eſtate is *quodam modo* a continuance of the eſtate-tail of the huſband, and therefore revives all charges made by him before the marriage. But if the wife be after delivered of a ſon, and die, now the iſſue may again avoid that leaſe or affirm it, as he thinks fit; or if ſuch leaſe were made after marriage, and the wife, being endowed thereof, avoid that leaſe, yet after her death the iſſue in tail may revive it; for in all theſe caſes the avoidance of ſuch leaſes being only by thoſe who had a temporary eſtate or intereſt in the land, cannot bind thoſe who ſucceed to the inheritance thereof, but that they may, if they think fit, re-eſtabliſh and ſet up ſuch leaſe again, which, as to them, was at firſt only voidable, and not abſolutely void.

7 Co. 8. a. Co. Lit. 46. b. But if a woman be endowed of an advowſon, which was appropriated, during the coverture, and ſhe preſent, and her preſentee be

be admitted, inſtituted and inducted, though the incumbent dies during the life of the dowereſs, yet is the appropriation defeated and diſſolved for ever; becauſe the incumbent, who came in by her preſentation, had the whole fee and eſtate in him, as much as any incumbent ever can have, and, conſequently, there can be no reverſionary or contingent intereſt left to revive the appropriation: but if the wife in this caſe had died before any preſentation, then the appropriation had remained untouched; for then nothing had been done to defeat or alter it, and make it preſentable; for the actual preſentation only defeats and diſſolves the appropriation, not the bare power of preſenting, without it be reduced into execution.

(E) Of Leaſes for Lives or Years by Eccleſiaſtical Perſons: And herein,

1. What Leaſes they might have made by the Common Law, and of the ſeveral enabling and diſabling Statutes, with ſome general Obſervations on them.

AS to leaſes made by eccleſiaſtical perſons, by the common law, we ſhall but briefly obſerve, that all eccleſiaſtical perſons had in former times as full power and authority to leaſe, grant, or alien their poſſeſſions, as temporal perſons had, that is, if the grant, &c. made by a ſole corporation was with the conſent of others, whoſe confirmation was in ſuch caſe neceſſary; for though deans and chapters, maſters and fellows of colleges, maſters and brethren of hoſpitals, and ſuch like corporations aggregate, might of themſelves alone, without the conſent or confirmation of any, have made long leaſes for lives or years, or gifts in tail or fee, at pleaſure; yet biſhops, deans, &c. ſeiſed in right of their biſhopricks, deanries, &c. ſo archdeacons, prebendaries, parſons, vicars, if they aliened or leaſed, muſt have had the conſent and confirmation of others, that had the power of confirming in that behalf, and then their grants, &c. were as good as thoſe made by aggregate corporations. Comp. Incumb. 415.

But the law, as to the capacity of clergymen in granting, leaſing, &c. being greatly altered by divers acts of parliament, and thoſe not a little intricate and perplexed, it will be neceſſary to ſet down the ſtatutes themſelves, to render the caſes reducible to them more clear and intelligible.

The firſt ſtatute concerning leaſes by eccleſiaſtical perſons, which is alſo the only ſtatute that gives directions concerning leaſes by tenant in tail, or huſbands ſeiſed of lands in right of their wives, is 32 *H.* 8. *c.* 28. which provides as followeth: "Where- "as great numbers of the king's ſubjects have heretofore taken "leaſes of lands, tenements, and other hereditaments, for term "of years, and divers of them for term of life, and have given "and paid great fines and ſums for the ſame, and alſo been at "great coſts and charges, as well in and about great reparations 32 H. 8. c. 28.

" and buildings upon their ſaid farms, as otherwiſe concerning
" their ſaid farms; yet notwithſtanding the ſaid farmers, after
" the deaths or reſignation of their leſſors, have been, and be
" daily, with great cruelty, expulſed and put out of their ſaid
" farms and takings by the heirs or ſucceſſors of their ſaid leſſors,
" or by ſuch perſons as have intereſt therein, after the deaths or
" reſignations of their ſaid leſſors, by reaſon of privy gifts of en-
" tail, or for that the leſſors had nothing in the lands, tenements,
" or other hereditaments ſo letten at the time of the leaſes there-
" of made, but only in the right of their wives, or ſuch other
" like cauſe, to the great impoveriſhment, and in a manner utter
" undoing, of the ſaid farmers; for reformation whereof, be it
" enacted, *&c.* That all leaſes to be made of any lands, tene-
" ments, or other hereditaments, by writing indented, under
" ſeal, for term of years, or for term of life, by any perſon or
" perſons, being of full age of twenty-one years, having an
" eſtate of inheritance either in fee-ſimple or fee-tail, in their
" own right, or in right of their churches and wives, or
" jointly with their wives, of an eſtate of inheritance, made be-
" fore the coverture or after, ſhall be good and effectual in the
" law againſt the leſſors, their wives, heirs, and ſucceſſors, and
" every of them, *&c.* *Provided* that the ſaid act ſhall not ex-
" tend to any leaſes to be made of any manors, lands, tene-
" ments, or hereditaments, being in the hands of any farmer
" or farmers, by virtue of an old leaſe, unleſs the ſame old leaſe
" be expired, ſurrendered, or ended, within one year next after
" the making of the ſaid new leaſe; nor ſhall extend to any
" grant to be made of any reverſion of any manors, lands, tene-
" ments, or hereditaments, nor to any leaſe of any manors,
" lands, tenements, or hereditaments which have not moſt com-
" monly been letten to farm, or occupied by the farmers there-
" of, by the ſpace of twenty years next before ſuch leaſe thereof
" made; nor to any leaſe to be made without impeachment of
" waſte; nor to any leaſe to be made above the number of *twenty-*
" *one years or three lives* at the moſt, from the day of the making
" thereof; and *that upon every ſuch leaſe there be reſerved yearly,*
" during the ſame leaſe, due and payable to the leſſors, their
" heirs and ſucceſſors, to whom the ſame lands ſhould have come
" after the deaths of the leſſors, if no leaſe had been thereof
" made, and to whom the reverſion thereof ſhall appertain, ac-
" cording to their eſtates and intereſts, *ſo much yearly farm or rent,*
" or more, as hath been moſt accuſtomably yielden or paid for
" the manors, *&c.* ſo to be letten within twenty years next be-
" fore ſuch leaſe thereof made; and that every ſuch perſon or
" perſons, to whom the reverſion of ſuch manors, *&c.* ſo to be
" letten ſhall appertain, as is aforeſaid, after the deaths of ſuch
" leſſors, or their heirs, ſhall and may have ſuch like remedy
" and advantage, to all intents and purpoſes, againſt the leſſees
" thereof, their executors and aſſigns, as the ſame leſſor ſhould
" or might have had againſt the ſame leſſees; *Provided* alſo, that
" this act extend not to give any liberty or power any perſon

" to

" to take any more farms, leaſes, or takings, of any manors, " &c. than he ſhould or might lawfully have done before the " making of this act; nor extend to any liberty or power to any " parſon or vicar of any church or vicaridge, for to make any leaſe " or grant of any of their meſſuages, lands, tenements, tythes, " profits, or hereditaments, belonging to their churches or vi- " caridges, otherwiſe, or in any other manner, than they ſhould " or might have done before the making of this act."

This act extends only to ſole corporations, as biſhops, deans, &c. but as to corporations aggregate, as deans and chapters, &c. though they be ſeiſed in right of their churches, this is no enabling ſtatute; for they, by the conſent of the major part of them, might have made any leaſes or grants of their eſtates without limitation before this ſtatute, and ſo they might have done after, till by other ſubſequent ſtatutes they were reſtrained, this being merely enabling, and not at all reſtraining them; and though by this ſtatute the ſole corporations before mentioned could not, without the conſent and confirmation of others, have made leaſes for three lives, or twenty-one years, yet with confirmation they might have made longer leaſes, or abſolute alienations, of any of their poſſeſſions; and therefore to reſtrain biſhops, and other eccleſiaſtical perſons, were the ſtatutes of 1 & 13 *Eliz.* made, which are as follow:

10 Co. 60. a. See Co. Litt. 44. b.

Moor, 107.

For the reſtraining of biſhops, the 1 *Eliz. c.* 19. ſays, " That all " gifts, grants, feoffments, fines, and other conveyances, or eſtates " from the firſt day of this preſent parliament had, made, done, " or ſuffered, or to be had, made, done, or ſuffered, by any " archbiſhop or biſhop of any honours, caſtles, manors, lands, " tenements, or other hereditaments, being parcel of the poſſeſ- " ſions of his archbiſhoprick or biſhoprick, or united, appertain- " ing or belonging to any of the ſame, to any perſon (other than " the (*a*) queen, her heirs and ſucceſſors), whereby any eſtate " ſhould or might paſs from the archbiſhop or biſhop other than " for term of twenty-one years, or three lives, from ſuch time " as any leaſe, grant, or aſſurance ſhall begin, and whereupon " *the old accuſtomed yearly rent*, or more, ſhall be reſerved payable " yearly during the ſaid term of *twenty-one years*, or *three lives*, " ſhall be utterly void; any law, cuſtom, &c. notwithſtanding."

(*a*) This ſtatute, leaving biſhops their former power of granting to the queen, her heirs and ſucceſſors, was to little effect, for that many eſtates were granted to the queen, upon deſign that ſhe ſhould grant them over to others, to prevent

which was the ſtatute 1 Jac. 1. c. 3. made, which diſables all archbiſhops and biſhops from granting any of their poſſeſſions to the king, his heirs or ſucceſſors, and makes all ſuch leaſes, grants, &c. to the king, his heirs or ſucceſſors, utterly void and of none effect. 11 Co. 71. Gibſ. Codex. 679.

The ſtatute which diſables all other eccleſiaſtical perſons is 13 *Eliz. c.* 10. which is as followeth: " And for that long and " unreaſonable leaſes made by colleges, deans and chapters, par- " ſons and vicars, and others, having ſpiritual promotions, be " the chiefeſt cauſes of the dilapidations and the decay of all " ſpiritual livings and hoſpitality, and the utter impoveriſhing of " all ſucceſſors, incumbents of the ſame; be it enacted, That " from henceforth all leaſes, g ſts, grants, feoffments, convey-

" ances,

" ances, or eſtates, to be made, had, done, or ſuffered, by any " maſter and fellows of any college, dean and chapter of any " cathedral or collegiate church, maſter or guardian of any hoſ- " pital, parſon, vicar, or any other, having any ſpiritual or eccle- " ſiaſtical living, or any houſe, lands, tythes, tenements, or other " hereditaments, being any parcel of the poſſeſſions of any ſuch " college, cathedral, church, chapel, hoſpital, parſonage, vica- " ridge, or other ſpiritual promotion, or any ways appertaining " or belonging to the ſame, or any of them, to any perſon or " perſons, bodies politick or corporate, (other than for the term " of *twenty-one years*, or *three lives*, from the time as any ſuch " leaſe or grant ſhall be made or granted; whereupon the *accuſ-* " *tomed yearly rent*, or more, *ſhall be reſerved* and payable yearly " during the ſaid term,) ſhall be utterly void and of none effect, " to all intents and purpoſes whatſoever; any law, cuſtom, *&c.* " notwithſtanding: *Provided*, *&c.* that nothing herein extend to " make good any leaſe, or other grant, to be made by any ſuch " college or collegiate church within either or both the univerſi- " ties of *Oxford* and *Cambridge*, or elſewhere, within the realm " of *England*, for more years than are limited by the private ſta- " tutes of the ſame college: *Provided* alſo, that this act ſhall not " extend to any leaſe hereafter to be made, upon ſurrender of any " leaſe heretofore made and now continuing, ſo that the leaſe to " be made do not contain more years than the reſidue of the " years of the former leaſe, now continuing, ſhall be at the time " of ſuch leaſe hereafter to be made, nor any leſs rent than is " reſerved in the ſaid former leaſe."

5 Co. 2. 4 Co. 76. Moor, 253. Cro. Jac. 112. 2 Roll. Abr. 465. Leon. 306. Yelv. 106. Mod. 205. 2 Mod. 56.

On theſe ſtatutes we ſhall obſerve, 1. That the ſtatute of 1 *Eliz.* *c.* 19. is but a private or particular ſtatute, and muſt be ſpecially pleaded, elſe the court will take no notice of it; but 13 *Eliz.* *c.* 10. is a general law, whereof the judges are bound *ex officio* to take notice, though it be not pleaded, becauſe it extends to all eccleſiaſtical perſons whatſoever, except biſhops, who were before provided for by the 1 *Eliz.* *c.* 19.

5 Co. 15. b. 11 Co. 75. Roll. Abr. 378. Roll. Rep. 151.

2. It has been adjudged and holden in parliament, that the king was bound by 13 *Eliz.* *c.* 10. though not named, becauſe the ſtatute was general and for the publick good: but for ſome time the law was holden otherwiſe; and therefore, where a leaſe was made to the king by a dean and chapter, and the king had aſſigned it over, after that the law came to be holden that the king was bound, the aſſignee had his leaſe made good to him in Chancery againſt the ſtatute, becauſe he could not know the law in a matter ſo dubious.

Comp. Incumb. 417.

3. That all leaſes made according to 13 *Eliz.* *c.* 10. by any ſingle corporation, if not warranted likewiſe by 32 *H.* 8. *c.* 28. muſt be confirmed by thoſe who by law are to confirm the ſame.

Comp. Incumb. 419.

4. That theſe ſtatutes of 1 *Eliz.* *c.* 19. and 13 *Eliz.* *c.* 10. are merely reſtraining, ſo that though biſhops, and other eccleſiaſtical perſons, might, with the confirmation of thoſe required by

by law, have made any leaſe or perpetual grant, yet now no confirmation whatever will make them good for above three lives or twenty-one years.

5. That no leaſe by an archbiſhop or biſhop for three lives, or twenty-one years, made according to the exception of 1 *Eliz.* *c.* 19. is good to bind the ſucceſſor, if it be not in every thing purſuant to 32 *H.* 8. *c.* 28. unleſs it be confirmed by the dean and chapter; for leaſes for twenty-one years, or three lives, being only exempted and taken out from the general diſability impoſed on biſhops by the firſt part of the act, receive no ſanction at all from that act, but as they are taken out to reſt upon 32 *H.* 8. *c.* 28. and therefore though they are for twenty-one years, or three lives, yet if part of the land were not in poſſeſſion, or if the old leaſe were not ſurrendered or expired within one year before the new leaſe made, or in any other reſpect, ſuch new leaſe was not warranted by 32 *H.* 8. *c.* 28. to bind the ſucceſſor, there muſt be the confirmation of the dean and chapter, becauſe at common law ſuch confirmation was neceſſary; and theſe leaſes not being warranted by 32 *H.* 8. *c.* 28. which is the only ſtatute that enables biſhops ſolely to make leaſes to bind their ſucceſſors, remain at common law, and by conſequence, without confirmation, are voidable by the ſucceſſors as much as if they were made for one hundred years or lives. 10 Co. 60. b. Co. Lit. 45. a. Moor, 108.

6. That 13 *Eliz.* *c.* 10. hath been always conſtrued largely and beneficially to prevent all inventions and evaſions againſt the true intent thereof; therefore, where the ſtatute ſays, maſter and fellows of any college, yet it hath been often held, that be the college incorporated by that name, or by the name of warden and fellows, or warden and ſcholars, or warden, fellows, and ſcholars, or maſter, fellows, and ſcholars, or maſter and ſcholars, or proveſt, fellows, and ſcholars, or by any other name of corporation, and be the college temporal for the advancement of the liberal arts and ſciences, or mere eccleſiaſtical or mixt, that all theſe are within the reſtraint of this act. So where the ſtatute ſays maſter or wardens of any hoſpital, be the hoſpital incorporated by any other name, and be it a ſole corporation, or corporation aggregate of many, yet the ſtatute extends to them. 11 Co. 76. Magdalen College's caſe.

The next ſtatute that made any alteration in theſe things was 14 *Eliz.* *c.* 11. which as to houſes in cities and towns is as followeth: "Whereas in an act made 13 *Eliz.* *c.* 10. there is one "branch to avoid certain leaſes to be made by maſters and fel- "lows of colleges, deans and chapters of cathedral or collegiate "churches, maſters or guardians of any hoſpital, or by any other "parſon or vicar, or any other having any ſpiritual or eccleſiaſti- "cal living; be it enacted, That the ſaid branch, nor any thing "therein contained, ſhall not extend to any grant, aſſurance, or "leaſe of any houſes belonging to any perſons or bodies politick "or corporate aforeſaid, nor to any grounds to ſuch houſes ap- "pertaining, which houſes be ſituate in any city, borough, town "corporate or market-town, or the ſuburbs of any of them; but "that all ſuch houſes and grounds may be granted, demiſed, and "aſſured, 14 Eliz. c. 11. § 17.

" aſſured, as by the laws of this realm and the ſeveral ſtatutes " of the ſaid colleges, cathedral churches, and hoſpitals they law- " fully might have been before the making of the ſaid ſtatute, or " lawfully might be, if ſuch ſtatute were not, ſo always that ſuch " houſe be not the capital or dwelling-houſe uſed for the habita- " tion of the perſons aboveſaid, nor have ground to the ſame " belonging above the quantity of ten acres: provided that no " leaſe ſhall be permitted to be made by force of this act in re- " verſion, nor without reſerving the accuſtomed yearly rent at " the leaſt, nor without charging the leſſee with the reparations, " nor for longer term than for forty years at the moſt; nor any " houſes ſhall be permitted to be aliened, unleſs in recompence " thereof there ſhall be, afore, with or preſently after ſuch alien- " ation, a good and ſufficient aſſurance made in fee-ſimple ab- " ſolutely to ſuch colleges, houſes, bodies politick or corporate, " and their ſucceſſors, of lands of as good value, and of as great " yearly value at the leaſt, as ſo ſhall be aliened; any ſtatute to " the contrary notwithſtanding."

Comp. Incumb. 423.

Note; This ſtatute makes no alteration of the ſtatute 1 *Eliz. c.* 19. nor has any relation to it, but only to the ſtatute 13 *Eliz. c.* 10. and therefore gives no power to biſhops to let houſes, otherwiſe than according to 1 *Eliz. c.* 19.

Cro. Eliz. 564.

Note alſo; That this ſtatute need not be found by verdict, being a general law.

By this ſtatute it is expreſsly provided, that no leaſe ſhall be made of ſuch houſes in reverſion; but by 13 *Eliz. c.* 10. no reſtraint being made of ſuch leaſes, it was found neceſſary to provide againſt them by another ſtatute, *viz.* the 18 *Eliz. c.* 11.

18 Eliz. c. 11. continued by 43 Eliz. Note: This ſtatute is a general law. 4 Co. 76. 120. 2 Roll. Abr. 465.

Which reciting, that ſince the making of the 13 *Eliz. c.* 10. divers eccleſiaſtical and ſpiritual perſons, and others having ſpiritual or eccleſiaſtical livings, have from time to time made leaſes for term of twenty-one years, or three lives, long before the expiration of the former years, contrary to the true intent and meaning of the ſaid ſtatute; " Be it therefore enacted, That all leaſes to " be made by any of the ſaid eccleſiaſtical, ſpiritual, or collegiate " perſons, or others, of any of the ſaid eccleſiaſtical, ſpiritual, " or collegiate lands, tenements, or hereditaments, whereof any " former leaſe for years is in being, not to be expired, ſurren- " dered, or ended within three years next after the making of " any ſuch new leaſe, ſhall be void, fruſtrate, and of none effect, " and that all and every bond and covenant for renewing or mak- " ing of any leaſe, or leaſes, contrary to the true intent of this " act, or of the ſaid act made in the ſaid 13th year, ſhall be ut- " terly void; any law, ſtatute, *&c.* Provided that this act, nor " any thing therein contained, ſhall extend or be prejudicial to " make fruſtrate or void any leaſe or leaſes heretofore made by " any of the ſaid ſpiritual or eccleſiaſtical perſons, or any of " them; but that the ſame, and every of them, are of the like " force and effect as they, or any of them, were before the " making of this preſent ſtatute."

The

The ſtatute of 18 *Eliz. c.* 11. has relation only to the ſtatute of 13 *Eliz. c.* 10. to reſtrain leaſes in reverſion where above three years of the firſt leaſe is then to come, but leaves the ſtatute of 14 *Eliz. c.* 11. perfectly at large as to houſes in cities, without making void ſuch leaſes, or any bonds or covenants concerning them; for as to ſuch houſes the ſtatute of 14 *Eliz. c.* 11. is a new law, and ſets looſe the 13 *Eliz. c.* 10. therefore, where an action of covenant was brought againſt the Dean of *Lincoln* and one of the prebendaries, upon a covenant made by the Dean and Chapter, by their ſpecial names jointly and ſeverally, to make a leaſe of a houſe in *London*, though it was argued to be void upon the ſtatute 18 *Eliz. c.* 11. that ſtatute extending only to 13 *Eliz. c.* 10. and not to the 14 *Eliz. c.* 11. which, as to houſes in cities, repealed 13 *Eliz. c.* 10. and makes all leaſes thereof good, ſo they do not exceed forty years, *&c.* and are not made in reverſion, which was not prohibited by 13 *Eliz. c.* 10. Alſo, the ſtatute 14 *Eliz. c.* 11. forbids alienations of ſuch houſes, except there be full recompence given to the Church at the ſame time, ſo as with ſuch recompence they may alien ſuch houſes in fee, which was not permitted by 13 *Eliz. c.* 10. and it was adjudged accordingly. And it is (*a*) ſaid, the reaſon of repealing 13 *Eliz. c.* 10. as to houſes in market towns, was to make thoſe places more populous.

Hob. 269. Crane and Taylor.

(*a*) 1 Vent. 245.

But to avoid the force of thoſe ſtatutes of 13 *Eliz. c.* 10. and 18 *Eliz. c.* 11. and the clauſe making void bonds and covenants againſt them, a contrivance was ſet on foot to this effect: the Dean and Chapter of *Windſor*, in the 35th year of *Eliz.* made an agreement among themſelves by lots to have an aſſurance of a leaſe to each of them, of certain part of the poſſeſſions of their Church; and after the lots caſt, whereby every one knew his own leaſe, they executed the aſſurance in this manner: the corporation enters into an obligation of 500 *l.* to every canon that was to have a leaſe, and the payment limited to be within a ſhort time before the expiration of the old leaſe in being, and the canon the ſame day entered into an obligation to pay the College 510 *l.* at the ſame time, if they did make a leaſe according to a ſchedule annexed, which ſchedule was *verbatim* the demiſe agreed to be made; and it was farther proved, that the intent and agreement betwixt them was, that one 500 *l.* ſhould be ſtopped for the other 500 *l.* and that the corporation ſhould have only the 10 *l.* for the leaſe; which matter being diſcloſed in Chancery, the Lord Keeper *Egerton* made a decree, that the obligation of 500 *l.* made by the Dean and Canons to each canon was void by 18 *Eliz. c.* 11. and in the ſame caſe a precedent was ſhewn between *Fry* and the Dean and Canons of *Wells*, decreed 44 *Eliz.* in Chancery, which was thus: *Fry* gave to the Dean and Canons of *Wells* 1000 *l.* and took an obligation of 2000 *l.*, with condition to repay the 1000 *l.*, and for non-payment brought an action of debt againſt the Dean and Prebendaries, and obtained a judgment, and made a defeaſance thereof, that if they make a leaſe to him of land then in leaſe to Sir *Amias Pawlett* for fifteen years to come, then the judgment ſhould be void; and the truth of the caſe was, that the 1000 *l.* was paid, and 600 *l.* thereof

Moor, 789. Dean and Canons of Windſor v. Sir Gilbert Perwin.

thereof employed in payment of tenths due by the Church; yet by the opinion of *Popham*, *Anderſon*, and *Periam*, it was decreed in Chancery, that the judgment was void by 18 *Eliz. c.* 11. which makes void bonds and covenants for making leaſes againſt that ſtatute of 13 *Eliz. c.* 10. but by way of arbitrament they awarded to *Fry* the 600 *l.* that was paid and employed in the affairs of the Church, and after the 43 *Eliz. c.* 9. § 8. was made to extend to judgments in ſuch caſes.

Another ſtatute concerning leaſes made by colleges in the two Univerſities, and the colleges of *Wincheſter* and *Eaton*, is 18 *Eliz. c.* 6. which adds one thing more, as followeth: "That no "maſter, provoſt, preſident, warden, dean, governor, rector, or "chief ruler of any college, cathedral church, hall, or houſe of "learning in any of the univerſities of *Cambridge* and *Oxford*, nor "any provoſt, warden, or other head officer of the colleges of "*Wincheſter* or *Eaton*, nor the corporation of any of the ſame, "by what title, ſtile, or name ſoever they now be, ſhall or may be "called, after the end of this preſent ſeſſion of Parliament, ſhall "make any leaſe for life, lives, or years, of any farm, or any their "lands, tenements, or other hereditaments, to the which any "tythes, arable land, meadow, or paſture doth or ſhall apper-"tain, except that the one-third part at leaſt of the old rent be "reſerved in corn for the ſaid colleges, cathedral churches, halls, "and houſes, that is to ſay, in good wheat after the rate of 6 *s.* and "8 *s.* the quarter, or under, and good malt at 5 *s.* the quarter, or "under, to be delivered yearly upon a day prefixed at the ſaid col-"leges, cathedral church, halls, or houſes; and for default thereof "to pay the ſaid colleges, cathedral church, halls, or houſes, in ready "money, at the election of the ſaid leſſees, their executors, admi-"niſtrators, and aſſigns, after the rate of the beſt wheat and malt in "the market of *Cambridge*, for the rents that are to be paid to the "uſe of the houſe or houſes there, (and ſo for *Oxford* and *Win-*"*cheſter*, *in totidem verbis*,) and in the market of *Windſor* for the "rents that are to be paid to the uſe of the houſe or houſes at "*Eaton*, is or ſhall be ſold the next market day before the ſaid "rent ſhall be due, without fraud or deceit; and that all leaſes "otherwiſe hereafter to be made, and all collateral bonds or "aſſurances to the contrary by any of the ſaid corporations, ſhall "be void in law to all intents and purpoſes; the ſame wheat, "malt, or money coming of the ſame, to be expended to the uſe "of the relief of the commons and diet of the ſaid colleges, ca-"thedral church, halls, and houſes only, and by no fraud or colour "let or ſold away from the profit of the ſaid colleges, cathedral "church, halls, and houſes, and the fellows and ſcholars in the "ſame, and the uſe aforeſaid; upon pain of deprivation of the "governor and chief rulers of the ſaid colleges, cathedral church, "halls, and houſes, and all other thereunto conſenting: but this "act, or any thing therein contained, ſhall not extend or be in "any wiſe prejudicial to any leaſe to be made of a barn called "*Muncken Barn*, with a certain portion of tithes riſing, growing "and being in the pariſh of *Southweek* in the county of *Suſſex*

"being

" being parcel of the poſſeſſions of *Maudlin College* in *Oxford*, ſo " that the term demiſed in and by the ſaid leaſe exceed not the " number of ten years from and after the feaſt of *St. Michael the* " *Archangel* next coming, neither ſhall this act extend to any leaſe " to be made by the preſident and ſcholars of the college of *St.* " *John Baptiſt* in *Oxford*, to any heir male of Sir *Thomas White*, " founder of the ſaid college, which leaſe ſhall be made accord- " ing to the meaning of the foundation and ſtatutes of the ſaid " college, of the manor of *Fiſield*, and no other hereditaments."

In the conſtruction of this ſtatute it hath been holden, that it is a private act, becauſe it concerns only thoſe particular places; and therefore muſt be pleaded or given in evidence, or found by a jury, otherwiſe the court is not bound to take notice of it. Leon. 306. Sav. 129.

Alſo it is ſaid, that in a declaration upon a leaſe made by any of theſe colleges it ought to be ſhewed, that the corn was reſerved according to the ſtatute; otherwiſe this may be good cauſe to move in arreſt of judgment; but of this it may be doubted; for in the caſe itſelf, cited in *Leon* (*a*) for that purpoſe, it appears that that exception was diſallowed; for though it does not appear in the declaration that corn was reſerved, yet it may be that it was reſerved in the leaſe; and if not, yet the other party ought to ſhew it; and therefore the exception to the declaration for not ſhewing it was diſallowed. Leon. 306. 333. Sav. 129.

[(*a*) In the caſe itſelf, Leon. 306., the objection was, that this was not found by the ſpecial verdict: in the reference to the caſe, Leon. 333., the objection is ſtated to be as in the text; but that reference is faulty in another reſpect, inaſmuch as it ſtates the judgment to have been arreſted for this reaſon.]

By the ſtatute 22 *Car.* 2. *c.* 11. § 61. it is enacted, " That for " ever hereafter the mayor, commonalty, and citizens of *London* " may and ſhall have a market, to be kept three or four days in " the week, as to them ſhall ſeem convenient, upon the ground " now ſet out by the aſſent of the dean and chapter of the ca- " thedral church of *St. Paul*, *London*, for a market-place within " *Newgate*, and that the ſaid dean and chapter ſhall make and " give one or more leaſe or leaſes of the ſaid ground to the ſaid " mayor, commonalty, and citizens, and alſo of the wall of the " ſaid church-yard, abutting ſeverally upon *Paternoſter-row* and " the *Old Change*, for the term of forty years, reſerving the year- " ly rent of four pounds for the ground of the ſaid market-place, " and two-pence for every ſuperficial foot of the ground or ſoil of " the ſaid wall, as it is now ſet out by the ſurveyors of the city " and of the ſaid dean and chapter, and ſo from forty years to " forty years for ever, at the like yearly rent, and one year's rent, " after the rates aforeſaid, to be paid by way of fine for each of " the ſaid grounds reſpectively, upon the making every new leaſe " thereof; which ſaid leaſe and leaſes ſhall be good and effectual " in the law, as againſt the dean and chapter, and their ſucceſſors, " and all perſons claiming by, from, or under them, and that no " houſe, ſhed, or other building, ſhall ſtand, or hereafter be erect- " ed and fixed upon the ſaid market-place, other than the market- " houſe already built with the conſent of the ſaid dean and chap- " ter; any thing in this or any other act to the contrary not-

" withſtand-

§ 75. "withſtanding." "And whereas the ſaid parſons or vicars, or "ſome of them, (within the ſaid city of *London*,) are intereſted in "ſeveral glebe lands or grounds, the which they cannot rebuild "themſelves, nor let ſuch leaſe or leaſes as may be an encourage- "ment to others to rebuild the ſame; be it enacted, That the ſaid "parſons and vicars, and every of them reſpectively, be em- "powered, and are hereby empowered to let ſuch leaſe or leaſes "of their ſaid glebe lands or grounds, with the conſent and ap- "probation of the patron or patrons, and ordinary, for any term "not exceeding forty years, and at ſuch yearly rents, without "fine, as can be obtained for the ſame."

Dyer, 69. a. Hob. 7. Roll. Rep. 443. Before we mention any caſes, or make any obſervations on the foregoing ſtatute, it may be neceſſary to take notice, that at common law if a parſon had made a leaſe for years of his glebe-land, to begin after his death, or granted a rent-charge in that manner, and ſuch leaſe or grant were confirmed by the patron and ordinary, this would have bound the ſucceſſor of the parſon; becauſe here was the conſent and concurrence of all perſons intereſted, and the leaſe or charge bound immediately from the perfecting of the deed by the parſon, patron, and ordinary, though it was not to take effect in poſſeſſion till after the parſon's death; but now no confirmation whatever will make ſuch leaſe or grant good againſt the ſucceſſor, by reaſon of the ſtatutes made to avoid them.

Hetl. 57. Mayor and Commonalty of Wincheſter's caſe. If a perſon obtain a grant to build houſes on church or college lands, and this be confirmed, (in caſe where confirmation is neceſſary,) yet this grant is no alienation againſt the ſtatutes, but is only a covenant or licence, and nothing elſe; for the ſoil remains in the grantor, and, by conſequence, the houſes built thereon are in him.

Comp. Incumb. 334. If a pariſh be upon the deſign of incloſing lands, and a parſon have tithes in kind, and common for beaſts thereout, the Chancery may decree him to take a quantity of ground elſewhere, in lieu thereof.

Comp. Incumb. 334. So, where one had a leaſe of tithes in kind, it was ordered in Chancery, that a commiſſion ſhould go forth to ſet out other meadow and ground in lieu thereof; the reaſon of which caſes ſeems to be, either for the prejudice the publick might ſuffer, if ſuch recompence in no caſe ſhould be allowed, or for that the ſucceſſor of the parſon hath no injury thereby, being recompenced in other lands: *ſed quære*, why an act of parliament in ſuch caſes ought not to be procured? for it ſhould ſeem the Chancery, as well as the other courts, are bound by all acts of parliament, which are poſitive laws, and have no liberty of breaking through them, upon any pretence of convenience or neceſſity, more than other courts.

Hob. 269. Noy, 5. By the ſtatute of 14 *Eliz. c.* 11. as appears before, all thoſe who were reſtrained by 13 *Eliz. c.* 10. have liberty given them to alien houſes in cities abſolutely, ſo as at the time of ſuch alienation there be a recompence in lands given to them, and their ſucceſſors, of as great value as the houſes aliened are; but this liberty of aliening, upon ſuch recompence to be given, extends only to houſes; for as to lands they have no ſuch power, nor can they exchange

exchange them, to bind their ſucceſſors, upon any recompence whatſoever: and *quære*, whether ſuch houſe may be exchanged for lands of greater value, without licence, againſt the ſtatutes of *mortmain?*

It is agreed, that corporations of mayor and commonalty, bailiffs and burgeſſes, and ſuch other lay corporations, are out of all the beforementioned ſtatutes, and may make leaſes, and other eſtates, as they might ever have done. Sid. 162.

It hath been adjudged, that a ſpiritual perſon not beneficed is not within the 21 *H.* 8. *c.* 13. which prohibits ſpiritual perſons from taking leaſes to farm, *&c.* for life, years, or at will, in their own name, or in the name of any other perſon or perſons to their uſe, *&c.* Deg. 135. Mich. 4 Car. 1. in Scaccar., Clagg and Lampley.

A leaſe being made to a ſpiritual perſon againſt 21 *H.* 8. *c.* 13. and a bond or obligation taken for performance of covenants, the obligee brought an action of debt upon this bond, and had judgment; which proves that the leaſe was not abſolutely void between the leſſor and leſſee, as the words of the ſtatute are; and though in *Dyer*, where this caſe is reported, this is not mentioned to be any cauſe of the judgment; yet *Periam* in 1 *Leon.* held it to be the greateſt cauſe of the judgment: and ſo it appears to have been adjudged in another place; for the ſtatute inflicts a penalty of 10 *l.* for every month that the clerk ſhall occupy ſuch farm, and therefore it cannot be void; but the leaſes made void by that ſtatute are only thoſe which ſpiritual perſons before that act, or after had, and before *Michaelmas* then next following were not bargained, ſold, or granted away. Dyer, 27, 28. 358. a. 1 Leon. 309. 3 Keb. 436.

In an action upon 21 *H.* 8. *c.* 13. againſt a parſon for taking farms, it is a good plea to ſay, *non habuit ſeu tenuit ad firmam contra formam ſtatuti*; and the defendant may give in evidence, that the farm was for the maintenance of his houſe, *&c.* according to the proviſo in the ſtatute for that purpoſe *. Bro. tit. *Action ſur le ſtat.* 2. * Would not the general iſſue *nil debet*, be as good, if not more eligible?

Alſo, the writ grounded on this ſtatute ought to be *qui tam* for the king and party; and therefore a writ, which demanded the whole, was ruled not to be good. But the ſtatute need not be mentioned in the writ. Bro. *Action ſur le ſtat.* 4.

By another act, intitled, *An act for the erecting of hoſpitals, or abiding and working-houſes for the poor*, it is (amongſt other things) provided, That all leaſes, grants, conveyances, or eſtates to be made by any corporation ſo to be founded exceeding the number of twenty-one years, and that in poſſeſſion, and whereupon the accuſtomable yearly rent, or more, by the greater part of twenty years next before the taking of ſuch leaſe, ſhall not be reſerved, and yearly payable, ſhall be void. 39 Eliz. c. 5. § 2.

As to the perſons who may be ſaid to be ſeiſed in right of their churches, ſo as to be impowered by the ſtatute of 32 *H.* 8. *c.* 28. to make leaſes for three lives, or twenty-one years, to bind their ſucceſſors, it appears to have been adjudged, that a prebendary, though he be ſeiſed in right of his prebend, and not in right of his church, may yet 4 Leon. 51. Acton and Pritcher. Cro. Eliz. 350. Watkinſon and Mann, Co.

Lit. 44. b. 3 Bulſ. 290. Bro tit. Leaſes, 9. Palm. 105. Comp. Incumb. 325.

yet within the equity of that act make leaſes for three lives, or twenty-one years, to bind his ſucceſſor, obſerving the ſeveral qualifications required by the act; for the words of the act being general, all perſons having an eſtate of inheritance in right of their church, with a ſpecial exception of parſons and vicars only, ſhew the intent of the act to include and take in all but thoſe ſo excepted: and *Popham* ſaid, that in Dr. *Dale*'s caſe, for an houſe near St. *Paul*'s it was ſo adjudged, and ſo had been twice adjudged in his experience; and *Fenner* ſaid, it was ſo adjudged in the caſe of a treaſurer of a church. Beſides, prebendaries are eccleſiaſtical perſons, for they are admitted and inſtituted, and have *locum in choro, & vocem in capitulo.*

Lev. 112. Sid. 158. Keb. 576. Bis v. Holt, Palm. 105. Euſden v. Dennis.

So likewiſe, it hath been adjudged, that a chancellor of a cathedral church may make leaſes for twenty-one years, or three lives, within this ſtatute, to bind his ſucceſſor: ſo, of a treaſurer, archdeacon, and precentor; for they are prebendaries, and more, for they are generally choſen out of the prebendaries, and have thoſe dignities ſuperadded or annexed. And though chancellors and treaſurers are in ſome ſort miniſterial, yet are they not *inter minores ordines*, as the *oſtiarii* and *vergers* are, who are only ſervants to carry candles and wax, keep the doors, *&c.*, but the others are ſeiſed in fee in right of their church, *&c.*, and have moreover theſe dignities ſuperadded. But a caſe was cited to have been adjudged in the Exchequer, that leaſes made by the chanters of St. *Paul*'s muſt be confirmed; for it was ſaid, they are not properly chanters, but ſinging men only, and *minoris ordinis*; but the chanters, properly ſo called, precentors, *&c.* are *majoris ordinis*; as the biſhop of *Sarum*, in right of his biſhoprick, is *præcentor Angliæ*; which ſhews it to be honorary, and a ſpiritual dignity.

Bro. tit. Age, 64. 80.

If a parſon, prebendary, mayor, dean, abbot, *&c.*, or any other ſole corporation make a leaſe for years, either upon theſe ſtatutes, or at common law, though the leſſor be under the age of twenty-one years, yet he ſhall not avoid ſuch leaſe for that cauſe; for ſince they are admitted to exerciſe ſuch offices or functions, though within age, they are likewiſe by law ſuppoſed capable of doing all things belonging thereto, as other perſons of full age may do; and therefore ſuch acts as are done by them in their politick capacity, which is ſubject to no age or infirmity, as the body natural is, are valid and effectual, notwithſtanding their minority, which in ſuch caſe is not material.

2. Of the Rules to be obſerved, and Qualifications requiſite to the Perfection of Leaſes by Eccleſiaſtical Perſons: And therein,

Rule 1. *Where an Indenture or Deed is neceſſary.*

Co. Lit. 44. b. 3 Keb. 379.

The firſt thing to be obſerved upon the ſeveral ſtatutes beforementioned concerning leaſes is, that as well upon the ſtatutes of the 1 *Eliz. c.* 19. & 13 *Eliz. c.* 10. as upon 32 *H.* 8. *c.* 28. the leaſes to be made by virtue thereof muſt be by indenture; for though the ſtatutes 1 *Eliz. c.* 19. & 13 *Eliz. c.* 10. do not require

quire it, yet in that and all other qualities and properties required by the 32 *H.* 8. *c.* 28. (except concurrent leaſes only), they muſt follow the pattern thereof. And (*a*) if the deed be indented, whether it begin *this indenture* or not, it is not material; for notwithſtanding that, it is an indenture: on the contrary, if it be not indented, the calling it an indenture will not make it ſo*.

(*a*) 5 Co. 25. Stile's caſe. Co. Lit. 143. a. 229. a. Cro. Eliz. 472. 2 Inſt. 672. 2 Roll. Abr. 22.

* If only the form of indenting the parchment, or paper, be wanting, that is not material, for it might even by done in court, and therefore no exception is now taken on ſuch a trifling omiſſion.

But the moſt obſervable thing under this head is, how far a parol leaſe or agreement by the parſon with his pariſhioner or a ſtranger for his tithes ſhall be good, and how far and in what caſes not; concerning which there are various caſes and opinions in the books, many of which have no foundation from the ſtatute, but ſtand entirely on their own bottom.

Comp. Incumb. 337, &c.

And herein all the books agree, that if a parſon leaſe or grant over his tithes to a ſtranger for life or years, or even for a year, that ſuch leaſe or grant muſt be in writing; and if it be not, it will be abſolutely void; the reaſon whereof is, becauſe tithes are things which lie merely in grant, and whereof no manual occupation can be; till they are actually collected, they are not things ſubſtantive, whereof the property can be changed by the notoriety of livery and ſeiſin, or any actual taking of poſſeſſion; but their whole eſſence before they are ſevered and divided conſiſts only in notion and idea: therefore, without deed, the grantee or leſſee can make no manner of title to them; for without that, there is nothing can be done to inveſt him with the property thereof, but the eſſence and ſubſtance of his title is to be derived from the deed, granting or leaſing them to him: and for this reaſon it is that he muſt not only have a deed thereof, but muſt alſo in pleading ſhew it with a *profert hic in curiâ*; for otherwiſe the court, which is to judge *ſecundum allegata & probata*, can no more adjudge his title good, than if he had no deed at all: but yet (*b*) if ſuch grant or leaſe be made of tithes without deed, and the grantee or leſſee ſue for them in the ſpiritual court, the defendant muſt plead that all the title the plaintiff has is by leaſe without deed; nor can he ſuggeſt this matter to ground a prohibition on; but he ought either to ſet out his tithes without regarding who hath the title to them, which will diſcharge him, or he ought to preſcribe *in modo decimandi*, and ſurmiſe that the tithes belong to *J. S.* with whom he hath compounded to pay ſuch a ſum for all tithes.

Godb. 374. 2 Roll. Abr. 63. Cro. Eliz. 188. 249. Perk. § 62. Cro. Jac. 317, 613. 10 Co. 92. Leon. 23. 2 Brownl. 11. 17. 2 Keb. 17.

(*b*) Leon. 23. Whitby v. Sanders.

But if a parſon leaſe his rectory or parſonage for years, in this caſe the tithes and offerings will paſs as incident to the rectory, though there be no deed, becauſe the rectory is the principal, and the leaſe of that being good without deed, the tithes and offerings, which are but as part of or acceſſory to the rectory, muſt paſs likewiſe, though they are not named. And ſome hold, that by ſuch parol leaſe, the rectory and tithes will paſs, though there be no houſe, but only the church and church-yard.

2 Roll. Abr. 63. Latch. 177. Bro. tit. Incidents, 7. tit. Leaſes, 15. 20. tit. Grant, 44. 59.

If a portion of tithes hath been long uſed with a chapel, a grant or leaſe of the chapel, with all the tithes thereunto belonging,

Clayton, § 25. Bradford's caſe.

Comp. Incumb. 338.

is a ſufficient deſcription to paſs the tithes, though generally a portion of tithes ought to be ſo named. But it does not appear whether in this caſe the grant or leaſe of the chapel were by deed or not.

As concerning leaſes of tithes to the pariſhioner himſelf, who ought to pay them, there are variety of opinions in the books, how far ſuch leaſes or agreements ſhall be good without writing, if they are made for the life of the parſon, or for years, or for one year only, and how far, and in what caſes, the aſſignee of the pariſhioner ſhall take advantage of, or be bound by ſuch leaſes or agreements.

Cro. Jac. 137. Cro. Eliz. 188. 249. Noy, 121. Yelv. 94. 2 Leon. 29. 3 Leon. 357. Godb. 333. Palm. 377. 2 Brownl. 117. Lev. 24.

Firſt then, moſt of the books agree, that if the parſon, in conſideration of ſuch a ſum then paid, or ſo much annually to be paid, by the pariſhioner, contract or agree by parol with him, that he ſhall retain his tithes, or ſhall be diſcharged of the payment of his tithes during the life of the parſon, or for ſo many years as he ſhall be incumbent, this ſhall be void. And the reaſon given is, becauſe as a leaſe, this cannot be good without writing; and as a compoſition or agreement, it cannot be good, becauſe it is uncertain at the making of it.

2 Roll. Abr. 63. Godb. 333. Palm. 377. Hetley, 31. 107. 122. Yelv. 94. Noy, 121. 3 Leon. 257. 2 Brownl. 31. 2 Roll. Abr. 63. Godb. 354. 374. Cro. Jac. 668.

But yet ſome books hold ſuch parol agreement for the life or incumbency of the parſon to be good, and that if he demands tithes againſt it in the ſpiritual court, a prohibition ſhall be awarded to ſtay his ſuit.

It is held in ſeveral books, that though ſuch parol agreement with the pariſhioner for the life or incumbency of the parſon be not good, yet if it be for ſo many years certain, that this is good, though it be not by deed or writing; becauſe it is in nature of a compoſition or agreement with the pariſhioner himſelf, who ought to pay them; and therefore if he ſues in the ſpiritual court for tithes, againſt ſuch agreement, a prohibition ſhall be awarded to ſtay his proceeding.

Hetley, 31.

So it is likewiſe held, in purſuance of that opinion, that if the pariſhioner, after ſuch agreement to retain his tithes for years, makes a leaſe of thoſe lands to another, that the leſſee alſo ſhall be diſcharged of the payment of tithes, becauſe the diſcharge runs along with the land. But others hold the contrary; and that if the aſſignee be ſued in the ſpiritual court he ſhall have no prohibition, becauſe by ſuch parol contract no intereſt was transferred to the pariſhioner, but it was only a perſonal agreement between the parties themſelves, and cannot extend to ſtrangers.

Yelv. 94. Hawkes and Brothwith.

2 Roll. Abr. 63. Cro. Jac. 668. Godb. 333. Palm. 377.

But all that hold ſuch parol agreement for years to be good, hold likewiſe, that, if the agreement were with the pariſhioner, his executors and aſſigns, there the executors or aſſigns of the pariſhioner, or even their leſſee at will, ſhall take advantage thereof; and if they are ſued in the ſpiritual court, ſhall have a prohibition, and compel the parſon to take his remedy upon the contract; and that if the executors of the pariſhioner have made a leaſe over at will, they ſhall have their remedy over againſt the tenant at will,

who

who came in under the benefit of ſuch a diſcharge, and therefore ought to be contributory to the charge of it: and that granting ſuch prohibition is a means to compel the parſon to ſeek his true remedy.

And yet we find ſome caſes where ſuch agreement was by deed with the pariſhioner and his aſſigns, that the pariſhioner, or aſſignee, being ſued in the ſpiritual court, could have no prohibition, becauſe, it was ſaid, the covenant or agreement paſſed no intereſt in the tithes; and therefore, for breach of ſuch covenant, the aſſignee had no remedy, but by action of covenant on the deed. Palm. 36. Aldriche's caſe. Palm. 377. 2 Leon. 73. Wellock's caſe.

Accordingly alſo ſeveral books held, that though ſuch parol agreement for life or years, be not ſufficient foundation for granting a prohibition, yet ſuch ſuit in the ſpiritual court is a breach of the contract or agreement, for which the party may have remedy by action upon the caſe, upon the *aſſumpſit*, that he ſhould hold diſcharged. 43. Brown v. Kinman. 2 Leon. 29. Poph. 140. Fulcher v. Griffin. Godb. 333. Palm. 377. Roll. Abr.

So likewiſe it is held, in ſeveral books, that though ſuch parol agreement to retain for life or years be not good by way of paſſing an intereſt, yet if an action of debt be brought upon the ſtatute 2 & 3 *E.* 6. *c.* 13. and the agreement be pleaded, and found for the defendant, that this ſhall be ſufficient to bar the plaintiff of the treble damages given by that ſtatute: ſo if *nihil debet* be pleaded, and ſuch agreement be given in evidence, it is ſufficient to excuſe the defendant from the penalty of treble damages. Lev. 24. Raym. 14. Keb. 5. 21. 2 Keb. 34. 3 Keb. 24.

But the beſt opinion ſeems to be, that ſuch parol agreement with the pariſhioner himſelf for more than one year is void: and even to make good this, it ought not to be entered into till after the corn is ſown, becauſe when once the corn is ſown, then it is ſuppoſed to be *in eſſe*, and growing all that year; and then ſuch agreement is in the nature of a ſale of a thing or chattel actually *in eſſe*, which, like ſales of other goods and chattels, needs no writing. But if it be for more than one year, then it is in nature of a leaſe or grant of the parſon's right or intereſt in the tithes, which, before they are *in eſſe*, conſiſt only in notion; and therefore, to bind the parſon, there ought to be a deed or writing; and if there be not, he may ſue for them in the ſpiritual court, and ſhall not be tied up by a prohibition; and ſuch parol grant or agreement, for more years than one, is not only void for all the years after the firſt, but in the whole; for the contract being entire, muſt be void in all, or good in all, and ſhall not be good and void by parcels. 2 Brownl. 17. Cro. Jac. 137. Hob. 176. Cro. Eliz. 188. 249. 2 Leon. 29. 3 Leon. 257. Owen, 103. Lev. 24. Raym. 14. Keb. 5. Godb. 333, 334. Latch. 176. Noy, 89. Comp. Incumb. 340.

But a diverſity ſeems to be taken in ſome books, between the parſon or vicar, and the impropriator; the parſon or vicar, they ſay, may leaſe his tithes for one year without deed, but the impropriator cannot, but it will be abſolutely void; and it is ſaid to be ſo ruled in *Bennet* and *Spel*'s caſe; and in the caſe of *Bellamy* and *Balthorp*, where the leaſe for one year by the impropriator was holden void, being to a ſtranger of the tithes of the whole pariſh, by the oppoſition (*a*) that follows in ſaying, "*otherwiſe it is, if it be* "*a leaſe of the tithes for a year, by the parſon himſelf*," it muſt alſo be meant of a leaſe to a ſtranger, and not to the pariſhioner himſelf, who ought to pay them; and then it follows, that a parſon or vicar may leaſe the tithes of their whole pariſh for one year to a ſtranger, without deed, which, it ſeems, they may do, notwithſtanding Comp. Incumb. 338. Latch 176. Noy, 89. Godb. 374. [(*a*) The argument from this oppoſition is drawn entirely from Noy's report: In Godbolt, the right of the parſon to demiſe his

ſtanding the books abovementioned, as is proved by conſtant practice: for perhaps it would be difficult and troubleſome for the parſon himſelf to collect all the tithes in *ſpecie*, and it may be, ſeveral of the pariſhioners will not take leaſes, or agree or compound for their own tithes; and therefore, if the parſon can find one who will take all that trouble off his hands, and leave him more at liberty to attend his cure, it ſeems reaſonable he ſhould be at liberty to ſet his tithes (as they call it) to ſuch perſon for that year: and it would be too troubleſome and unreaſonable to expect, that upon every ſuch yearly ſetting of his tithes, he ſhould be forced to be at the expence of a new and formal leaſe in writing, eſpecially ſince ſuch ſetting or leaſing is generally made about *Eaſter*, when the corn is actually growing, and in a good forwardneſs; and therefore ſuch ſetting or leaſing is rather a ſale of chattel *in eſſe*, than a leaſing or making over of a thing only in potentiality or idea; and ſuch ſale may be good without deed, as it would be of any other goods or chattels. And why the impropriator himſelf, in the like caſe, ſhould not have the ſame power, ſeems hard to be accounted for; though, perhaps, in the caſe where this difference is taken, the vendee or leſſee, ſtrictly ſpeaking, could not juſtify in trover againſt the owner, as by virtue of the leaſe *qua* leaſe without deed. But *quære*, if he had pleaded it as a ſale for a valuable conſideration, if that would not have altered the caſe, and made good his juſtification in taking them after they were ſevered?

tithes without deed is expreſsly negatived by Dodderidge, J.; and in Latch, no more is ſaid, than that "the parſon may diſcharge the pariſhoner of tithes by parol, or leaſe the rectory, conſiſting of glebe and tithes, by parol for years."—Although in the diſcuſſion of this queſtion in the caſes in the text, a *parol* demiſe be generally uſed in oppoſition to one by *deed*, yet the queſtion is not, whether tithes may be leaſed by *parol merely*, but whether they may be leaſed *without deed?* And the reſult of all the caſes ſeems to be, that to paſs an intereſt in tithes, to convey them to a ſtranger, a deed is abſolutely neceſſary: but that a compoſition with the pariſhioner by way of retainer is good without deed. This latter point receives a confirmation, if indeed it want any, from the Kenſington caſe (Adams v. Hewitt, Dom. Proc. 1782.); for in that caſe the compoſition was without deed; but when the lords held that the notice there given to determine the compoſition was not a ſufficient notice for that purpoſe, they neceſſarily admitted the compoſition itſelf to be valid, for there could be no queſtion about the determination of a thing that was void.—In Keddington v. Bridgman, Bunb. 2. a difference is taken between a compoſition by way of retainer by parol, and an agreement between the parſon and his pariſhioners by parol; the latter, Baron Montague thought would be good for years, being only an agreement that the parſon would not ſue his pariſhioners for ſo many years for tithes; the former, Bury and Price, Barons, held was good only for one year, being by way of contract. But where is the difference between the compoſition and the agreement in this caſe? The agreement on the part of the parſon, is, that he will not demand tithes in kind for a limited time; on the part of the pariſhioners, that they will, during that time, pay a ſum of money in lieu thereof: but what elſe is this but a compoſition? But if a compoſition be good for one year, it may alſo be good for more than one year; for the objection is, that tithes, being an incorporeal hereditament, cannot paſs without deed; if then they can be retained at all without deed, the more or leſs time for which they are agreed to be ſo retained cannot be material. See Noy, 121. Yelv 96.]

Latch. 115. Vicar of Anford's caſe. Palm. 423. S. C. by the name of Harris and Dilworthy.

A parſon by parol, leaſed his tithe hay to the vicar, and the vicar paid the rent for the firſt year, but finding that the rent was more than the tithe was worth, refuſed to hold the bargain any longer; and being ſued in the Court of Requeſts, (which was a court of equity,) and not pleading there any notice of his refuſal, and ſentence and decree being given for the parſon, the vicar prayed a prohibition: it was agreed by the court, that if the vicar had received the profits, he was ſueable in the Court of Requeſts for the rent; and that if he had given notice of the refuſal of the bargain, he had been diſcharged of the rent from the time of the notice given, becauſe he had no remedy for the tithes, for that it was a void contract in law: and by *Dodderidge* and *Jones* the caſe is the ſame, though he hath not given notice.

By

By all the caſes before-mentioned, it appears how unſettled a point this is; and it is ſaid now to be the conſtant practice of the courts at *Weſtminſter* not to grant prohibitions upon the ſuggeſtions of ſuch agreements, but to leave it to the ſpiritual court to determine; and if the party thinks himſelf there aggrieved, he may appeal. And this ſeems to hold ſtill, as to ſuch parol leaſes under the term of three years; for if they be above three years, then by the ſtatute of frauds and perjuries, they are made to have the force only of leaſes at will; and if under three years, yet by that ſtatute there muſt be yearly reſerved two-thirds, at leaſt, of the full improved value of the thing demiſed. Comp Incumb. 339, 340.

Rule 2. *When ſuch Leaſes are to begin.*

And herein the ſtatute of 32 *H.* *c.* 28. is different from the ſtatutes of 1 *Eliz.* *c.* 19. & 13 *Eliz.* *c.* 10. for the 32 *H.* 8. *c.* 28. requires ſuch leaſes to begin *from the day* of the making; but by the exceptions in 1 & 13 *Eliz.* they are to begin *from the making thereof;* and the diverſity between theſe expreſſions will appear more fully by the following caſes, which we will reduce under the following heads: Co. Lit. 45. a. 5 Co. 6. Mountjoy's caſe. 3 Keb. 379.

1. When ſuch Leaſes as have no Date at all, or a void or impoſſible Date, are to begin.

As to ſuch leaſes as have no date at all, or a void or impoſſible date, as the 30th day of *February*, or the 40th of *March*, theſe muſt begin from the delivery, for there is no other certain *indicium* of the time of their taking effect; and therefore the delivery, which is ſolemn and notorious, gives them from thenceforth a ſanction, and binds the parties thereto. Co. Lit. 46. b. 2 Co. 5. 2 Inſt. 674. Yelv. 194. Hob. 140. 2 Roll. Abr. 21. Plow. 402. Roll. Abr. 848. Latch. 61.

2. Such Leaſes as have a good Date, and are delivered on the ſame Day: in what Caſes the Day of the Date or Delivery is to be taken incluſive, and in what Caſes excluſive.

Where leaſes have a good date, and are delivered on the ſame day, *habendum* for twenty-one years, without ſaying for what time or when they ſhall begin; the leaſes in this caſe ſhall begin from the delivery; for the delivery makes the deed preſently to be the deed of the leſſor, and when nothing appears to the contrary, the lands contained in ſuch deed ſhall paſs to the leſſee at the ſame time: for otherwiſe it would be the deed of the leſſor to no manner of purpoſe; and there can be no reaſon to affix the time when the lands ſhall paſs after one day more than another; therefore the delivery, which in this caſe makes it the deed of the leſſor, ſhall likewiſe fix the *terminus a quo* the contract or leaſe ſhall begin. Co. Lit. 46. Comb. Incumb. 340. Roll. Abr. 849.

So, if a leaſe be made for twenty-one years *habendum* from the making, or from the ſealing and delivery, or from henceforth, this ſhall take effect from the delivery, whether there be a date or not; for the delivery gives ſanction to the deed, and before delivery Hob. 140. 5 Co. 1. 2 Co. 5. 2. 2 Inſt. 674. Moor, 879. Cro. Jac.

264. Cro. Car. 263. Dyer, 286. 307. Hob. 73. 2 Roll. Abr. 520.

livery it is no deed at all; and, by conſequence, from henceforth, or from the making, muſt relate to the time of its taking effect as a deed, and not from any other time. And in ſuch caſe, the day of the delivery is taken incluſive; ſo that if ſuch a leaſe be delivered the 20th day of *June*, the leaſe ſhall determine on the 19th day of *June* incluſive; and though the leaſe was delivered at four of the clock in the afternoon, or at any time after, on the ſaid 20th day of *June*, yet that whole day ſhall be taken incluſive, to prevent clamour and incertainty, by making fractions and diviſions in a day. And yet in (*a*) *Latch.* where one declared of a leaſe of 25 *March*, *habendum abinde* for a year, rendering rent at *Michaelmas* and the *Annunciation*; and it was objected that the laſt *Annunciation* was not within the year: but the objection was diſallowed; for *abinde* ſhall be taken *a confectione*, and excluſive of the day.

(*a*) Latch. 157. Alſop's caſe.

5 Co. 1. 94. Co. Lit. 46. Moor, 879. Cro. Jac. 248. 340. Cro. Eliz. 766.

But if a leaſe be made to begin *a die confectionis*, or *a die datûs*, there the day of the delivery, or the day of the date, is to be taken excluſive, becauſe the prepoſition *a* is privative of the whole day before which it is prefixed: and therefore, if the leſſee in ſuch caſe ſhould declare of an ejectment the day of the delivery or date, it would be againſt him, becauſe that was before his title began.

Denn v. Fearnſide, 1 Wilſ. 176. See to the ſame effect, Freeman v. Weſt, 2 Wilſ. 165. Doe v. Watton, Cowp. 189.

[So, where under a power to make leaſes for twenty-one years, or three lives, *in poſſeſſion*, and not in reverſion, a leaſe was made to one for three lives, *habendum* from the day of the date thereof, at the uſual rent, &c. which leaſe had all the formal circumſtances required by the power; it was holden, that this leaſe was not warranted by the power, for the demiſe being *habendum from the day of the date*, the leaſe was a freehold to commence *in futuro*, and *therefore* void.]

Co. Lit. 46. b. Dyer, 218. Moor, 41. 5 Co. 1. 2 Inſt. 674. 2 Roll. Abr. 520. Roll. Rep. 137. 3 Bulſ. 203. Cro. Jac. 135. Oſborn and Rider. Bulſ. 177. S. C.

So, if a leaſe be dated and delivered the ſame day, and the *habend.* be *a datu*, or from the date hereof, it has been held, that the whole day of the date is to be taken excluſive; and by conſequence, that from the date, and from the day of the date, are all one, if there be a date; but if there be none, then the date ſhall be taken for the day of the delivery, and that whole to be excluded.

Yet the contrary to this has been adjudged in one caſe, where an ejectment was brought on a leaſe made 1 *January* 3 *Jac. habend. a datu indenturæ prædict.*, and the ejectment was the ſame day, and after verdict for the plaintiff it was moved in arreſt, &c. that this leaſe being made *habend. a datu indenturæ prædict.*, was as much as from the day of the date, as in 5 *Co.* 1. and then the ejectment being alleged the ſame day, is ill; but all the court reſolved, that the date is the time of the delivery, and it differs from the time or day of the date, and therefore the ejectment being alleged *poſtea* the ſame day was good enough, and the plaintiff had judgment.

Moor, 107. And. 65. Fox and Collier.

So, where the archbiſhop of *York* 6 *Novem.* 18 *Eliz.* by indenture, made a leaſe for twenty-one years *habend. a datu indenturæ*, no exception was taken to it, which proves that *a datu indenturæ* is

is the ſame as from the making, and that the day of the date, or day of the making, is not to be taken excluſive in ſuch caſe, becauſe then the leaſe would not be warranted by the exception in 1 *Eliz. c.* 19. which ſays, other than for three lives, or twenty-one years from the making, which is inclusive of the day of the making.

Ejectment by the ſucceſſor of a prebendary upon a leaſe made for life *habend. a datu;* and if this ſhould bind the ſucceſſor, was thrice argued, and for the plaintiff urged, that it ſhould not; that *a datu* is all one with *a die datûs*, and then livery being made the ſame day that the indenture bears date was void, becauſe it cannot expect. 2. That this was a leaſe in reverſion, not being to begin in point of intereſt till the day after the making or date, which is not good by 13 *Eliz. c.* 10. for here the day of the date is excluded. But it was anſwered and reſolved, that in propriety of ſpeech *datus*, or dated in *Engliſh*, is the very act of the delivery of the deed; for *datus* in *Latin*, being taken participly, is given or delivered in *Engliſh;* and *datus* ſubſtantively taken in *Latin*, is the date of the delivery in *Engliſh*, which ſignifies all one; and in *Clayton*'s caſe, the ſix months were taken the moſt extenſively to make good the deed by inrolment, but to make a word of an equivocal ſenſe as this is, (which may be taken either inclusive or excluſive of the day of the delivery or date of it,) to make the leaſe void is unreaſonable, therefore it ſhall rather be taken in ſuch ſenſe as may make it good, *ut res magis valeat quam pereat;* and therefore it was adjudged good by the three puiſne judges, the Chief Juſtice *Treby* diſſenting, though he was at firſt of the ſame opinion, and ſo alſo was *Powell*, but afterwards changed it for the defendant; which ſhews the nicety of theſe diſtinctions. 3 Lev. 438. Hatter and Aſh. 2 Salk. 413. pl. 1. S. C. Ld. Raym. 84.

[The diſtinction made in the preceding caſes, and in ſeveral of thoſe in the next diviſion, hath been levelled by the deciſion in the Court of King's Bench in *Pugh* v. Duke of *Leeds*. In that caſe, a leaſe under a power to make leaſes in poſſeſſion was made to commence "*from the day of the date*," and on a caſe made for the opinion of the court on the validity of that leaſe as a leaſe in poſſeſſion, it was holden to be good, upon the ground that the particle *from* might, in the ſtricteſt propriety of language, be taken either inclusive or excluſive.] Cowp. 714. This deciſion, it ſhould be remarked, hath not been generally aſſented to in Weſtminſter-hall. The reader will find it examined, and commented upon in a very able manner by Mr. Powell in his Eſſay on the Learning relating to the Creation and Execution of Powers.

3. Such Leaſes as have a good Date, but are not delivered till a Week or Month, &c. after, when they are to begin, and how the Declaration on ſuch Leaſes is to be framed.

And it is to be obſerved, that every deed ſhall be intended to be delivered on the ſame day it bears the date, unleſs the contrary be proved; and it is the beſt courſe (as the law intends) to deliver it on the ſame day that it bears date: therefore, where in an ejectment the plaintiff declared of a leaſe dated 1 *Novem. habend. a confectione*, or *a die datûs, ſigillationis & deliberationis indenturæ prædict.*, 2 Inſt. 674. Cro. Jac. 264. Cro. Eliz. 773. Cro. Jac. 646. Dyer, 167. b. 221. b.

prædict., and laid the ejectment 2 *Novem.* though it was objected that the declaration was not good, becauſe it did not appear when the leaſe was ſealed and delivered, and it might be delivered long after the date; and the courſe is to ſay, that ſuch a day and year *dimiſit per indenturam*, bearing date the ſame day and year; yet it was adjudged, that the declaration was good, becauſe when he declares that he let by indenture of ſuch a date, it ſhall be intended to be delivered on the ſame day, unleſs it be ſhewn with a *primo deliberatum* at another day; and he, who pleads a deed of ſuch a date, cannot by replication, or other pleading, maintain it to be delivered at another time, for that would be a departure.

Cro. Jac. 264. But if the truth be that the leaſe was ſealed and delivered at another time than it bears date, then the plaintiff ought to ſhew it in his declaration; or the defendant, if it be material for him, may ſhew in his plea the delivery at another time than the date, and traverſe, that it was delivered on the day it bears date.

Cro. Jac. 258. Lewellin and Williams. Accordingly, an ejectment was brought of a leaſe made 12 *Decemb. habend. a primo die*, and upon not guilty, the jury found the leaſe dated 1 *Decemb. habend.* from henceforth, but delivered 12 *December*, which proves that where the date and delivery were at ſeveral times, they ought to be diſtinguiſhed in the declaration: but the queſtion therein was, whether this leaſe was the ſame whereof the plaintiff declared, that is, whether being limited to take effect from henceforth, the day of the date ſhould be taken excluſive, ſo as to warrant the declaring of a leaſe *a primo die?* for it was objected, that this did not warrant the declaration, becauſe from henceforth, and from the day of the date, are ſeveral commencements, the one beginning on the day it is ſealed and delivered, the other the day after. But it was reſolved *per curiam*, that they are both one, being a computation up to a time paſt; and when the leaſe is ſealed at a day after the date, whether it be limited to begin from henceforth, or from the day of the date, yet in pleading it ſhall be alleged to begin from the day on which it is dated. And Serjeant *Moor* took this diverſity in another caſe, that if one leaſes land in intereſt, *habend. a datu*, there, the day of the date ſhall be taken incluſive, the date and delivery being both on the ſame day; but where it does not begin in intereſt at the time it is dated, as where the date and delivery are ſeveral, and the *habend.* is *a datu*, there, the day of the date ſhall be taken excluſive, becauſe it is to commence from the date, that is, from the day of the date, for the date in that caſe can mean nothing elſe, ſince it is not delivered till after; and therefore the computation of its commencement being from a day backwards, that whole day ſhall be excluded. And perhaps this diverſity may reconcile the caſes of *Clayton*, 5 *Co.* and *Oſburn* and *Rider*, *Cro. Jac.* 135. before put; for in *Oſburn*'s caſe the leaſe was made the ſame day it was dated, and ſo began then in intereſt; but the caſe cited in *Clayton*'s caſe, to prove the date and the day of the date to be all one, was, from a computation backwards upon the ſtatute of enrolments, which appoints them to be enrolled within ſix months after the date; and there it was adjudged

adjudged that a deed enrolled upon the laſt day of the ſix months, counting the day of the date excluſive, was yet well enrolled within the ſtatute; but this, as has been obſerved, was a computation backwards, and that from the date, and from the day of the date, is all one, is only an *unde ſequitur* of my Lord *Coke*'s own, from the caſe of the enrolment; and in his 1 *Inſt.* 46. *b.* where he mentions it again, he cites for it *Clayton*'s caſe and *Dyer*, 286. where that caſe of the enrolment is reported: And though the caſe of *Bacon* and *Waller*, 3 *Bulſ.* was adjudged according to *Clayton*'s caſe, that the date and day of the date were all one, and the day to be taken excluſive; ſo that a leaſe there dated and delivered 26 *May*, *habendum* from the date, did not begin till 27 *May*; and it appears both by (*a*) *Bulſ.* and *Rolls*, that the judgment therein given was founded on the caſe of *Lewellin* and *Williams*, where the date and day of the date were held all one; yet, as it appears, the reaſon of that caſe was upon a computation from a time paſt, and that the leaſe therein did not begin in point of intereſt upon the day it bore date, and, by conſequence, was no warrant for the judgment that was given in *Bacon* and *Waller*'s caſe; and then that judgment being founded on the authority of the former caſe, can be of authority no farther than as it agrees with that former caſe, and then it is of none at all, becauſe, as appears before, it varied materially from it; therefore, the diverſity taken by Serjeant *Moor*, which is likewiſe warranted by the caſe of (*b*) *Oſburn* and *Rider*, ſeems to remain unſhaken, and to be the true diſtinction for ſettling the books.

(*a*) 3 Bulſ. 203. Roll. Rep. 387. Bacon and Waller.

(*b*) Cro. Jac. 135.

In ejectment the plaintiff declares of a leaſe 7 *Jan.* by indenture dated 6 *Decemb. habend. a die datus indenturæ prædict.*, and gave in evidence a leaſe dated 6 *Decemb. habend. a tempore confectionis indenturæ*, and it was held not the ſame leaſe whereof the plaintiff declares, becauſe, ſays the book, *a die datûs* excludes the day. But a better reaſon ſeems to be, becauſe it does not agree in point of deſcription with the leaſe whereof he declares; for if the declaration had been of a leaſe 7 *Jan. habend. a* 6 *die Decembris*, then by the authority of *Lewellin*'s caſe this had been good; yet being upon a computation from a time paſt, the day of the date muſt be pleaded excluſively: but when he declares of a leaſe 7 *Jan.* by indenture dated 6 *Decemb. habend. a die datûs*, this muſt be intended a deſcription of the leaſe as it is compriſed in the indenture; and when he afterwards ſhews an indenture, containing a leaſe *habend. a tempore confectionis*, this is a decription of another leaſe, and not of that which was to begin *a die datûs*. And this likewiſe ſeems to be the reaſon, that in another caſe, where the plaintiff, in bar of an avowry, pleads a leaſe 30 *March habend.* from the feaſt of the Annunciation next before, and upon traverſe of the leaſe *modo & forma*, the jury found a leaſe to the plaintiff on the 25th day of *March* for one year from thence next enſuing; and though held not to be the ſame leaſe the plaintiff pleaded, becauſe this begins on the 25th of *March* incluſive, and the leaſe pleaded from the 25th of *March* excluſive, yet the plaintiff had judgment, it being found in ſubſtance that the plaintiff

Cro. Jac. 647. Scavage and Parker.

Hob. 73. Moor, pl. 1188. Pope v. Skinner.

plaintiff had ſuch a leaſe as by force thereof he might have common the 11th of *April* following, *&c.* but agreed clearly, that if he had declared ſo in ejectment, it would have been againſt him, becauſe there he demands and recovers the term, and therefore muſt ſet out his title truly, which appears to have been by a leaſe dated and executed the 25th of *March*, *habend.* from thenceforth; and therefore a leaſe executed but the 30th of *March*, and dated the 25th of *March*, *habend.* from thenceforth, could not be the ſame, not agreeing in point of deſcription. But if the truth had been that the leaſe had been executed but the 30th of *March*, then, it ſeems, he might have declared of a leaſe then made *habend.* from the 25th day of *March*, being a computation from a time paſt, though the leaſe were dated 25th *March*, *habend.* from henceforth, becauſe it did not then begin in intereſt: But *quære*, if the better way in all theſe caſes, to prevent any miſtakes, be not to declare of a leaſe dated ſuch a day, *habend.* from henceforth, or from the making, or from the day of the date, or day of the making, *&c.* exactly as it is in the leaſe *, with a *primo deliberat.* ſuch a day, if the truth be ſo, rather than for the leſſor to take upon him to judge when the day ſhall be taken incluſive, and when excluſive, and ſo as in this caſe to declare of the *habend' a* 25 *die Martii*, when in truth the *habend.* was worded from henceforth; though if the leaſe had been executed but 30 *March*, it ſeems that if he had declared of a leaſe 30 *March habend. a* 25 *March*, this had been good, for the reaſons before-mentioned.

* This is now the form conſtantly uſed by good pleaders.

Cro. Car. 502. Loyd v. Gregory.

A leaſe in reverſion was made to commence *ad feſtum Annunciationis* after the former leaſe ſhould be determined; and it was objected, that it ought to be *a feſto Annunciationis*; yet the court held it to be all one, for that there ſhall be no fraction of a day: but *quære*, how this would have made a fraction of a day? for there ſeems to be a whole day's difference, *ad* including the feaſt-day, and *a* excluding it.

Yelv. 131. Edmonds v. Boothe.

A parſon leaſes by indenture the tithes of 200 acres of land to the owner of the land, of which he, and his wife, and his heirs were ſeiſed, *habend.* from *Mich.* next following to him and his heirs, during the life of the parſon: the leſſee dies, and his wife had the 200 acres for her jointure, and married *B.*, who let the 200 acres to the plaintiff; the heir of the firſt huſband grants alſo to the plaintiff the tithes of thoſe lands at will, and he being ſued for tithes by the parſon againſt his own leaſe, brought a prohibition; but a conſultation was after granted; for by *Flemming*, *Fenner*, and *Williams*, the leaſe being for life, and to begin at a day to come, was void; for though tithes are ſpiritual, and are not extinct in the land, yet in the conveyance of them they ought to follow the nature of land, rent, or other hereditaments *in eſſe*, which cannot be granted for life at a day to come. But *Yelverton* and *Croke* thought, that this leaſe being to the owner of the land, did not enure by way of *intereſt*, but by way of *diſcharge*; for as the plaintiff hath pleaded, by force of which the leſſee was ſeiſed of the tithes to him and his heirs for the life of the parſon; they, as judges, could not intend it to be otherwiſe: and beſides, it cannot be intended by

by way of diſcharge, becauſe there are no ſuch words in the leaſe, and it was more for the leſſee's benefit to have it by way of intereſt, than by way of diſcharge; for then this would be ſuch a privilege annexed to the land as could not be granted over; whereas here the wife was owner of the land, but the ſon and heir of the leſſee took upon him to be owner of the tithes: and *Yelverton* inclined, that the pleading of the leaſe, and of the ſeiſin by force of it, was not good.

A leaſe of houſes within 14 *Eliz. c.* 11. may be made for years from a time to come; for that ſtatute does not require them to begin from the making, or day of the making, but only that they do not exceed forty years from the making. Poph. 9. Thompſon v. Trafford.

And it is ſaid, that a leaſe for lives being avoided at common law, for that it was made to commence from a time to come, an injunction was granted out of Chancery to continue poſſeſſion. Comp. Incumb. 341.

A leaſe to three for their lives, *habend. a die datûs*, is good, if livery be made after the day of the date, becauſe till livery nothing paſſes, and being made after the day of the date, it may then operate preſently: *ſecùs*, if livery had been made on the day of the date, becauſe then the operation of it muſt have been ſuſpended till the next day, which the law will not allow. Moor, 637. 759.

[The dean and chapter of *Worceſter* being ſeiſed in right of their church of one of the manors of *Charlton*, by indenture bearing date the 26th *November* 1750, for a valuable conſideration granted the ſaid manor, of which the premiſes in queſtion were part, to the leſſor of the plaintiff, to hold to him and his heirs from the day of the date thereof for the lives of three perſons, under the yearly rents, *&c.* In the leaſe, power was given by the dean and chapter to their attorney, to take poſſeſſion of the premiſes, and to deliver ſeiſin thereof to the leſſee, *according to the tenor, effect, and true meaning of the ſaid leaſe*; and in purſuance of ſuch power, ſeiſin was delivered of the premiſes by the attorney to the leſſee, on the 28th day of *May* 1751. The queſtion was, whether this leaſe being made to commence from the day of the date thereof, and ſeiſin delivered the 28th of *May* following, was good? The court held that it was: that till livery was made, the freehold remained in the dean and chapter: that they would preſume that the power given to the attorney was to make livery at *any* day ſubſequent to the leaſe, which, they ſaid, was the true meaning of the deed; for by the warrant of attorney to deliver ſeiſin in the preſent caſe, the deed ſhould be ſubſtantiated by the livery. Freeman v. Weſt, 2 Wilſ. 165.

But if a man make a leaſe of land to hold for life from the day of the date, and make livery by attorney the ſame day *ſecundum formam chartæ*, this is a void leaſe.] Bull v. Wyatt, 1 Roll. Abr. 828.

Butler v. Fincher, 2 Bulſtr. 302. 1 Roll. Rep. 229.

Rule 3. *Within what Time the old Leaſe is to be ſurrendered; and herein of concurrent Leaſes.*

Another rule to be obſerved in the making of leaſes upon theſe ſtatutes is, that if there be an old leaſe in being, it muſt be ſurrendered, Co. Lit. 44. b. 5 Co. 2.

Moor, pl. 1084. [(a) The leſſor of the plaintiff, being a prebendary of Sarum, brought an ejectment to avoid a leaſe made by his predeceſſor, as not being conformable to the above proviſo in the ſtat. 32 H. 8. His objection was, that the ſurrender made of the former leaſe was with a condition, that if the then prebendary did not within a week after grant a new leaſe for three lives the ſurrender ſhould be void; whereby, as it was contended for the plaintiff, the old term was not abſolutely gone, but the leſſee reſerved a power of ſetting it up again. But the court, after two arguments, gave judgment for the defendant; this being within the intent of the ſtatute, which was, that there ſhould not be two long leaſes ſtanding out againſt the ſucceſſor. Here, the new leaſe was made within the week and from thence it became an abſolute ſurrender both in deed and law. And the whole was out of the leſſee, without further act to be done by him. In the proviſo in this act, there is the word *ended* as well as ſurrendered; and can any one ſay the firſt leaſe is not at an end? This was no more than a reaſonable caution in the firſt leſſee, to keep ſome hold of his old eſtate, till a new title was made to him. Wide *ex dem.* Eyres v. Carter, 2 Str. 1201.]

rendered, expired, or ended within a certain time after the making of the new leaſe; and ſuch ſurrender muſt be abſolute, and not conditional (a); for then the intent of the ſtatute might be eaſily evaded, by ſetting up all ſuch old leaſes again, upon breach of the condition.

Roll. Rep. 82. Sir George Frevil v. Ewebank. Comp. Incumb. 346.

And ſuch ſurrender may be ſafely made either to a corporation ſole or aggregate, upon their promiſe to make a new leaſe; for if any ſingle perſon, or ſole corporation make ſuch promiſe, and refuſe after to make the leaſe, an action on the caſe ſhall lie againſt them; and if ſuch promiſe be made by a corporation aggregate, though no action will lie againſt them, becauſe being a corporation they cannot be bound without deed, yet the perſon who ſurrendered may ſue in equity, and compel them to a ſpecific performance of their promiſe, and to make a new leaſe: but ſuch ſuit muſt be againſt ſome of them by name, as the dean in particular, and the chapter of the ſame place generally: and ſuch ſuit in equity ſeems the beſt way in caſe the ſurrender was made to a ſole corporation or ſingle perſon, becauſe in the action at common law, damages are to be recovered only, but no new leaſe made, and

29 Car. 2. c. 3.

will be decreed in equity. But now ſince the ſtatute of frauds and perjuries, which requires all ſurrenders to be in writing, it is uſual to have a covenant from the perſon or corporation, to whom the ſurrender is made, that they will within ſuch a time make a new leaſe under ſuch and ſuch terms; but, as it ſeems, that ſtatute does not extend to ſurrenders in law, by the taking of a new leaſe in writing.

The ſtatute of 32 *H.* 8. *c.* 28. provides, that ſuch old leaſe ſhall be expired, ſurrendered, or ended within one year next after the making of the new leaſe; and the ſtatute 18 *Eliz.* *c.* 11. enacts that all leaſes to be made by any of the eccleſiaſtical, ſpiritual, or collegiate perſons, or others, within 13 *Eliz.* *c.* 10. of any lands *&c.* whereof any former leaſe, *&c.* for years is in being, and not to be expired, ſurrendered, or ended within three years next after the making of any ſuch new leaſe, ſhall be void, and of none effect.

Poph. 9. Plow. 106. Comp. Incumb. 345-6.

And a ſurrender in law by the taking of a new leaſe, either to begin preſently, or at a day to come, ſeems a good ſurrender within theſe ſtatutes; for by taking ſuch new leaſe, though it be to commence at a future day, the firſt leaſe is preſently ſurrendered and gone, and ſhall not continue good till the day on which the ſecond leaſe is to commence; but by acceptance of ſuch ſecond leaſe

leaſe the firſt is immediately determined; becauſe both leaſes cannot conſiſt together, and the firſt cannot be diſſolved or ſurrendered in part, and therefore muſt be ſurrendered for the whole.

One *Small* being poſſeſſed of the manor of *Paddington* by a leaſe for years from a biſhop, the biſhop made a leaſe to another for three lives, and before livery the tenant ſurrendered his former term; it was held, that this ſurrender was made in time, and the ſecond leaſe good, becauſe it was no complete leaſe till livery, and before that, the firſt leaſe was ſurrendered and gone. Degg. 130. Small's caſe.

And this rule, that if there be any old leaſe in being, it muſt be ſurrendered, expired, or ended within the times before-mentioned, is neceſſary not only when biſhops, and other ſole corporations, mentioned in 32 *H.* 8. *c.* 28. make leaſes by authority of that ſtatute for twenty-one years, or three lives, without the aſſent or confirmation of others, but alſo when any ſpiritual or eccleſiaſtical corporation ſole (other than biſhops) do make ſuch leaſes, though with the conſent and confirmation of thoſe who by law are to confirm the ſame, and alſo when any ſpiritual, eccleſiaſtical, or collegiate corporation aggregate make ſuch leaſes whereto no confirmation of others was ever requiſite: for the better underſtanding whereof, it will be neceſſary to conſider the learning of concurrent leaſes, and what perſons, upon the ſeveral ſtatutes before-mentioned are capable of making them, and in what manner. Comp. Incumb. 343.

To begin then with biſhops: it is to be obſerved, that at common law, biſhops, with the confirmation of their dean and chapter, might have aliened the poſſeſſions of their church for ever, or have made leaſes for what term of years they thought fit; and this would have bound their ſucceſſors, though it were for 5000 years: but a biſhop, without ſuch confirmation, could not have made a leaſe to bind his ſucceſſors, though but for one year; both of which being great miſchiefs, were remedied by 32 *H.* 8. *c.* 28. and 1 *Eliz.* *c.* 19. For whereas before 32 *H.* 8. *c.* 28. biſhops could not make any leaſe at all to bind their ſucceſſors, unleſs it were confirmed by the dean and chapter; now that ſtatute enables the biſhops alone, without ſuch confirmation, to make leaſes of all or any of their poſſeſſions, ſo they do not exceed three lives, or twenty-one years; but if biſhops had a mind to make leaſes or grants for any longer term, or in any other manner than this ſtatute warranted, then ſuch leaſes or grants were out of the protection of this act, and remained perfectly at common law, as they were before, and, by conſequence, muſt have the like confirmation of the dean and chapter, in order to bind the ſucceſſor, as they muſt have in all caſes at common law: and becauſe it was found by experience, that many biſhops made an ill uſe of this power, and choſe to make leaſes for long terms of years, rather than keep within the bounds this ſtatute had preſcribed them, and ſometimes to make abſolute alienations of their poſſeſſions, and then get the dean and chapter to confirm ſuch leaſes and alienations, whereby the ſucceſſor was oftentimes left without ſufficient to keep up hoſpitality, or ſuſtain his dignity; therefore, to remedy this miſchief was the Moor, 107. And. 65. Fox and Collier. Leon. 36. 3 Leon. 131. Palm. 464. 466, 467. Latch. 241. Leon. 59. Co. Lit. 45. Ley, 78.

ſtatute

ſtatute of 1 *Eliz.* *c.* 19. made, which makes void all gifts, grants, *&c.* or eſtates of any honours, caſtles, manors, lands, tenements, or hereditaments, being parcel of the poſſeſſion of the biſhoprick, (other than for twenty-one years, or three lives,) ſo that now, after this ſtatute, no confirmation whatever will make good any Biſhop's leaſe, if it exceed that term, becauſe then the ſtatute makes it void, and, by conſequence, not capable of receiving any ſanction from a confirmation: but upon theſe ſtatutes was the concurrent leaſe invented, which has generally obtained, and been held good, and is in this manner.

Moor, 107. And. 65. Leon. 36. 3 Leon. 131. Palm. 464., &c. Latch. 241.

If a biſhop ſolely makes a leaſe for twenty-one years according to the ſtatute of 32 *H.* 8. *c.* 28. and within four or five years, or more, before the end of that leaſe makes a new leaſe to another for twenty-one years, to begin from the making, *&c.* this ſecond leaſe, if it be confirmed by the dean and chapter, and be in every thing elſe purſuant to the exception in the 1 *Eliz.* *c.* 19. is good as a concurrent leaſe, for theſe reaſons: 1. Becauſe ſuch leaſe, though it be not good within the 32 *H.* 8. *c.* 28. by reaſon the firſt leaſe is not ſurrendered or expired within a year after the making thereof; yet being confirmed by the dean and chapter, it remains a good leaſe at common law, and then if it be not void within the exception of 1 *Eliz.* *c.* 19. the ſucceſſor ſhall be bound; and that it is not void within that ſtatute, appears both from the letter and meaning of the exception; for the words are, *other than for twenty-one years, or three lives, from ſuch time as any ſuch leaſe ſhall begin*; now this ſecond leaſe does not exceed twenty-one years from the time it begins, being for twenty-one years only from the making, and ſo within the expreſs words of the exception. 2. This is not void within the meaning of the exception, becauſe for ſo many years as were to come of the firſt leaſe this is good only by eſtoppel, and not in intereſt; for the ſecond leſſee can have no benefit of it ſo long as the firſt leaſe endures, and then againſt the ſucceſſor there is in effect no more than a leaſe for twenty-one years; for the ſecond leaſe, being in effect void for all the years that are to come of the firſt leaſe, thoſe years that are to come of the firſt leaſe and thoſe that will then remain of the ſecond leaſe make in all no more than twenty-one years at one time, and ſo not againſt the meaning of that exception. 3. Such ſecond leaſe is ſo far from being prejudicial to the ſucceſſor, that it is rather for his benefit; for now he will have the rent reſerved on the firſt leaſe during the reſidue of that term, and may alſo at the ſame time recover the rent reſerved upon the ſecond leaſe, being only for years, becauſe the leſſee is eſtopped to ſay he did not take ſuch leaſe under ſuch reſervation: and ſo the ſucceſſor will have two rents inſtead of one; though if the ſecond leſſee ſhould enter, and be evicted by the firſt leſſee, this would cauſe a ſuſpenſion of the rent reſerved on the ſecond leaſe: however, the ſucceſſor ſuffers no prejudice, becauſe though he cannot diſtrain for the ſecond rent during the continuance of the firſt leaſe, and though the re-entry of that firſt leſſee ſhould amount to an attornment, and give the rent thereon reſerved to the ſecond leſſee, yet the biſhop

[1 Bl. Rep. 626.]

biſhop, or his ſucceſſor, may always maintain an action of debt againſt the ſecond leſſee for the rent, and ſo will in all events be ſure of one rent.

But this leaſe, though it be not either againſt the letter or meaning of the exception in 1 *Eliz. c.* 19. yet ſince it is not warranted by 32 *H.* 8. *c.* 28. it muſt be confirmed by the dean and chapter, as before the 1 *Eliz. c.* 19. all leaſes not purſuant to 32 *H.* 8. *c.* 28. muſt have been, to bind the ſucceſſor: and ſuch confirmation muſt be in the (*a*) life of the biſhop who makes it. 10 Co. 60. b. Moor, 109. Co. Lit. 45. (*a*) But one book ſays, that confirmation of ſuch concurrent leaſe in the vacation of the biſhoprick, is good enough. 4 Leon. 78. *Quære.*

But after ſuch leaſe for years, the biſhop cannot make a leaſe for three lives to be good by way of concurrent leaſe, though it be confirmed by the dean and chapter; but ſuch ſecond leaſe, whether it be made to begin preſently, or by way of leaſe or grant in reverſion, and attornment upon it, is againſt the exception in the 1 *Eliz. c.* 19. and, by conſequence, ſhall not bind the ſucceſſor: for the words of the exception are, *other than leaſes for three lives, or twenty-one years*, in the disjunctive; ſo that there ought to be only one, or only the other in being at a time againſt the ſucceſſor, and not both together: for which reaſon alſo, after a leaſe for three lives, the biſhop cannot make a leaſe for twenty-one years to bind the ſucceſſor, though with the confirmation of the dean and chapter, becauſe then there would be both a leaſe for three lives and twenty-one years in being at a time, which that ſtatute does not allow of: and if the leaſe in reverſion for three lives ſhould be good as a concurrent leaſe, then would the ſucceſſor have no remedy for the rent thereon reſerved during the firſt leaſe; not by diſtreſs, becauſe the poſſeſſion was only a pledge for the rent reſerved on the firſt leaſe; not by action of debt, becauſe that does not lie for rent reſerved on an eſtate of freehold during the continuance thereof (*b*); not by aſſiſe, becauſe he had no ſeiſin of it; and though *ex vi termini* the rent is payable, becauſe after the leaſe for years determined the leſſor may diſtrain for all arrears; yet that is only a poſſibility or contingency; for the leaſe for years may outlaſt the three lives, and then they, by reaſon of their reverſionary intereſt, having the preſent rent of the leſſee for years, if they all die before the determination of the leaſe for years, the biſhop and his ſucceſſors will loſe all that rent, and ſo have nothing to maintain hoſpitality, or ſuſtain the dignity of their ſees, which this ſtatute of 1 *Eliz. c.* 19. intended chiefly to provide for. And though the firſt leaſe were for three lives, and the ſecond only for twenty-one years, yet that will not bind the ſucceſſor; becauſe though an action of debt might be maintained againſt the leſſee for years for the rent reſerved on his leaſe during the leaſe for lives, yet ſuch leaſe for lives and years at the ſame time is againſt the words of the exception of 1 *Eliz. c.* 19. which are in the disjunctive. It may alſo happen that the leſſee for years is worth nothing, and then if the three lives ſhould outlive ſuch ſubſequent leaſe for years, the ſucceſſor of the biſhop would loſe all that rent, and ſo ſuffer in his revenues, againſt the deſign

Co. Lit. 44. b. Palm. 466., &c. 5 Co. 2. Moor, 253. Leon. 59. Latch. 241. 2 Brownl. 162. Cro. Eliz. 141. And. 193. Ley, 78. Cro. Eliz. 111.

Vide tit. Rents.

[(*b*) See 5 Geo. 3. c. 27.]

and meaning of the act; which proves, that the concurrent leaſe holds place only where *both are for years*; ſo that the certain determination of the firſt, and commencement of the ſecond are known immediately upon the making thereof, and that the ſucceſſor will in all events be ſure of a remedy by way of diſtreſs, for the one rent and the other, as they reſpectively commence; and alſo by action of debt or covenant upon the contract in the mean time, if ſuch concurrent leaſe ſhould be conſtrued to paſs a reverſionary intereſt, and entitle him to the rent reſerved upon the firſt leaſe by an unwary or wilful attornment of the firſt leſſee. And this concurrent leaſe for years has not eſcaped the cenſure of ſome learned men, though being adjudged at firſt in the *Exchequer Chamber*, by a majority of ten judges, it has been ever ſince allowed for law; for my lord chief juſtice *Vaughan* ſays, that this concurrent leaſe is neither within the letter or meaning of the ſtatute 1 *Eliz. c.* 19. the words of which are, *other than for twenty-one years, or three lives*, and in that caſe there is another leaſe *in eſſe* than for twenty-one years, or three lives; for there are two leaſes *in eſſe*, and ſo more than the ſtatute warrants; and that the ſtatute intended, when the firſt leaſe expired, the biſhop who ſhould then be, ſhould have the advantage to make a new leaſe, which by allowing ſuch concurrent leaſe may be prevented perpetually, except by way of remainder: and as for the intent of the ſtatute, he ſaid, though the party is eſtopped in pleading, yet the jury are not, but may find the truth of the caſe; and if the party dies to whom ſuch concurrent leaſe is made, neither his executors nor adminiſtrators are eſtopped; for otherwiſe they would pay a rent for nothing, which would be in their own wrong, and againſt the right of the teſtator.

3 Keb. 378. Degg. 111.

Comp. Incumb. 243.

It appears by the caſes before-mentioned, how and in what manner biſhops may make concurrent leaſes, not being reſtrained therefrom by the 1 *Eliz. c.* 19. In the ſame manner likewiſe might deans and chapters, maſters and fellows of any college, and other perſons mentioned in the 13 *Eliz. c.* 10. not being reſtrained therefrom by that ſtatute; but that being found a great miſchief, was remedied and qualified by 18 *Eliz. c.* 11. which makes all leaſes by any of the ſaid eccleſiaſtical, ſpiritual, or collegiate perſons, or others of any of their eccleſiaſtical, ſpiritual, or collegiate lands, tenements, or hereditaments, whereof any former leaſe for years is in being, not to be expired, ſurrendered, or ended, within three years after the making of any ſuch new leaſe, to be void and of none effect; ſo that within theſe bounds they may likewiſe make concurrent leaſes for years.

2 Brownl. 134. 158. 164. Moor, 875. Co. Lit. 45. b.

The dean and chapter of *Norwich*, 8 *Eliz.* made a leaſe to *A.* for ninety-nine years, to begin after the end of a former leaſe then in being, which happened 35 *Eliz.*; afterwards, in 42 *Eliz.* the dean and chapter made a leaſe to the plaintiff for three lives, rendering the antient rent quarterly, and covenanted to acquit and ſave harmleſs the plaintiff and the lands demiſed to him, during the leaſe, by reaſon of any leaſe made by them, or any of their predeceſſors; and livery was made upon it; but it did not appear whether

whether it was the ſame dean that made the leaſe to *A.*, nor that *A.* had then entered: and now the plaintiff being evicted by the aſſignee of *A.*, brought his action of covenant againſt the dean and chapter; and had judgment by reaſon of the expreſs covenant; and alſo, becauſe it did not appear that the dean, who was party to the plaintiff's leaſe, was dead: for it was agreed, that the leaſe to the plaintiff would be void againſt the ſucceeding dean by the 18 *Eliz. c.* 11. becauſe there were then above three years of the firſt to come: but *Coke* held, that though there were four or five, or more years of a former leaſe to come, yet if that former leaſe were ſurrendered within three years after the making of a ſecond leaſe for years, ſuch ſurrender would make good the ſecond leaſe; but if the firſt leaſe were for years, and the ſecond for lives, then, though there were but two years to come of the firſt leaſe, yet the ſecond would be void, which perhaps may be for the reaſons mentioned in the concurrent leaſes by biſhops: but if ſo, then what my lord *Coke* ſays in the ſame caſe muſt be a miſtake, that if the plaintiff (whoſe leaſe was for three lives) had procured *A.* within three years to have ſurrendered his leaſe to him, that this would have made good his own leaſe, which cannot be if what he ſaid before be true; *ideo q.*

But for ſuch houſes, and ſo much land, as by 14 *Eliz. c.* 11. they may let for forty years, they cannot make leaſes in reverſion or concurrent leaſes, becauſe that ſtatute expreſsly forbids leaſes in reverſion thereof; and the 18 *Eliz. c.* 11. relates only to the 13 *Eliz. c.* 10. as appears by the following caſe. Comp. Incumb. 344.

In treſpaſs upon ſpecial verdict it was found, that the dean and chapter of *Paul's* made a leaſe for forty years, of a Houſe in *London*, to begin preſently there being then ten years of a former leaſe to a ſtranger to come; and the court held this ſecond leaſe merely void by 13 *Eliz. c.* 10. and not warranted by 14 *Eliz. c.* 11. which makes good leaſes of houſes in market-towns for forty years, ſo they be not made in reverſion; and this leaſe, though it be made to begin preſently, yet there being another leaſe *in eſſe*, is a leaſe in reverſion; for ſo much as remains of the former leaſe. And ſo it was reſolved in *C. B.* 14 *Car.* 2. in the caſe of *Wynn* and *Wild*, of a leaſe of the dean and chapter of *Weſtminſter*; and though this was properly a concurrent leaſe, yet being a leaſe in reverſion, it is forbidden within the expreſs words of the 14 *Eliz. c.* 11. and ſo void againſt the ſucceſſor. Cro. Eliz. 564. Hunt and Singleton. Vent. 246. Carter, 9.

A vicar having made a leaſe for years of a houſe in a market-town, and of lands thereunto appertaining, *anno* 1672, when there were but two years of that leaſe to come, let it to another for twenty-one years from *Michaelmas* then next, reſerving the ancient rent during the term, payable at the four moſt uſual feaſts, or within ten days after, and this leaſe was confirmed by the archbiſhop, (patron of the vicarage,) and the dean and chapter of *Canterbury*; if the ſucceeding vicar was bound by this leaſe, was the queſtion? and adjudged by all the court, that he was not. 1. It was adjudged, that the death of the vicar, by eighty days, did not make ſuch non-reſidence as would avoid the leaſe within the ſtatute Vent. 24. 2 Lev. 61. 3 Keb. 46. 107. 193. Bayly v. Murin.

of non-reſidence. 2. That though the rent were reſerved at the uſual feaſts, or within ten days after; (and therefore as it was urged, the term ending at *Michaelmas*, would be expired before the laſt day of payment; though for the other days it was agreed to be for the ſucceſſor's advantage, becauſe the predeceſſor might die within the ten days, and then the ſucceſſor would have that whole quarter's rent;) yet the court reſolved that the reſervation was good in the whole, and that being reſerved during the term, there ſhould be no ten days given to the leſſee for the laſt payment, according to *Barwick* and *Foſter*'s caſe, *Cro. Jac.* 227. 233. 3. It was adjudged that this was a leaſe in reverſion, and ſo not warranted by 14 *Eliz. c.* 11. which, as to houſes in market-towns, repeals the 13 *Eliz. c.* 10. but excepts leaſes in reverſion; and this leaſe being to commence at *Michaelmas* next, was properly a leaſe in reverſion, and differs from a grant of a reverſion. And further, they all, but *Hale*, held, that if this leaſe, in this caſe, had been made to commence preſently, yet it would have been void, there being another leaſe in being, ſo that for ſo many years as were to come of the former leaſe, it would be a leaſe in reverſion; and they held, that the 18 *Eliz. c.* 11. which permits concurrent leaſes, ſo that there be not above three years of the former leaſe, *&c.* extends only to 13 *Eliz. c.* 10. and recites that, but not the 14 *Eliz. c.* 11. nor makes any alteration thereof: but *Hale* doubted of this, and inclined rather contrary, that if the leaſe had been made to commence preſently, it had been good; becauſe there were not then three years of the former leaſe to come, and he thought the 18 *Eliz. c.* 11. was a qualification as well of leaſes upon the 14 *Eliz. c.* 11. as upon 13 *Eliz. c.* 10. 1. Becauſe the 14 *Eliz. c.* 11. is an appendix to 13 *Eliz. c.* 10. and only enlarges it as to houſes in cities and market-towns; and therefore the 18 *Eliz. c.* 11. reciting the 13 *Eliz. c.* 10. does, by conſequence, recite alſo the 14 *Eliz. c.* 11. 2. Becauſe there is ſuch a connection between all the ſtatutes concerning eccleſiaſtical perſons, that they have been generally taken in the conſtruction of one another; and that though 32 *H.* 8. *c.* 28. is not recited either in the 1 *Eliz. c.* 19. or 13 *Eliz. c.* 10. yet a leaſe is not warranted by thoſe ſtatutes, unleſs it hath the qualifications required by 32 *H.* 8. *c.* 28. 3. From the great rummage it would make in leaſes, if they ſhould be void, when there was ever ſo little of a former leaſe unexpired.

Poph. 8. The preſident and ſcholars of *Magdalen College* in *Oxford* made a leaſe of a houſe, *&c.* for twenty years, and ten years before the expiration thereof made a leaſe to another for twenty years, to begin after the expiration of the firſt leaſe; though this be, in ſtrict propriety, a leaſe in reverſion, yet it was ſaid to be good, and to ſtand well within 14 *Eliz. c.* 11., becauſe theſe contracts or leaſes do not intermix, but the one ſtands well with the other, and both together do not exceed the forty years compriſed in the ſtatute, which doth not hinder leaſes to be made from a day to come: but this opinion is (*a*) denied to be law, and ſeems alſo to be expreſsly againſt the foregoing caſes, where ſuch leaſe to begin

(*a*) 1 Vent. 225. 3 Keb. 107.

gin at a day to come, there being then another leaſe *in eſſe*, is condemned, though both did not exceed the term of forty years in the whole. Carter, 12. 15.

Rule 4. *That ſuch Leaſes are not to exceed three Lives, or twenty-one Years.*

A fourth rule to be obſerved for making theſe leaſes good in law is, that they do not exceed three lives, or twenty-one years, from the making thereof; therefore, if a biſhop makes a leaſe for four lives, and one of them dies in the life of the biſhop, ſo that at his death there are but three lives in being, yet the leaſe is void againſt the ſucceſſor, becauſe being void by 1 *Eliz. c.* 19. at the time when it was made, no ſubſequent accident can make it good. 10 Co. 61. b. 62. a.

So, if a leaſe be made for three lives in this manner, *viz.* to one for life, remainder to a ſecond for life, remainder to a third for life, this leaſe is void againſt the ſucceſſor; becauſe, otherwiſe the two firſt would be diſpuniſhable of waſte during their lives, by reaſon of the intermediate remainder; and ſo dilapidations, and other miſchiefs, which the ſtatutes intended to provide againſt, would be let in. Cro. Car. 95. Owen and Ap Rees, Hetley, 22. [This point was made and argued at the bar in the caſe referred to, but the court gave no opinion upon it.]

So, if an archdeacon makes a leaſe for three lives, according to the ſtatutes, and the leſſees make a leaſe for 100 years, which is confirmed by the archdeacon, biſhop, dean, and chapter, yet ſuch leaſe ſhall not bind the ſucceſſor: or, if a biſhop makes a leaſe for three lives, reſerving the ancient rent, and they make a leaſe for 100 years, if three men ſo long live, which is confirmed by the biſhop and chapter; yet may the ſucceſſor avoid this leaſe, and yet theſe are out of the words of the ſtatutes; but if they are not to be conſtrued to be within the meaning thereof, the ſtatutes would ſignify nothing, and all eccleſiaſtical perſons, by ſuch evaſions, might get out of the acts, and make what alienations they pleaſed. Ley. 74. Biſhop of Hereford's caſe. 5 Co. 15. a.

If a leaſe be made to *A.* for the lives of *B.*, *C.*, and *D.*, this is a good leaſe; for a leaſe to one for the lives of three others, and a leaſe to three for their lives, is all one, within the intent of theſe ſtatutes; for three lives are the meaſure of the eſtate, which is all the ſtatutes require. But a leaſe for ninety-nine years, determinable on three lives, ſeems not good within the ſtatute of the 1 *Eliz. c.* 19. & 13 *Eliz. c.* 10. which make void all eſtates, gifts, grants, *&c.* (other than for three lives, or twenty-one years); ſo that a leaſe for ninety-nine years, determinable on three lives, being neither of thoſe, falls within the diſability and voidance of the firſt part of thoſe acts. Cro. Jac. 76. Baugh v. Hains.

But a leaſe by huſband ſeiſed of lands in right of his wife, or jointly with his wife, of an eſtate of inheritance for ſixty years, if they ſhould ſo long live, was held ſufficient to bind the wife ſurviving, within the 32 *H.* 8. *c.* 28. and no queſtion made of it; the only diſpute there being, Whether the wife ought to have joined in the indenture of leaſe? and that ſuch leaſes for ninety- Cro. Car. 22. Smith v. Trinder.

nine years, determinable on three lives, are good within that ſtatute, appears from the reaſoning in (*a*) *Whitlock*'s caſe; where it is adjudged, that if a man has power to make leaſes abſolutely or generally, (as the ſeveral perſons compriſed in the ſtatute of 32 *H.* 8. *c.* 28. have,) and a proviſo or reſtraint comes after, (as in that act it does,) that ſuch leaſes ſhall not exceed the number of twenty-one years, or three lives at the moſt; there, a leaſe for ninety-nine years, determinable on two or three lives, is good within the firſt part of the act, and not made void by the laſt part thereof, becauſe it does not exceed the three lives thereby allowed, though it be not directly for three lives; but now a leaſe for ninety-nine years, determinable on three lives, upon the ſtatute of 1 *Eliz. c.* 19. & 13 *Eliz. c.* 10. is juſt the reverſe of this; for the firſt part of theſe acts makes void all eſtates, gifts, grants, &c. by the perſons therein-mentioned, and the laſt part ſaves only leaſes for twenty-one years, or three lives, &c. ſo that this leaſe being void by the firſt part of theſe acts, and not within the ſaving of the laſt part, being neither for twenty-one years, nor three lives, ſhall not bind the ſucceſſor within theſe acts; *ſed quære de hoc.*

(*a*) 8 Co. 70. & *vide* 3 Keb. 595.

Leon. 306. 5 Co. 6. b. 8 Co. 70. b.

But though theſe ſtatutes provide that theſe leaſes ſhall not exceed twenty-one years, or three lives, yet ſuch leaſes for fewer years, or lives, are good; for the intent of the ſtatute was only to abridge the power of making long and unreaſonable leaſes, by reducing them to ſuch a determinate number of years or lives, which they ſhould not exceed, but might be made as much under as the parties pleaſed.

Rule 5. Of what Things Leaſes may be made to bind the Succeſſor.

Co. Lit. 44. b. 47. a. 142. a. 144. a. 7 Co. 51. Leon. 333. Bro. tit. Leaſes, 17. 21. tit. Grant, 44. 59.

A fifth rule to be obſerved in the making of leaſes upon theſe ſtatutes to bind the ſucceſſor is, that they muſt be made of lands or tenements corporeal and manurable, whereto reſort may be had for the rent reſerved thereout by way of diſtreſs; for otherwiſe the ſucceſſor may be without any remedy for the rent, and ſo dilapidations, poverty, and all the other miſchiefs the ſtatutes intended to provide againſt, be let in. Therefore, leaſes of fairs, markets, liberties, franchiſes, advowſons, commons, piſcaries, offices, hundreds, tithes, or any other incorporeal inheritance, though with confirmation of the dean and chapter, or other perſons required by law to confirm the ſame, will not bind the ſucceſſor.

For the better underſtanding of this rule, it will be neceſſary to take notice of ſome diſtinctions, which plainly ariſe out of the books.

5 Co. 3. Jewel's caſe. Cro. Jac. 111. 173. Moor, 778. Palm. 175. 2 Sand. 303. Hard. 326.

1. All the books agree that a leaſe for three lives of tithes, or other incorporeal inheritances before-mentioned, will not bind the ſucceſſor, though the ancient rent be reſerved, and the leaſe or grant confirmed; the reaſon whereof is, that if ſuch leaſe or grant ſhould be good againſt the ſucceſſor, he would then be without the tithes, &c. and have no remedy for the rent thereon reſerved;

ſerved; for diſtrain he could not; becauſe there would be no place wherein to take any diſtreſs, the things leaſed or granted being perfectly incorporeal and inviſible; an aſſiſe he could not have, becauſe either he had not ſeiſin, or, if he had, yet there would be nothing to put in view of the recognitors; and an action of debt he could not maintain during the leaſe, becauſe, being for three lives, that is, an eſtate of freehold, which will endure no action of debt ſo long as it continues; and ſo the ſucceſſor would, in ſuch caſe, have no manner of remedy for the rent reſerved, which would be againſt the expreſs proviſion and intent of the ſeveral acts.

2. It is held likewiſe in ſome books, that a leaſe for twenty-one years of ſuch incorporeal inheritances, though they have been uſually demiſed, and the ancient rent be thereout reſerved, that yet this is voidable by the ſucceſſor within theſe ſtatutes; becauſe though the rent reſerved be good by way of contract between the leſſor and leſſee, and that debt may be maintained for recovery thereof; yet, they ſay, it is not ſuch a rent as is incident to the reverſion, nor ſhall paſs with it to the ſucceſſor; and therefore the ſucceſſor having no remedy for the rent, ſhall not be bound by the leaſe. 5 Co. 3. Co. Lit. 44. b. 47. a.

But this point ſeems to have been ſhaken by contrary reſolutions ſince *Jewel*'s caſe, for ſome books expreſsly hold ſuch leaſe for years to be good againſt the ſucceſſor; becauſe, they ſay, he has remedy for the rent by action of debt, and ſay it has been ſo adjudged, and take the diverſity (*a*) between ſuch leaſe for years and a leaſe for life: alſo, they ſay, that the rent iſſues out of the tithes in point of render, though not in point of remedy, becauſe no diſtreſs can be taken for it; but that is ſupplied by the action of debt which lies for ſuch rent, and ſhall devolve on the ſucceſſor; and that ſuch rent does not lie only in privity of contract, as a ſum in groſs, but is incident to the reverſion, otherwiſe the ſucceſſor could not have it, being only privy to the eſtate, not to the perſonal contracts of his predeceſſor; and to this opinion the court inclined, but thought it a point of great conſequence, and therefore, to avoid it, gave judgment on another point which was clear. Cro. Jac. 112. Moor, 778. Ley, 76. Palm. 105. Hard. 326. Raym. 18. Lev. 108. 2 Sand. 304. Keb. 63. 2 Keb. 727. [(*a*) This diverſity is no longer of any importance; for the 5 Geo. 3. c. 17. makes leaſes of tithes and other incorporeal hereditaments by eccleſiaſtical perſons, whether for lives or for years, as good as if the leaſes were of corporeal hereditaments, and gives action of debt to the ſucceſſor for rent reſerved on freehold leaſes.]

3. All the books agree that a leaſe for three lives, or twenty-one years, of a manor, with the advowſon appendant, or of lands or houſes, and of tithes uſually let therewith, reſerving the ancient rent, &c. is good, and ſhall bind the ſucceſſor within theſe ſtatutes; for though the rent does not iſſue out of the advowſon, tithes, &c., in point of remedy, yet the rent is greater in reſpect thereof, and the ſucceſſor has his remedy for the whole rent upon the lands, or other corporeal inheritances let therewith; (*ſed quære*, if the tithes ſhould be worth 2 or 300 *l. per ann.* and the lands not above 4 or 5 *l.* &c.;) and *Vaughan* proves this from the expreſs words of 13 *Eliz. c.* 10. which are, That all leaſes by any ſpiritual or eccleſiaſtical Cro. Jac. 453. Moor, 201. 5 Co. 4. 2 Roll. Abr. 451. Vaugh. 203, 204. 2 Sand. 303. Leon. 333.

ſiaſtical perſons, having any lands, tenements, tithes, or hereditaments, (other than for twenty-one years, or three lives, &c.) ſhall be void; ſo that the ſtatute plainly ſhews, that ſome way or other tithes may be leaſed for twenty-one years, or three lives; and if they cannot be leaſed ſingly, it muſt be with lands uſually letten therewith.

Lev. 333. Corbet and Cleer, cited.

Therefore, where the dean and chapter of *Norwich* leaſed a parſonage and common of paſture, rendering rent, and 1 *E.* 6. ſurrendered their poſſeſſions to the king, and afterwards the king granted the parſonage, without ſpeaking of the common of paſture; it was held, that the patentee of the parſonage ſhould have all the rent, and no apportionment ſhould be in reſpect of the common; becauſe all the rent iſſued out of the parſonage, and nothing out of the common.

Cro. Eliz. 690. Armiger v. Biſhop of Norwich and Holland.

A biſhop, having an advowſon appendant to a manor in right of his biſhoprick, grants the advowſon for twenty-one years, and this was confirmed by the dean and chapter, yet held within the reſtraint of 1 *Eliz. c.* 19. and void againſt the ſucceſſor; becauſe, as was ſaid, it was not ſuch an hereditament whereout a rent could be reſerved: but a better reaſon ſeems to be, becauſe no rent was at all reſerved, and then, to be ſure, neither the predeceſſor nor ſucceſſor could have any benefit thereof by way of contract, or otherwiſe; nor did it appear to have been uſually letten.

Palm. 174. Biſhop of Oxford's caſe. Co. Lit. 47. a. 342. a. 386. b.

The biſhop of *Oxford*, having *primam veſturam ſive tonſuram* of certain lands, after 1 *Eliz. c.* 19. lets to the plaintiff for three lives, rendering the ancient rent, and dies, and his ſucceſſor, the now defendant, enters upon him, and takes the hay: it was urged, that this was not like the leaſe of a fair, becauſe this concerned land, and was to be taken upon the land, and ſo the ſucceſſor was not without remedy, becauſe he might diſtrain the graſs when it was cut: but *per curiam*, if the biſhop had had *veſturam*, or *primam veſturam*, or *tonſuram*, from ſuch a day to ſuch a day, this had been ſuch an hereditament as might have been leaſed; for there the biſhop or his leſſee might have mowed, and after fed it, during that time, and then the ſucceſſor might have diſtrained the cattle; but here the biſhop had only *primam veſturam*, *viz.* only the cutting of the graſs once within ſuch a time, and then his intereſt is at an end, and he cannot after feed it; ſo that it is no hereditament within the ſtatute, whereof any leaſe can be made to bind the ſucceſſor.

5 Co. 15. a. 10 Co. 60. b. Cro. Eliz. 207. 440. And. 241. Mod. 204. 2 Mod. 56.

If a biſhop, dean, and chapter, or any other perſon reſtrained by theſe ſtatutes, grant the next avoidance of any church which they have in right of their biſhoprick, deanry, &c., though with confirmation of all perſons intereſted therein, yet the ſucceſſor ſhall avoid it; for this is ſuch an hereditament as the ſtatutes intended to reſtrain them from binding their ſucceſſors by, and no rent can be reſerved out of it; for ſuch grant of the next avoidance can bring no manner of benefit to the ſucceſſor.

4 Co. 24. Ley, 80. Comp. In-

It hath been ſeveral times held, that biſhops, or other eccleſiaſtical perſons, are not reſtrained either by the 1 *Eliz. c.* 19. or

13 *Eliz.*

13 *Eliz. c.* 10. from making grants of copyhold lands in fee, in tail, or for lives, or for any number of years, according to the cuſtom of the manor, and that no confirmation is neceſſary to make ſuch grants good, though they are made by a ſole corporation, as by a biſhop, prebendary, *&c.* Leon. 4. 4 Leon. 117. cumb. 253. *& vide* 3 Co. 7. Moor, pl. 276. Sav. 66. Heydon's caſe.

The biſhop of *Wincheſter*, 5 *Eliz.* with confirmation of the dean and chapter, granted an annuity or annual rent out of lands, parcel of the poſſeſſions of his biſhoprick, with clauſe of diſtreſs to it, *pro conſilio impenſo & impendendo pro termino vitæ ſuæ*, and died; the grantee brought debt againſt the executors of the biſhop for arrears incurred in his lifetime; and the only queſtion was, whether upon the 1 *Eliz. c.* 19. this grant was void againſt the ſucceſſor, ſo that the grantee could not maintain a writ of annuity againſt him, but only an action of debt againſt the executors of the grantor? the caſe does not appear to be adjudged, but it is cited in ſeveral books, that the annuity was determined by the death of the grantor; for though this was not parcel of the poſſeſſions of the biſhoprick, but only iſſuing out of them, yet if the ſucceſſor ſhould be charged with it, this would tend to his prejudice and impoveriſhment, which the ſtatutes intended to prevent. Dyer, 370. b. 10 Co. 61. 5 Co. 15. Hob. 97. Roll. Rep. 164. 171. Cro. Car. 49. 11 Co. 69.

So, where a writ of annuity was brought againſt the ſucceſſor upon a grant made by his predeceſſor, and confirmation by the dean and chapter, yet it was adjudged that it would not lie, becauſe it was not averred that it had been uſually granted, though it was averred to be reaſonable; and it appears by theſe caſes, that if to avoid this act a writ of annuity were brought againſt a parſon or vicar, who prayed in aid of the patron and ordinary, and upon default, judgment were given for plaintiff, this likewiſe is within the equity of the ſaid act, and void againſt the ſucceſſor: ſo, if a writ of annuity were brought againſt a biſhop upon title of preſcription, or otherwiſe, and judgment given againſt him by verdict or confeſſion, yet this is reſtrained by 1 *Eliz. c.* 19. becauſe the biſhop is charged with the annuity in reſpect of the biſhoprick; and therefore the ſucceſſor would be charged with the arrears incurred in the life of the predeceſſor, as it is held 48 *E.* 3. *c.* 26. and ſo it would tend to the diminution of the revenues, and impoveriſhing of the church. 10 Co. 61. Biſhop of Cheſter's caſe, cited 30 Eliz. Rot. 346. Ley, 72. Bridg. 30. S. C. cited.

So, if a rent-charge be granted by any corporation reſtrained by theſe ſtatutes, though this rent-charge be not parcel of their poſſeſſions, yet it is againſt the equity of the ſtatutes, and void againſt the ſucceſſor; for if biſhops, and other eccleſiaſtical perſons, were at liberty to grant what rent-charges they thought fit, and that theſe ſhould be good and binding upon the ſucceſſor, he might have his poſſeſſions ſo clogged and incumbered, as not to be able to keep up hoſpitality, or ſuſtain the dignity of his function, and ſo the good deſign of theſe acts be wholly eluded. 5 Co. 15. a. Roll. Rep. 171.

In covenant, plaintiff declared of a leaſe by the predeceſſor of the defendant, in which was a covenant, that he and his ſucceſſors would pay all taxes during the term, and aſſigns for breach, that ſuch a tax was made by Parliament for the royal aid, and that the plaintiff Vent. 223. 2 Lev. 68. 3 Keb. 69. Davenant v. Biſhop of Salisbury.

plaintiff was forced to pay it, the defendant refuſing to diſcharge it, *unde actio accrevit*, &c. and the only queſtion was, whether this were ſuch a covenant as ſhould bind the ſucceſſor as incident to the leaſe by 32 *H.* 8. *c.* 28.? for it is clear, if the biſhop had made a covenant or warranty, this had not bound the ſucceſſor at the common law, without the conſent of the dean and chapter; and if it ſhould now be taken that every covenant would bind the ſucceſſor, the ſtatute of 1 *Eliz. c.* 19. would be of no effect: but it was held, this covenant would not bind the ſucceſſor; 1. Becauſe it is not averred that ſuch covenants had been uſed in former leaſes, as it ought to have been, to prove it an ancient covenant. 2. If this covenant had been in former leaſes, yet it could not bind to pay this new tax by Parliament; but it muſt have been intended only of ſuch as were then in uſe, *viz.* ſynodals, penſions, tenths granted by the clergy, procurations, &c. it was held however, that this covenant would not avoid the leaſe.

Of grants of offices by biſhops, &c. within theſe ſtatutes, *vide* tit. *Offices*.

Rule 6. What ſhall be ſaid a uſual Letting to Farm upon the ſeveral Statutes, and by what Perſons.

A ſixth rule to be obſerved in the conſtruction of leaſes upon theſe ſtatutes ariſes upon the words of 32 *H.* 8. *c.* 28. that *that act ſhall not extend to any leaſe of any manors, lands, tenements, or hereditaments, which have not moſt commonly been letten to farm, or occupied by the farmers for the ſpace of twenty years next before ſuch leaſe thereof made.* The firſt conſtruction that prevailed was, that this letting to farm within the twenty years ought to be by ſome perſon who had an eſtate of inheritance therein; and therefore, if the heir in tail were in ward of the king for twenty years, and during that term the king, or his grantee, made leaſes of lands of the ward which had not been uſually letten or occupied in farm for twenty years before, this letting them to farm by the king, or his grantee, during the twenty years wardſhip, is not ſuch a letting to farm within the intent of the ſtatute, as will enable the heir in tail, when he comes of age, to make a leaſe for twenty-one years, or three lives, of thoſe lands, to bind his iſſue. So, if ſuch leaſe were made by tenant by the curteſy, tenant in dower, or the like, of lands which before that time had not been moſt uſually letten to farm for twenty years, their letting to farm of ſuch lands for the greater part of twenty years, will not impower the iſſue in tail, when he comes into poſſeſſion, to make a binding leaſe of ſuch lands within the intent of the ſtatute; for the intent of the ſtatute was only to make good leaſes of ſuch parts of the land as had been before uſually letten by thoſe who were owners of the inheritance, and beſt knew what was moſt proper to be let out, and what not, and therefore did not intend to eſtabliſh leaſes made of any other poſſeſſions than thoſe, which the owners of an eſtate of inheritance therein had, for the greater part of twenty years, thought fit

Co. Lit. 44. a. Dyer, 271. Degg. 106.

to

to leaſe to farm; for if the leaſes of tenant in dower, tenant by the curteſy, guardian by knight's ſervice, or ſuch like, who, having only a particular eſtate therein, would be for making money of it all, and letting out the whole for rent; if leaſes made by ſuch for eleven or twelve years, or more, according to the time they lived or had intereſt therein, ſhould be a letting to farm within this ſtatute; then might the iſſue in tail, when he came into poſſeſſion, make a leaſe for twenty-one years, or three lives, of the capital meſſuage or manſion-houſe, or, perhaps, of the whole eſtate, becauſe thoſe particular tenants had ſo done for eleven or twelve years, or more; and then if ſuch tenant in tail ſhould die the next day, his iſſue would not have a houſe to put his head in; which never was the intent of the ſtatute.

So, where the temporalties of a biſhoprick come into the hands of the king, and he keeps them twenty years, or more, and during that time lets to farm for eleven years, or more, lands which had not been before accuſtomably letten, and then appoints a ſucceſſor, and reſtores him the temporalties, he cannot by any leaſe bind his ſucceſſor, for thoſe lands, which had no other warrant for his leaſing thereof, than only that the king, whilſt the temporalties were in his hands, had let them to farm for eleven years or more; and he might have let the biſhop's palace, or the demeſnes about it; and then if the ſucceſſor might likewiſe make a binding leaſe thereof for twenty-one years, or three lives, and ſhould die, or be removed ſoon, the miſchief intended to be remedied by the ſtatute, in giving the farmers a ſecure and laſting poſſeſſion during their leaſes, would introduce a much greater upon the ſucceſſor, by ſhutting him out of all the houſes and lands belonging to the biſhoprick for twenty-one years, or three lives; and ſo, inſtead of maintaining hoſpitality, as the books ſpeak, would occaſion nothing but quarrels and contentions. So, for the ſame reaſon, a letting to farm by a diſſeiſor or any other who has not a rightful eſtate of inheritance, though it be for the greater part of twenty years, is not a letting to farm by ſuch a perſon as will enable the tenant in tail, biſhop, or other perſon intended to be provided for by this ſtatute, to make any binding leaſe of lands which were not accuſtomably letten to farm for the greater part of twenty years, by thoſe who had a rightful eſtate of inheritance therein.

Palm. 175, 6. Biſhop Oxford's caſe.

But as the miſchief would be great, on the one hand, to conſtrue the ſtatute in ſuch a manner, as would empower the perſons before-mentioned to determine of what parts and poſſeſſions leaſes might be made good and binding againſt the ſucceſſors, iſſues in tail, and other perſons intended to be bound by the act; ſo, on the other hand, a conſtruction not leſs hurtful to them ſeems to have obtained upon the ſame words of the ſtatute; which provides, *That it ſhall not extend to any leaſe of any manors, lands, tenements, or hereditaments which have not moſt commonly been letten to farm, or occupied by the farmers for the ſpace of twenty years next before ſuch leaſe thereof made;* upon which words it is held, that the lands to be leaſed within that ſtatute muſt be ſuch, and ſuch only, as have been letten to farm, or occupied for eleven years, or more,

Co. Lit. 44. b. Cro. Eliz. 708. Mallet and

Mallet. Sir John Mervyn's caſe.

at one or ſeveral times within the twenty years next before the leaſe for twenty-one, or three lives, to be made; ſo that if lands have been formerly let to farm never ſo long, or often, yet if the tenant in tail, or biſhop, ſhould keep them in his own hands fifteen or twenty years, theſe lands cannot be leaſed for twenty-one years, or three lives, to bind the iſſue or ſucceſſor, till they have undergone a probation of twenty years longer, and within that time have been letten to farm, or occupied by farmers for eleven years, or more: ſo, if the temporalties come to the hands of the king, and he ſhould keep the lands uſually letten in his own hands forty or fifty years, more or leſs, and then reſtore the temporalties to the ſucceſſor, he muſt then begin to let them to farm, till they have run out in farmers hands eleven years at leaſt, otherwiſe he can make no leaſe for twenty-one years, or three lives, within this ſtatute. So, if a diſſeiſor after a leaſe for twenty-one years, or three lives, expired, enter upon the biſhop, or tenant in tail, and hold the lands twenty years, or more, and then the biſhop, or tenant in tail, or their iſſue or ſucceſſor, enter, though theſe lands were demiſeable, and actually demiſed, within the ſtatute, but juſt before the diſſeiſor entered, yet now they cannot be again leaſed for twenty-one years, or three lives, till they have been in farmers hands for eleven years at leaſt; and ſo it is in the power of the king, the diſſeiſor, nay of the biſhop, or tenant in tail himſelf, to evade and elude the intent of the act, by keeping the lands ten or twelve years in their hands; and though they die, or are removed preſently, yet the ſucceſſor or iſſue can have no benefit of the ſtatute till after eleven years at leaſt.

(a) Where the caſe was, that the Archbiſhop of York in 1604, made

Theſe reaſonings and inſtances were preſſed and urged in a (a) caſe by *Twiſden* and Chief Juſtice *Keeling*, againſt *Windham* and *Moreton*, and they thought them ſo conſiderable, that it put them upon finding out a more eaſy and natural conſtruction.

a leaſe for three lives, rendering the ancient rent; in 1630, this leaſe was ſurrendered, and the lands remained unlet till 1662, when the archbiſhop made a leaſe thereof to the plaintiff's leſſor, rendering the ſame rent as was reſerved in 1604, and died, and the then archbiſhop entered, and let to the defendant; and whether theſe lands, not having been let ſince 1630, could be leaſed again, was the queſtion? and Twiſden and Keeling, for the reaſons herein mentioned, held they might. Lev. 212. Sid. 316, 416. Raym. 165. 2 Keb. 213, Pemble v. Stern.

For they held, that the clauſe conſiſted of two parts in the diſjunctive, and if either of them were obſerved, it was ſufficient to warrant the leaſing for three lives, or twenty-one years, within the intent of the ſtatute: the words are, that *that act ſhall not extend to any leaſe of any manors, lands*, &c. *which have not moſt commonly been letten to farm*; this is the firſt part of the diſjunctive, and is general: the other part is, *or occupied by the farmers thereof by the ſpace of twenty years*, &c. and they thought the moſt natural and genuine meaning of the words to be, that the lands to be leaſed muſt either be ſuch as have been moſt commonly letten, that is, ſuch as are not reputed part of the demeſnes of the biſhoprick, or ſuch as have been occupied by the farmers thereof by the ſpace of twenty years, &c., that is, if the biſhop has let out part of his demeſnes to farm, and the occupation of the farmer has been

been approved for twenty years together, as not any ways inconvenient to the biſhop, the ſtatute will preſume that they are lands fit to be let. And as to the authorities againſt this opinion, *Twiſden* ſaid, in *Mallet*'s caſe, that point came in unneceſſarily; and *Keeling*, that it came in on a fooliſh argument, and therefore was of no great weight; and ſo in Sir *John Mervin*'s caſe, the point never came in queſtion, but only *dictum fuit pro lege*; and as to my lord *Coke*, (though he were a grave and learned man,) yet he was not infallible, nor did he deſire to be accounted ſo, and this opinion of his was not judicial, that if it had come to an argument he might poſſibly have thought otherwiſe; for *Keeling* ſaid himſelf was of that opinion, till he came to conſider the caſe, and weigh the inconveniencies of that conſtruction: and it was ſaid, that queen *Elizabeth* kept the temporalities of the biſhop of *Ely* above twenty years in her hands, and yet no queſtion of his leaſes after: and they ſaid likewiſe, that the lord *Coke*'s inference was falſe, and not warranted by the ſtatute, *viz.* that if it had been leaſed for eleven years it would be ſufficient; for the firſt part of the ſtatute, as to leaſing, ſeems to refer to a more ancient time: alſo it was held, that if the other conſtruction prevailed, theſe lands, or any other which continued unlet for eleven years, could never after be let again for twenty-one years, or three lives, becauſe they were not moſt accuſtomably letten, *&c.*, by the ſpace of twenty years, which makes it the more reaſonable to reject ſuch conſtruction: *ſed quære*, if by letting them again to farm for eleven years, or more, the power given by the ſtatute to leaſe for twenty-one years, or three lives, be not ſet up again? but *quære*, whether ſince as it appears before, the letting to farm by the king, or a diſſeiſor, *&c.*, is not ſufficient within this ſtatute, whether likewiſe their keeping it in their hands for eleven years, or more, be of any prejudice to the biſhop, or his ſucceſſors, or to the tenant in tail, or his iſſue? for if the ſtatute only intended letting to farm by the biſhop or tenant in tail himſelf, then all the objections beforementioned ſeem to loſe their force, unleſs where the biſhop, or tenant in tail, keep the lands undemiſed in their own hands for eleven years or more.

A leaſe made by the predeceſſor of the plaintiff for three lives, rendering rent, and confirmed by the dean and chapter; the defendant claiming under it avers that it was the uſual and ancient rent, and the land uſually demiſed; the plaintiff replies, that it was uſually before that leaſe retained in the hands of his predeceſſors for hoſpitality, and traverſes *abſque hoc, quod fuit magis uſualiter dimiſſa, &c.*: it was held a good traverſe; for ſince 32 *H.* 8. c. 28. appoints that the ancient rent ſhall be reſerved, it is thereby implied that the land ſhould have been uſually demiſed, otherwiſe the ancient rent cannot be reſerved. Cro. Eliz. 874. Biſhop of Hereford and Scorey.

Another thing required by the ſtatute is, that theſe leaſes be made of lands uſually letten to farm, *&c.*, upon which words it hath been adjudged, that a demiſe by copy of court-roll is ſufficient; for that is in judgment of law but an eſtate at will; and Co. Lit. 44. b. 6 Co. 37. b. Cro. Jac. 76. 2 Jon. 29. Moor, 759.

Raym. 167. Sav. 66. Leon. 4. 4 Leon. 117.

without queſtion, lands demiſed at will by thoſe who have the inheritance, rendering rent, are lands accuſtomably letten to farm within the ſaid act; and ſo it was ruled 7 *Eliz.* in Sir *John Mervin*'s caſe, where tenant in tail let a copyhold by indenture, rendering the ſame rent as before, and held a good leaſe within 32 *H.* 8. *c.* 28. and *Williams* ſaid, he had known it thrice ſo adjudged in his time, in the caſe of tenant in tail.

Moor, 199. 5 Co. 5. b. Ld. Mountjoy's caſe.

But where tenant in tail had power, by a particular act of parliament, to make leaſes for life, lives, years, or at will, after the cuſtom of the manor, yielding the true and ancient rent, *&c.*, and he made a leaſe both of freehold and copyhold by a deed at common law, reſerving ſuch a rent; this was held not to be warranted by the ſtatute as to the copyhold, becauſe the ſtatute ſpeaks of leaſes at will by the cuſtom of the manor; which imports, that the ſtatute did not intend that copyholds ſhould be demiſed otherwiſe than they were before the ſtatute, and that was by copy of court-roll, not by a leaſe for years, and the rent to be reſerved thereon was cuſtomary rent, not rent upon a leaſe for years at common law.

Rule 7. *What Rent is to be reſerved; And herein,*

1. That there muſt be a Rent reſerved.

Moor, 593. Leon. 306. Carter v. Claypole. Sav. 128.

As to this the ſtatute is expreſs that a rent muſt be reſerved; and therefore where the college of all *All Souls* in *Oxford* made a leaſe without reſervation of any rent, though it was but to try a title, yet it was held void, the ſtatute being expreſs and poſitive; and therefore no conſtruction or pretence can be urged to avoid the ſtatute: but in that caſe it did not appear that no rent was reſerved, but only the plaintiff had not ſhewn that there was any reſerved, and yet there might be, in the leaſe; and if not, the defendant ought to ſhew it; and ſo the exception diſallowed.

2. That this Rent muſt continue due, and be payable to the Leſſors and their Succeſſors.

5 Co. 6. a.

This alſo is ſo ſtrictly required by the ſtatute, that it hath been held, that if a biſhop, tenant in tail, *&c.*, make a leaſe of land, the ancient rent whereof was 10 *l.* and reſerve but 5 *l. per annum* during his life, and 10 *l. per annum* after his death, to the iſſue or ſucceſſor, yet this leaſe ſhall not bind, becauſe the rent originally reſerved was not purſuant to the ſtatutes; though there can be no pretence of prejudice to the iſſue or ſucceſſor, more than if the biſhop, or tenant in tail, *&c.*, ſhould releaſe the rent, or any part of it, during their own lives, which ſurely they may do: *ideo quære?*

3. That ſuch Rent muſt be the ſame, or more in Quantity than hath been reſerved within twenty Years next before ſuch Leaſe made: And herein,

1. What

1. What ſhall be ſaid to be the ancient Rent, where Variety of Rents have been reſerved, or ſomething formerly reſerved now omitted or varied.

As to this, where variety of rents have been reſerved, as formerly 10*l.* then 20*l.* then 30*l.* and laſtly 40*l. per ann.* or *è contra* formerly 40*l.* then 30*l.* then 20*l.* and laſtly 10*l. per ann.*; the 10*l.* in the one caſe, and the 40*l. per ann.* in the other caſe, are the rents to be reſerved on any new leaſe to be made; but with this diverſity between leaſes made by virtue of the ſeveral ſtatutes before-mentioned, and leaſes by virtue of powers in private conveyances and ſettlements; for upon leaſes made by virtue of the ſeveral ſtatutes before-mentioned, this was the meaſure immediately after theſe acts paſſed, and muſt continue ſo ſtill; becauſe the ſame acts being to warrant every ſucceſſive leaſe as well as the firſt, there can be no variation of the rent in any other leaſe to be made from the rent, which, upon conſtruction of thoſe ſtatutes, was in the firſt leaſe, made by virtue thereof, ſettled to be the antient and unaccuſtomed rent; and conſequently, the variety of rents in ſuch leaſes muſt have been only before the ſtatutes: but upon leaſes made by virtue of powers in private conveyances and ſettlements at this day, reſerving the old and accuſtomed yearly rent, or the moſt ancient and accuſtomable yearly rent, there, the rent reſerved on any leaſe then in being, or upon the leaſe made laſt before ſuch ſettlement or conveyance, ſeems to be the meaſure of the reſervation upon any leaſe after to be made by virtue thereof; for the intent of ſuch power, as well in ſuch ſettlements as upon the ſeveral acts before-mentioned, was only that they, who were to make leaſes by virtue thereof, ſhould not put the eſtate in any worſe condition than it was at the time of ſuch ſettlement, or of thoſe acts made, but keep it in the ſame plight and condition as it then reſpectively was; and the rent reſerved laſt before the making of ſuch ſettlement, or of thoſe acts, may well be called old or ancient in reſpect of the new rent to be reſerved on ſuch leaſe, to be made after ſuch ſettlement, or after thoſe acts. But the Lord *Cowper*, in the caſe of Lord (*a*) *Mohun* and *Orby*, ſeemed to make a doubt of this conſtruction of the words *ancient and accuſtomable rent*, and thought the laſt rent no certain rule to go by; for ſuppoſe it were leaſed once at a greater, and twice at a leſs rent, he thought the ancient rule muſt be that reſerved on the firſt leaſe; for the two laſt may be made by a tenant in fee, who was not bound to reſerve the antient rent, but might let it for nothing, if he pleaſed: but upon the 32 *H.* 8. *c.* 28. or the ſame words in private powers, *viz.* ſo much yearly rent, or more, as hath been moſt accuſtomably yielded or paid within twenty years next before ſuch leaſe thereof made, if a greater rent had been reſerved before the twenty years, yet the reſerved within the twenty years, though it were leſs, muſt be the meaſure of the reſervation upon leaſes to be made by virtue of that ſtatute, or of private powers, worded in the ſame manner. But if within the twenty years it had been let once at a greater and

Hard. 325, 326. Morice v. Antrobus, *per* Hale.

(*a*) 2 Vern. 531, 542. Preced. Chan. 257. S. C. Gilb. Eq. Rep. 45. S. C.

and twice at a leſs rent, then the queſtion will remain, which of the reſervations will be the meaſure of the rent to be reſerved on any two new leaſes to be made? and how far the opinion of my Lord Chancellor *Cowper* will outweigh the opinions of my Lord Chief Juſtices *Hale* and *Holt* is conſiderable, though their opinions ſeem to fix a ſtanding rule to go by, whereas his leaves it at great uncertainty, from which no rule can be formed; for it may have been let twice formerly at a leſs rent, and once, on the laſt leaſe, at a greater; and if the firſt reſervation in this caſe, being greater, ſhall be the rule, why ſhould not the two firſt, in this caſe, though they are leſs; for his reaſon ſeems to turn upon the priority and antiquity of the rent, ſo that the firſt rent, according to his opinion, and the laſt rent, according to their two opinions, are to be the meaſure of the reſervation.

[Where the leaſes, on which the rent has been reſerved within the twenty years, have been ſometimes with fines, and ſometimes without, Lord Cowper's rule ſeems the beſt: in any other circumſtances Lord Holt's rule appears to be the more proper one. See Pow. on Powers, 549.]

6 Co. 37. Cro. Jac. 76. Co. Lit. 44. b. Moor, 759. Dean and Chapter of Worceſter's caſe. [Com. Rep. 312. Coventry v. Coventry.]

In ſome caſes, leaſes, by virtue of theſe ſtatutes, will be good, though there be an omiſſion of things formerly reſerved, or a variation in the rent reſerved in point of time: therefore, where the dean and chapter of *Worceſter* were ſeiſed of the manor of *H.* in fee, in right of their church, of which manor one *G.* was copyholder for life, under the ancient rent of 8 *s.* and 8 *d.* payable at the four quarter-days of the year, and heriotable at the death of the tenant, and the copyholds of that manor were grantable by cuſtom for three lives; the dean and chapter 24 *Eliz.* by indenture under their common ſeal, demiſe the ſaid lands to *G.* and his aſſigns for the lives of *A.*, *B.*, and *C.*, and the ſurvivor of them, rendering 8 *s.* and 8 *d.* half-yearly, and without reſervation of any heriot; and after this leaſe made the dean dies, and his ſucceſſor and the chapter enter to avoid this leaſe upon 13 *Eliz. c.* 10. (among other reaſons); 1. Becauſe the ancient rent was not reſerved by reaſon of the loſs of the heriot. 2. Becauſe the rent was not payable, as it uſed to be; for before, it was payable quarterly, and now, it is reſerved payable half-yearly, which is not ſo beneficial to the ſucceſſor: but it was adjudged, that, notwithſtanding theſe objections, the leaſe was good, and ſhould bind the ſucceſſor; for the 13 *Eliz. c.* 10. does not avoid any leaſe, if the accuſtomed rent or more, be reſerved; and here the accuſtomed rent is reſerved, and the omiſſion, or loſs of the heriot, is not material, becauſe that was not a thing annual or depending upon the rent, but perfectly caſual and accidental. 2. That though the rent was formerly reſerved quarterly, and now half-yearly, yet the leaſe is good, and ſo would have been if it had been reſerved only yearly; for the words of the act are, *whereupon the accuſtomed yearly rent, or more, ſhall be reſerved;* ſo that if the rent be reſerved yearly, the words of this act are ſatisfied, and this word *yearly*, not being in *Mountjoy*'s caſe, makes the difference. And yet this rent had not all the beneficial qualities the other rent had; for whilſt it continued copyhold, the lord might have entered for a forfeiture upon the denial or non-payment of the rent, which now, upon this leaſe thereof, at common law, he cannot do.

5 Co. 4. b. 5. b.

If the rent was anciently payable in gold, and it is now reſerved payable in ſilver, this leaſe ſhould not bind the ſucceſſor; for the variation may be prejudicial to the heir or ſucceſſor, by the fall of ſilver; and though the ſame may be ſaid were it reſerved in gold, as it uſed to be, yet by continuing the ſpecies of reſervation formerly made, the leſſor hath uſed all the precaution the ſtatute required, and the accidental fall after can be no ways imputed to him. 5 Co. 4. b. 5. b.

But if a quarter of corn was anciently reſerved, and now a leaſe is made, reſerving eight buſhels of corn, this is good; for the reſervation is the ſame both in quality, value, and nature, and differs only in words. 5 Co. 4. b.

A precentor or chanter of St. *Paul*'s, being ſeiſed of the parſonage of *S.*, in *jure cantariæ*, leaſed a portion of tithes for two years, rendering 8 *l. per ann.* and reſerving paſturage for a colt in the land of the leſſee; and the leaſe being expired, his ſucceſſor made a leaſe for twenty-one years of the ſaid portion of tithes, rendering 8 *l. per ann.* but omitted the running of the colt; yet the leaſe was held good, becauſe it was a thing reſerved out of the lands of the firſt leſſee only, which the ſucceſſor could not reſerve, ſuch firſt leſſee not being his tenant of the tithes: otherwiſe perhaps, if the reſervation had been general. Palm. 106. Euſden and Dennis.

2. In what Manner ſuch Reſervation is to be made.

All that ſeems neceſſary here to be obſerved is, that there muſt be a particular mention or ſpecification of the ſum intended to be reſerved, as well upon leaſes to be made by virtue of theſe ſtatutes, as upon leaſes by virtue of powers in private conveyances and ſettlements; for otherwiſe the heir, or ſucceſſor, would be put to infinite trouble, vexation and expence, if the reſervation might be allowed to be made in the ſame or as general terms, as the power itſelf was; and the neceſſity of averring and proving what was the ancient and accuſtomable rent were to lie upon them.

Therefore, where a biſhop was ſeiſed, in right of his biſhoprick, of three manors which had been uſually let together at the rent of 32 *l. per ann.* and made a leaſe of the ſaid three manors, except ſuch and ſuch parts thereof, rendering the ancient, uſual, accuſtomed yearly rent, and the rents and ſervices at the days and times uſually accuſtomed, without ſpecifying any rent or ſum in particular; it was adjudged, that this leaſe ſhould not bind the ſucceſſor, becauſe the uſual and accuſtomed rent was 32 *l. per ann.* where all the ſaid three manors had been let without any exception; whereas now part being excepted, that which was the uſual and accuſtomed rent for the whole, cannot be ſaid the uſual and accuſtomed rent for part; and then the reference being general to the ancient and accuſtomable rent, nothing at all is reſerved, and, by conſequence, the ſucceſſor is not bound by ſuch leaſe. This appears to be the reaſon in the book for the avoidance of that leaſe, and being ſufficient for the purpoſe, there needed no other: but it will appear by the following caſe, that if the whole three manors had been let without any exCro. Car. 95. Owen v. Thomas. 3 Keb. 380.

ception, yet the reſervation in ſuch general terms would have been ſufficient to have avoided the leaſe.

Trin. 1706. in Chanc. Lord Mohun and Orby. Eq. Abr. 343. pl. 5. 2 Vern. 531. 542. Gilb. Eq. Rep. 45. Preced. Chan. 257. 3 Chan. Rep. 102. 10 Mod. 473.

Fitton Gerard was tenant for life, with power to make leaſes for twenty-one years, or three lives, ſo as upon every leaſe of ſuch lands as have been uſually letten, and fines taken for them, the old accuſtomed rent, or more, be yearly reſerved; and ſo as upon every leaſe of other lands not uſually letten, or fines taken for them, there be reſerved the beſt improved rent that can be gotten for the ſame, and the leſſees to execute counterparts thereof. *Fitton* by indenture 21 *Decemb.* 1702, demiſes to the defendants all ſuch lands as have been uſually letten, and fines taken for them, for ninety-nine years, if three perſons ſhould ſo long live, with a reſervation in theſe words, *yielding* and *paying* therefore *the reſpective old and accuſtomed yearly rents*; and if this reſervation was purſuant to the power, was the queſtion? And my Lord Chancellor *Cowper*, being aſſiſted with the two Chief Juſtices *Holt* and *Trevor*, decreed, that this leaſe was not good to bind the remainder-man; but my Lord Chief Juſtice *Holt* differed in opinion, and held this leaſe good. 1. Becauſe the reſervation being in the very words of the power, if the power was good, the reſervation muſt be ſo too; for the ſame words muſt have the ſame meaning in both; and if a ſum certain had been reſerved, yet it muſt have been averred to have been the ancient and accuſtomable rent, or more; and therefore this reſervation, in the words of the power, may be helped by ſuch an averment, and conſequently is good. 2. That if any of the lands compriſed in this leaſe had not been anciently let, though the reſervation in ſuch manner as to them would be void, yet the leaſe would remain good as to the others. 3. Though all the lands were compriſed in this one deed of leaſe, yet the remainder-man, who is to have all the deeds in his cuſtody, might eaſily diſtinguiſh them, as well as if they had been let by ſeveral leaſes, as they were formerly. But my Lord Chancellor and *Trevor* held this leaſe void againſt the remainder-man, and not purſuant to the power. 1. Becauſe it was never intended that the words of the power ſhould be turned *verbatim* into a reſervation in leaſes; and to ſay, that if the words in the power are good, they cannot be bad in the reſervation, is a ſtrange poſition. Suppoſe in the power to make leaſes it were provided, that in every ſuch leaſe there ſhould be inſerted ſuch covenants as are uſual in leaſes in that county, and a leaſe were made in the very words of the power, would this be good? Certainly not; nor could it be aided by any ſpecial verdict, finding the covenants uſual in that county. 2. The queſtion in this caſe is not between the leſſor and leſſee (between whom perhaps the leaſe may be good, and the rent recoverable); but the queſtion is, as to the remainder-man, whoſe remainder and inheritance is to be charged by a power which is to be taken ſtrictly, and is not purſued; for the intent thereof was, that a certain rent might be reſerved upon every leaſe to be made, ſo that he in remainder may know how to come at it, and form his action for the recovery thereof, which as this reſervation is, he cannot do, but will be involved in per-

[1 Burr. 121.]

petual controverſy and uncertainty; for he muſt not only aver and avow that the ſum he diſtrains for is the ancient rent, but muſt alſo prove it; for if the tenant can ſhew another more ancient rent, then he may nonſuit the remainder-man, and ſo *toties quoties* he diſtrains or avows for any rent, the tenant by ſhewing that another rent has been reſerved, may baffle him and keep the land in ſpite of his teeth, without any rent at all, till he is ſo lucky as to hit upon the true ſum reſerved upon every ſeveral leaſe, which will be very difficult for him in remainder to do, and is no ways agreeable to the power. But if a certain ſum had been reſerved, and the counterpart ſhewn under the tenant's hand, he muſt either ſhew a more ancient rent, or it will be preſumed for the plaintiff; and if he ſhould ſhew one more ancient, the conſequence of that will be the avoiding of his own leaſe, which, to imagine he ſhould attempt, is abſurd; and without defeating the leaſe he can never avoid payment of the rent when it is reſerved in certainty; but as it is reſerved here, it is wholly uncertain. And my Lord Chancellor ſaid, it was the firſt attempt that ever was made to delegate the power generally that was to have been executed particularly, and was a new invention tending to introduce perjury, forgery, and frauds, and therefore was not to be countenanced.

So, in the ſame caſe, where tenant for life had made a leaſe of the lands not uſually letten, reſerving therefore the beſt and moſt improved rents for the ſame, according to the words of the power; this was held ſo utterly uncertain, that nothing was offered to ſupport it. Lord Mohun v. Orby.

But a caſe was therein cited, where Mr. *Venables* of *Cheſhire* had power, by a ſettlement, to make leaſes of lands anciently demiſed, reſerving, at leaſt, 12 *d.* for every *Cheſhire* acre; and he made a leaſe of all the lands anciently demiſed, *reſerving all the rent intended to be reſerved;* and though theſe words were very general and uncertain in themſelves, the reſervation was held good, becauſe it might eaſily be aſcertained by the reference of 12 *d.* at leaſt, for every *Cheſhire* acre, becauſe it is known what a *Cheſhire* acre is; and that may by admeaſurement be at all times aſcertained, and depends not upon uncertain evidence. Lewſon v. Piggot. 3 Ch. Rep. 61. 76.

[So, where a power was given to leaſe, provided that two parts in three of the improved value be reſerved as a rent, and the reſervation was made in the very terms of the power; it was holden that the leaſe was nevertheleſs good; and that unleſs proof were made of a greater value than had been conſtantly paid and accepted of by the remainder-man, ſuch ſum muſt be taken as two parts in three of the full value of the premiſes at the time of making the leaſe, which, or the greater value, if ſo proved, was to be continued to be paid, whether the premiſes roſe or fell in value.] Audley v. Audley, 2 Ch. Rep. 82.

A precentor of St. *Paul*'s made a leaſe of lands, the ancient rent whereof was 40 *l.* and a couple of capons, and he now reſerves only the 40 *l.* and takes a covenant from the leſſee to pay yearly, over and above the 40 *l.* a couple of capons, or 6 *s.* and 8 *d.*, yet this was held ſuch a covenant as amounted to a reſerva- Hard. 325. Morrice and Antrobus.

tion, and therefore the leaſe good againſt the ſucceſſor. But as the leaſe in this caſe was made to baron and feme, and the baron only covenanted in that manner, which would not bind his wife if ſhe ſurvived; ſo for that reaſon it was holden the ſucceſſors would not be bound.

3. Where the Addition of more Land, with or without the Addition of more Rent, ſhall avoid ſuch Leaſes.

Ley, 74. 77. Cro. Eliz. 340, 341. Tanfield v. Rogers.

Tenant in tail, or any ſpiritual perſon, in right of the church, ſeiſed of a manor whereof the copyholds and ſervices have not uſually been let, but only the freehold demeſnes, makes a leaſe of the whole manor, reſerving ſuch a ſum only as amounted to the ancient rent: this leaſe ſhall not bind the iſſue or ſucceſſor. But where the reſervation was ſeveral, *viz.* reſerving the ancient rent in certainty for the lands anciently let, and another diſtinct rent for the copyhold and ſervices, not uſually before letten; the leaſe was holden to be good as to the lands anciently let, becauſe for them the ancient rent was reſerved.

Cro. Jac. 458. 3 Bulſ. 290. Smith v. Bole.

A prebend uſually let, with exception of all crab trees, *&c.* at 17 *l. per ann.* was now let for three lives at that rent, without the exception, and adjudged that the leaſe was void to bind the ſucceſſor, becauſe there was more let than had been anciently; for by the exception of the trees, the fruits and boughs, and ſoil itſelf, were excepted, which now by this leaſe paſs to the leſſee; and ſo more being let than formerly, it is not warranted by 32 *H.* 8. *c.* 28. and then the rent thereout reſerved cannot be ſaid to be the ancient rent, and, by conſequence, is made void againſt the ſucceſſor by 33 *Eliz. c.* 10.

5 Co. 5. Moor, 197. Lord Mountjoy's caſe. Co. Lit. 44. b.

Tenant in tail by ſpecial act of parliament having authority to make leaſes, *&c. reddendo verum & antiquum redditum*, makes a leaſe of lands anciently demiſed, and of an acre of waſte not before demiſed, reſerving the ancient rent, and ſo much more as the acre of waſte was worth; and yet held, that this addition of acre of waſte ſpoiled the whole leaſe, becauſe the rent being entire in the reſervation iſſued out of the whole, and out of every part thereof, and the acre of waſte being never demiſed before, it could not be ſaid *verus & antiquus redditus*, which iſſued out of that which never before yielded any rent at all.

5 Co. 4, 5. Co. 139. Cro. Car. 23. 3 Keb. 380.

If two farms have uſually been let ſeverally, the one for 20 *l.* and the other for 10 *l.* and a biſhop, tenant in tail, *&c.* makes a leaſe of both together, rendering 30 *l. per ann.* and dies, *&c.* this leaſe ſhall not bind the iſſue or ſucceſſor, for the ancient rent iſſuing formerly out of the two farms ſeverally, according to the aforeſaid proportion, now iſſues wholly out of each, and out of every part of each; and where before the rents were ſeveral, now they are entire; and it was ſaid to be but wantonneſs, to ſave parchment and paper, to join them together in one leaſe, when they were uſually, and ought to have been let ſeverally; and there was no neceſſity or colour of convenience to join them in one leaſe; and if he might join two, he might as well join twenty, which

which would be very prejudicial to the ſucceſſor, ſince it is a kind of ſeignory and prerogative to have ſeveral tenants: therefore, if 40 *l. per ann.* had in that caſe been reſerved for the two farms, which is 10 *l. per ann.* more than the ancient rent of both; yet this ſhall not bind, not becauſe more is reſerved than the ancient rent, (for that the ſtatute allows,) but becauſe by their being joined, if the tenant ſhould prove inſolvent, the loſs would be greater upon the iſſue or ſucceſſor.

Deviſee for life, with power to make leaſes, whereupon the old and accuſtomed yearly rent ſhall be reſerved, entered and built a new houſe upon the land, and then made a leaſe for twenty-one years, reſerving only the ancient rent, *&c.*: it was inſiſted, that this could not be ſaid to be the ancient rent, becauſe part of it is iſſuing out of the new houſe: but the juſtices would not ſuffer it to be argued, but held the rent to be well enough reſerved. Leon. 147, 148. Read and Naſh.

4. Where a Reſervation of the whole Rent, or only *pro Rata* on a Leaſe of Part, ſhall be good.

On a ſpecial verdict the caſe was in ſubſtance no more than this: A biſhop ſeiſed of two manors in right of his biſhoprick, which had uſually been let for 67 *l.* 1 *s.* 5 *d. per annum*, now makes a leaſe for twenty-one years of one of thoſe manors only, reſerving the whole rent: and if this was a good leaſe within the ſtatute 1 *Eliz. c.* 10. was the queſtion? The objections againſt it were: 1. That the remedy for the rent was not ſo ample and beneficial as it was before; for before, the rent iſſued out of both, now, out of one only, and the ſtatute is to be taken ſtrictly, to prevent dilapidations and decay of ſpiritual livings. 2. That this was not the old accuſtomed rent, becauſe it did not iſſue out of the ſame lands, but out of leſs; and if that be allowed, you may leave but a moiety or quarter part, or but one or three acres, to anſwer 100 *l. per annum.* 3. It was objected, that now the biſhop could not leaſe the other manor at all; for if for the ancient rent, perhaps it is not worth ſo much; if for leſs, it is not the ancient rent: or ſuppoſing he could leaſe the other manor for leſs rent, yet the ancient rent, which the ſtatute chiefly deſigned to provide for, will not be at all the better ſecured; for now being reſerved out of one manor only, that will be the only fund to anſwer it for the future; and if the value of lands ſhould fall, as probably they may, there will be no ſufficient ſecurity or diſtreſs for the old rent, though perhaps the new rent, being leſs, will be abundantly ſecured: and of this opinion was *Vaughan* and *Ellis*; but *Atkins* and *Windham* held it a good leaſe: and after the death of *Vaughan*, *North* being of the ſame opinion, it was adjudged a good leaſe, and this judgment affirmed in *B. R.* upon a writ of error; for the ancient rent being reſerved, the ſtatute is ſatisfied, and what is not in leaſe is in the biſhop's own hands. And though the diſtreſs for the ancient rent be not ſo large, yet the biſhop cannot complain, having the reſidue of the lands in his own hands, or out upon another leaſe: and by *Windham*, if a biſhop ſhould enlarge a garden Mod. 203. 2 Mod. 57. 3 Keb. 192. 372. 583. 595. Pollexf. 176. 1 Freem. 92. 119. 165. 179. Threadneedle v. Lynam.

or orchard, it would be unreaſonable ſo to tie him up, as to force him to hold the reſidue of the tenancy in his own hands, and never ſuffer him to demiſe it again, becauſe he cannot reſerve the ancient rent, as that iſſued out of every part of the old land: but he agreed, that if the biſhop in this caſe had made a leaſe of both manors, reſerving the ancient rent out of one of them only, this would not have been good to bind the ſucceſſor, becauſe he departed with the whole land chargeable with the ancient rent, and yet confined the ſucceſſor's remedy for ſuch rent to part of the lands only: but in this caſe he having the reſidue of the lands in his own hands, it is clearly out of the miſchief of the ſtatute.

5 Co. 5, 6. If lands uſually let at ſuch a rent deſcend to two coparceners in tail, each may let her own part, reſerving rent *pro ratâ*: for it would be unreaſonable that the frowardneſs or perverſeneſs of one ſiſter, in not complying to join in a leaſe with the other ſiſter, ſhould hinder them both from making leaſes at all: and the deſcent, which cauſed the coparcenary, was an act of law, which they could not prevent or hinder, and the acts of law do no injury to any one. So, if a manor was uſually let at 10*s. per annum* rent, and a tenancy eſcheats, and then a leaſe is made of the whole manor, reſerving 10*s. per annum*, this is good, though the rent iſſues alſo out of the tenancy, and that never was in leaſe before; for the eſcheat was the act of law, and by that the ſeignory being extinct ought not to turn to the prejudice of the lord. But if the lord had purchaſed the tenancy, he could never have leaſed it within 32 *H.* 8. *c.* 28. or the other ſtatutes, becauſe the purchaſe was his own act; and therefore the tenancy having never been leaſed before, no ancient rent can be reſerved thereout, no more than a manor which had never been leaſed can now be leaſed by virtue of any of thoſe ſtatutes.

Co. Lit. 44. b. 3 Keb. 379, 380. 5 Co. 4, 5. The books are not agreed, whether a biſhop, tenant in tail, or any ſpiritual perſon, &c. of lands uſually let for a certain rent, may make a leaſe of part thereof, reſerving rent *pro ratâ*; but the better opinion ſeems to allow of ſuch leaſing (*a*), becauſe this in effect is the ancient rent; and otherwiſe, perhaps, they could not leaſe at all, if they had not a power of dividing the great farms; and *Mountjoy*'s caſe, which is contrary, they ſay, was adjudged upon a private act of parliament for enabling a particular tenant in tail to make leaſes, which neither his eſtate nor the law would allow of (as the leaſe there was for 300 years): but upon the other ſtatutes, if all the circumſtances thereby required are obſerved, a leaſe of part, rendering a proportionable rent, ſeems to have no inconvenience in it, or be any ways againſt the true meaning of the ſtatutes.

[(*a*) But according to the Touchſtone, p. 279. if tenant in tail of land let a part of it that hath been accuſtomably let, and reſerve the rent *pro ratâ*, or more than after the rate; this is not a good leaſe. And it ſeemeth to be exceedingly doubtful, whether biſhops, &c. have the power of dividing their eſtates, and leaſing them out in ſmaller parcels: for as the *whole* eſtate is no longer anſwerable for the *whole* rent, the ſecurity is leſſened by ſuch a diviſion; and there may poſſibly be an entire deficiency of remedy for portions of the rent, by reaſon of the failure of tenants, deficiency of diſtreſs, produce, &c. of the parcels out of which they are payable. When therefore a diviſion is deemed neceſſary, it hath been judged ſafeſt, on account of this *poſſible* injury to the ſucceſſor, to apply for the aid of the legiſlature. See two acts to this purpoſe in the 34th and 35th of the preſent king empowering the Biſhop of Ely to grant out eſtates belonging to his ſee in ſeveral ſmaller parcels.—However, in point of fact, partitions have been made without the ſanction of parliament, and that, under the opinion of ſome of the ableſt lawyers in the profeſſion. *Ideo quære.*]

Rule 8. *That ſuch Leaſes muſt not be made without Impeachment of Waſte.*

The laſt rule to be obſerved in the making of leaſes upon theſe ſtatutes is, that they muſt not be made without impeachment of waſte. Though this is expreſsly provided for in the 32 *H.* 8. *c.* 28. only, yet it hath been reſolved upon the 13 *Eliz. c.* 10. and held upon 1 *Eliz. c.* 19. that the ſeveral perſons therein reſpectively mentioned are by the equity thereof reſtrained from making leaſes diſpuniſhable of waſte: for if, as the preamble ſpeaks, long and unreaſonable leaſes are the chiefeſt cauſes of dilapidations, and the decay of all ſpiritual livings and hoſpitality, much more would they be ſo if they were made diſpuniſhable of waſte; and therefore thoſe ſtatutes being made to prevent ſuch unreaſonable leaſes for the future, muſt, by conſequence, prohibit the power of committing or ſuffering waſte. But if biſhops be not reſtrained by 1 *Eliz. c.* 19. from making ſuch leaſes, yet they muſt at leaſt be confirmed by the dean and chapter, otherwiſe they will be void by 32 *H.* 8. *c.* 28.

Co. Lit. 44. b. 45. a. 6 Co. 37. a. Dean and Chapter of Worceſter's caſe. Palm 468. Comp. Incumb. 357.

And although they are confirmed, yet if the leſſee ſhould go about to commit waſte, he may be ſtopped by prohibition, and attached if he perſiſt in it; for ſo may the biſhop himſelf, or any eccleſiaſtical perſon, if they commit waſte, either in cutting down the timber trees, or pulling down or defacing the houſes or poſſeſſions of the church: and ſuch waſte is alſo a good cauſe of deprivation; and as the biſhop or other eccleſiaſtical perſon cannot juſtify the doing of ſuch waſte, other than for reparations, fuel, or ſuch like neceſſaries, no more can their tenants or leſſees, who derive under them.

11 Co. 49. 98. b. 3 Bulſ. 91. Moor, 917. Zaker's caſe. 2 Roll. Abr. 813. Hob. 36. Drury v. Kent. 3 Inſt. 304. Godb. 259. 2 Bulſ. 279.

But where a prohibition was moved for, to hinder a parſon from the digging of lead and coal mines in his glebe, the court denied it, becauſe he having the fee in him in as high a manner as ever any body will have it, if he cannot open the mines, they will never be opened at all. Nor is this opening of mines any cauſe of deprivation by the canon law: and the reaſon of prohibiting the cutting down of trees in the church-yard by 35 *E.* 1. *ſtat.* 2. is, becauſe they were planted in defence of the church, and alſo becauſe ſuch cutting them down is waſte *. And it is ſaid in one book, that the parſon hath ſuch an eſtate in him, that he may maintain an action of waſte, for waſte in cutting down trees by his termors.

Sid. 152. Lev. 107. Keb. 557. Count de Rutland's caſe. *Ja. 1. Bonang. & Pull. 166.*

* They may be cut down for the repair of the chancel or of the church by the ſtat.

Note; Leaſes may be made without impeachment of waſte two ways; 1. Expreſsly by words in leaſe, declaring the ſame: or, 2. Impliedly by conſtruction of law; as if a leaſe be made for life, the remainder for life, this is diſpuniſhable of waſte, and ſo not warranted by the ſtatutes; becauſe in waſte the place waſted is to be recovered, as well as treble damage, which the reverſioner in this caſe cannot do, without deſtroying the intermediate eſtate for life.

6 Co. 37. Cro. Car. 95.

But if a leaſe be made to one for three lives, this leaſe is good, becauſe it is not diſpuniſhable of waſte, and the occupant, if any

6 Co. 37.

happen, ſhall be puniſhed for waſte within the ſtatute of *Glouceſter*, *c.* 5. which gives an action of waſte againſt any one that held in any manor for term of life or years; and an occupant in this caſe holds for term of life.

(F) Of Leaſes by Parſons, Vicars, and others, with reſpect to other Qualifications.

AS to leaſes made by parſons, vicars, and others, having benefices or promotions with cure of ſouls, theſe things are to be obſerved:

Co. Lit. 44. Comp. Incumb. 359.

1. That parſons and vicars are expreſsly excepted out of 32 *H.* 8. *c.* 28.; ſo that they are not, as other ſole corporations, enabled by that ſtatute to make any leaſes to bind their ſucceſſors without the confirmation of the patron and ordinary, but remain as they did perfectly at common law, for any thing in that ſtatute. 2. That they are not reſtrained by 13 *Eliz.* *c.* 10. from making leaſes for twenty-one years, or three lives: but then ſuch leaſes muſt not only be confirmed by the patron and ordinary, but muſt alſo be made with conformity to the eight rules or qualities mentioned, otherwiſe they will not bind the ſucceſſor. 3. They, as well as others, are reſtrained by 13 *Eliz.* *c.* 10. from making leaſes for any longer time, notwithſtanding any confirmation or conformity to the rules before-mentioned.

Moor, pl. 836. Cro. Eliz. 775. Roll. Abr. 476. Dyer, 292, 293.

But it is neceſſary that the leſſor be a prieſt; for if a mere layman be inſtituted and inducted to a benefice, and make a leaſe for twenty-one years, or three lives, which is confirmed by the patron and ordinary, and then the incumbent be deprived *quia merè laicus*; yet the leaſe remains good, and ſhall bind his ſucceſſor, becauſe it was made by a *parſon de facto pro tempore*, whereof the law takes cognizance by the ſolemnity of his inſtitution and induction; and the people can take notice of no other. So, if the parſon were after deprived for contracting matrimony when the law was that prieſts could not marry, or for not reading the articles within two months, *&c.* yet his leaſes being confirmed by the patron and ordinary remain good againſt the ſucceſſor, as well ſince the ſtatutes before-mentioned, as they did at common law before the making thereof; becauſe being made by a lawful incumbent *pro tempore exiſtente*, they ought not to be impeached by any ſubſequent act or neglect of the parſon.

Cro. Jac. 552. Palm. 22. Biſhop of Oſſory's caſe.

But if he who makes ſuch leaſe be but a ſuppoſed incumbent, or be in a church by a ſuper-inſtitution, or the like ſeeming title, and ſo be reputed the legal incumbent, he cannot make a leaſe to bind after his death, or the death of the true incumbent: therefore, where *A.* was made lawfully biſhop of *Oſſory* in the time of *Edw.* 6. and after, in the time of Queen *Mary*, *B.* was conſecrated biſhop of that dioceſe, living *A.*, who was not deprived, and then *B.* made a leaſe of parcel of the poſſeſſions of the biſhoprick, and then *A.* died, and *B.* ſurvived him about three years; yet after his death it was adjudged, that this leaſe ſhould not

not bind the ſucceſſor, becauſe it was a voluntary act, and tended to the impoveriſhing of the ſucceſſor, and *A.* not being deprived, continued biſhop ſtill; ſo that the conſecration of *B.* was a mere nullity, and never made him biſhop of that dioceſe: but yet they held, that all judicial acts done by *B.* as inſtitutions, certificates, *&c.* were good, becauſe they were neceſſary, and could then be performed by no other.

So, if one were appointed biſhop of a dioceſe, but never ordained or conſecrated, (as, it is ſaid, in the time of *Ed.* 6. ſome were not,) then leaſes made by ſuch biſhops, though confirmed by the dean and chapter, will not bind their ſucceſſors, becauſe for want of ordination and conſecration they are no biſhops at all, and conſequently, their acts null and void in themſelves. But if one were lawful biſhop at the time of making ſuch leaſe, no deprivation after will avoid the leaſe, becauſe there was nothing wanting when it was made, and the deprivation after ſhall not impeach that which was good in itſelf before. Bro. tit. Leaſes, 68.

If the incumbent, be he clerk or layman, were under the age of twenty-one years at the time of making a leaſe, yet ſhall not his ſucceſſor avoid it for this cauſe, if there was nothing elſe wanting; for though he ought not to have been admitted under age, yet after ſuch admiſſion he continued rightful parſon till deprived, and then all acts done by him in the mean time continue good and unavoidable; and in his politick capacity, as parſon, his age is not material or imputable. Bro. tit. Age, 80.

Though leaſes made by parſons or vicars be in all reſpects well made, yet by non-reſidence they become void by virtue of the ſtatute 13 *Eliz. c.* 20. which is as followeth; *viz.* "That the "livings appointed for eccleſiaſtical miniſters may not by corrupt "or indirect dealings be transferred to other uſes, be it enacted, "That no leaſe hereafter to be made of any benefice or eccleſiaſtical promotion with cure, or any part thereof, and not being "impropriated, ſhall endure any longer than while the leſſor "ſhall be orderly reſident, and ſerving the cure of ſuch benefice, "without abſence above eighty days in any one year, but that "every ſuch leaſe immediately upon ſuch abſence ſhall ceaſe and "be void, and the incumbent ſo offending ſhall for the ſame loſe "one year's profit of his ſaid benefice, *&c.* and that all chargings of ſuch benefices with cure with any penſion or profit out "of the ſame to be yielded or taken, other than rents upon "leaſes to be made according to the meaning of this act, ſhall "be utterly void: Provided, that every parſon, by the laws of "this realm allowed to have two benefices, may demiſe the one "of them, upon which he ſhall not be then moſt ordinarily reſident, to his curate only that ſhall there ſerve the cure for him; "but ſuch leaſe ſhall endure no longer than during ſuch curate's "reſidence without abſence above forty days in any one year."

This ſtatute, though it extends only to thoſe who have the cure of ſouls, yet by reaſon of the multiplicity of parſonages and vicarages in *England*, hath been held to be a general law, whereof the judges are bound to take notice, without pleading it. 2 Roll. Abr. 465. Yelv. 206. 1 Brownl. 208. 4 Co. 120.

Upon

Yelv. 106. Brownl. 208. Jenning v. Haithwait.

Upon an action of treſpaſs brought, and not guilty pleaded, the jury found the defendant vicar of *D.* and that he ſuch a day leaſed his vicarage to *J. S.* for three years, rendering rent, which *J. S.* aſſigned one acre, parcel thereof, to the plaintiff, and that the defendant was abſent ſeveral quarters in one year, *viz.* fifty days in each quarter: it was adjudged for the defendant, that this was ſuch an abſence as avoided his own leaſe within the ſtatute.

Noy, 116. Sidner v. Calvert.

So, it is ſaid to have been adjudged, that if a parſon be abſent at ſeveral times, *viz.* ten days at one time, and twenty days at another, and ſo till eighty days be fulfilled in one year, that this is ſuch a non-reſidence within the ſtatute as ſhall avoid his leaſe.

Bulſ. 111. Sheppard v. Twoulfie. [This caſe in Bulſtrode hath been ſince denied to be law: ſuch a conſtruction would entirely defeat the ſtatute, for at this rate an incumbent need be reſident only five days in one year. Quilter v. Muſſendine, Gib. Rep. 228.]

And yet, where it was found by ſpecial verdict, that a parſon made a leaſe of his glebe and tithes, and was abſent by the ſpace of eighty days in a year; yet becauſe it was alſo found that he did upon all occaſions reſort to his pariſh, and perform divine ſervice in the church four days in a week, and duly ſerve the cure thereof, though he lived in another pariſh, which was a non-reſidence within the ſtatute *H.* 8. yet this was not ſuch a non-reſidence as ſhould avoid his leaſe within the ſtatute of 13 *Eliz. c.* 20. for that, they held, muſt be a non-reſidence for eighty days together at one time in the year.

Degg. 126. [(*a*) This allegation is clearly unneceſſary. Mills v. Ethridge, Bunb. 210.]

By this it appears, the ſureſt way to avoid the leaſe (if the caſe will bear it) is, to allege the abſence for eighty days together (*a*), becauſe then the cure muſt moſt certainly be neglected: but ſince it alſo appears, that if the cure were not neglected, though the abſence were for eighty days in a year at ſeveral times, that there ſhould be no avoidance of the leaſe; therefore the other caſes which hold the abſence at ſeveral times, till eighty days be accompliſhed in a year, ſufficient to avoid the leaſe, muſt be intended ſuch an abſence as was accompanied with the neglect of the cure; otherwiſe, the caſes will not be conſiſtent and uniform.

Degg. 126.

And note; Where any leaſe becomes void for abſence above eighty days, no confirmation of the patron and ordinary can ſave it. [In ſuch caſe it is merely void, and the leſſee cannot maintain an ejectment even againſt a ſtranger, who enters without any colour of title.]

Doe v. Barber, 2 Term Rep. 749. Cro. Eliz. 88 Goſnal and Kindlemarſh. Cro. Eliz. 490. Earl of Lincoln v. Hoſkins.

If an information be brought on the ſtatute 13 *Eliz. c.* 20. or if that ſtatute be pleaded to avoid a leaſe, bond, or covenant, it ought to be ſaid, not that the incumbent was abſent, but alſo that he was abſent eighty days & *ultra:* for to ſay eighty days, and nothing more, is not ſufficient within this ſtatute, which ſays above eighty days; for he may be abſent eighty days, and come again in the night of the 80th day; and if ſo, he is no offender within this ſtatute; and therefore it ought to be expreſsly alleged, and not by implication.

3 Bulſ. 202. Rudge and Thomas.

So, it muſt alſo be ſaid, that he was abſent eighty days & *ultra* in a year; otherwiſe it will not be good, for ſo is the ſtatute expreſsly.

Alſo

Alſo, it muſt be ſhewed that the incumbent was voluntarily absent (*a*); for if he were abſent, or did not ſerve the cure, by reaſon of ſickneſs, ſuſpenſion, or becauſe he was inhibited by the ordinary from ſerving the cure, or was ejected by any out of the parſonage-houſe, or upon the account of any other reſtraint, this is no ſuch abſence as will avoid any leaſes, *&c.* within theſe ſtatutes. Cro. Eliz. 590. Moor, 540. 6 Co. 21. Butler and Goodal, Cro. Eliz. 100. Collins v. Vaughan, Moor, 448.

[(*a*) But it is now ſettled, that it is not neceſſary to aver that the abſence was voluntary, or if it be otherwiſe, it is matter of excuſe, which it lies upon the parſon to ſhew. Mills v. Etheridge, Hunb. 210. Quilter v. Muſſendine, Gilb. Eq. Rep. 228. Note; A ſequeſtration of a benefice under *fieri facias* is no impediment to the ſerving of a cure; ſo that the non-reſidence of the incumbent in ſuch a caſe is a clear avoidance of any leaſe he may have entered into. Doe v. Mears, Cowp. 129.]

Theſe laſt caſes prove the unreaſonableneſs of the conſtruction that has been made of this ſtatute in the following caſe: Where a parſon, after 13 *Eliz. c.* 20. made a leaſe to one, for twenty-one years *a die confectionis*, of lands uſually letten, rendering the ancient rent; and this was confirmed by the patron and ordinary; then the parſon died; and the queſtion was, if his death was ſuch a non-reſidence as that eighty days after being incurred ſhould avoid the leaſe? *Moor* reports this caſe, that the judges were divided in it, and that though judgment was given againſt the defendant, under-leſſee of *A.* in an action of debt brought by *A.* for the rent; yet the reaſon of it was for his miſrecital of the ſtatute, whereby he would have avoided the leaſe to *A.*, and, conſequently, the under-leaſe to himſelf. But *Cro.* reports the caſe to be adjudged, that the death of the parſon was a non-reſidence within that ſtatute to avoid his leaſes; for, the court ſaid, the intent of the ſtatute was to provide againſt dilapidations, and for maintenance of hoſpitality, and therefore muſt be intended to avoid leaſes, not only for non-reſidence, but alſo by the death or reſignation of the parſon; for otherwiſe dilapidations would be in the time of the ſucceſſor, and he could not maintain hoſpitality. And *Hale* ſays, this was adjudged, as it is reported by *Cro.* by the opinion of three judges againſt one, but ſays, it was a hard opinion: and therefore (*b*) where the ſame point came again in queſtion, it was adjudged that the death of the parſon was not ſuch a non-reſidence as ſhould avoid a leaſe duly made. 1. Becauſe the intent of the ſtatute was only to oblige the parſons to reſidence, by impoſing a forfeiture upon them of a year's value of their benefices if they did not reſide, which could not be, if death were a non-reſidence within that ſtatute; for, immediately upon the death of the incumbent, all the profits of the living, except for ſupply of the cure in the vacation, belong to the ſucceſſor; how then could the biſhop ſequeſter them for the uſe of the poor, for a whole year, as the ſtatute directs? 2. It is plain the ſtatute meant a wilful negligence, becauſe it ſays, *the party ſo offending*; but death is involuntary, and cannot be puniſhed. 3. The ſtatute of 14 *Eliz. c.* 11. which allows leaſes of houſes in market-towns for forty years, would be of no effect, if death ſhould be interpreted a non-reſidence to avoid them. 4. The confirmation of the patron and ordinary would be to no purpoſe, and Cro. Eliz. 123. Moor, 270. Mott and Hales. (*b*) 2 Lev. 61. Vent. 244. 3 Keb. 46. 107. 193. Bayly and Munday.

and their permiſſion to make leaſes for twenty-one years or three lives, with ſuch confirmation, would be vain and idle, if ſuch leaſes ſhould continue no longer than during the parſon's life; for he might have made them good during his own life, without any ſuch permiſſion or confirmation. 5. Theſe caſes above cited prove that the non-reſidence, within this ſtatute, muſt be ſuch as is voluntary; and therefore ſickneſs, inhibition by the ordinary, &c. which are involuntary, are a good excuſe of non-reſidence within this ſtatute, and ſo have been allowed.

(*b*) 14 Eliz. c. 11. § 15, 16. But for as much as ſeveral evaſions were found out to fruſtrate and elude the true intent of the ſaid ſtatute of 13 *Eliz.* *c.* 20. therefore, by another (*b*) act of parliament it was provided as followeth; *viz.* "That whereas ſundry evil diſpoſed perſons have de-"frauded the true meaning of the laſt mentioned ſtatute, by "bonds and covenants, of ſuffering other perſons to enjoy ec-"cleſiaſtical livings, and the fruits thereof, for that ſuch bonds "and covenants are not in law taken to be leaſes, although in-"deed they amount to as much; be it therefore enacted, That "all bonds, contracts, promiſes, and covenants hereafter to be "made, for ſuffering or permitting any perſon to enjoy any be-"nefice or eccleſiaſtical promotion, with cure, or to take the "profits or fruits thereof, (other than ſuch bonds and covenants "as ſhall be made for aſſurance of any leaſe heretofore made,) "ſhall, to all intents and purpoſes, be adjudged of ſuch force "and validity, and not otherwiſe, as leaſes by the ſame perſons, "made of ſuch benefices and eccleſiaſtical promotion, with cure; "and be it further declared and enacted, That all leaſes, bonds, "promiſes, and covenants, of and concerning benefices and ec-"cleſiaſtical livings with cure, to be made by any curate, ſhall "be of no other or better force, validity, or continuance, than "if the ſame had been made by the beneficed perſon himſelf "that demiſed, or ſhall demiſe the ſame to any other curate."

(*c*) 43 Eliz. c. 9. And by another (*c*) act for the continuance of the ſaid ſtatutes of 13 *Eliz.* *c.* 20. and 14 *Eliz.* *c.* 11. there is another clauſe, by way of addition, "That all judgments to be had, for the intent "to have and enjoy any leaſe contrary to the ſaid ſtatutes, ſhall "be deemed void, in ſuch ſort as bonds and covenants are ap-"pointed to be void for that purpoſe."

The ſtatute of 13 *Eliz.* *c.* 20. as appears by the expreſs words thereof, extends only to leaſes to be made after that ſtatute: therefore, where a parſon made a leaſe for ſixty years before the 13 *Eliz.* which was confirmed by the patron and ordinary, and then the parſon died, and his ſucceſſor, after the ſtatute of 14 *Eliz.* *c.* 11. gave a bond that the leſſee ſhould enjoy the leaſe during the term, and after became non-reſident for above eighty days in one year, and ſo would have avoided both the leaſe and the bond; yet in an action of debt brought thereupon, it was adjudged, that neither of them were within either of thoſe ſtatutes; for as to the leaſe, that being made and duly confirmed before 13 *Eliz.* *c.* 20. was good at common law; and then the bond given for enjoyment of ſuch leaſe, though it were given after 14 *Eliz.* *c.* 11. yet was neither within the words nor intent of that ſtatute, which extends only

o bonds given after that ſtatute, for enjoyment of leaſes, con-
rary to 13 *Eliz.* *c.* 20. which this leaſe, that was made before,
annot be ſaid to be: nor could the ſucceſſor himſelf avoid this
eaſe, ſo that the bond given for the enjoyment thereof cannot
e unlawful.

Alſo, the ſaid ſtatute of 13 *Eliz.* *c.* 20. extends only to avoid leaſes for non-reſidence or abſence for above eighty days in one year, and the ſtatutes of 14 *Eliz.* *c.* 11. and 43 *Eliz.* *c.* 9. avoid only bonds, covenants, promiſes, and judgments, made or given for enjoyment of eccleſiaſtical livings or benefices, become void for ſuch non-reſidence or abſence, and not where the living, *&c.* became void by death, reſignation, or deprivation, *&c.* which are voidances at common law. Comp. Incumb. 361. 264.

Therefore, where a parſon covenanted with *A.* that he ſhould have his tithes for thirteen years abſolutely, without ſaying, if he ſhould ſo long live, and continue incumbent, and afterwards, before the expiration of the term, reſigned his benefice, and ſo became abſent or non-reſident for above eighty days; and his ſucceſſor, after induction, ouſted *A.* of the tithes; upon which he brought an action of covenant againſt the firſt parſon, who pleaded the ſtatute of 14 *Eliz.* *c.* 11. in bar; it was adjudged by *Coke*, *Dodderidge*, and *Haughton*, that though this leaſe was void by the reſignation, yet the action well lay upon the covenants in the leaſe; for the 13 *Eliz.* *c.* 20. avoids leaſes only where the parſon becomes abſent or non-reſident for above eighty days in a year; and the 14 *Eliz.* *c.* 11. as appears by the preamble, intended only to avoid bonds, covenants, and promiſes made or given for the enjoyment of eccleſiaſtical livings, or the fruits thereof, upon pretence that they were not leaſes within the ſaid ſtatute 13 *Eliz.* *c.* 20. and enacts, that they ſhall be of ſuch force and validity, and not otherwiſe, as leaſes by the ſame perſons would have been, and ſo extends to avoidance thereof for abſence, or non-reſidence, for above eighty days only, as the other act did the leaſes themſelves; but this reſignation was an immediate voidance of the leaſe at common law, and an action thereby attached in the leſſee immediately, for breach of the covenant before the avoidance, by abſence or non-reſidence for above eighty days, by force of the ſtatute had incurred: and theſe ſtatutes did not intend to intermeddle with avoidances at the common law, but left them as they were before, and, by conſequence, this reſignation, which defeated the intereſt of the leſſee at common law, was a breach of the covenant, for which the action well lay. So, they held, if the parſon had died, or been deprived, *&c.* which would alſo in conſequence have defeated the intereſt of the leſſee; yet an action of covenant would have well lain againſt him or his executors; becauſe the covenant was abſolute, and this avoidance of his intereſt was an avoidance at the common law, and not by force of either of the ſtatutes; and then at common law ſuch leaſe or covenant is good, and the parſon, at his peril, is to take care that the leaſe or covenant be made good according to his agreement; as if tenant for life covenants that another ſhall 3 Bulſ. 202. Roll. Rep. 403. Thomas v. Rudge.

enjoy

enjoy his lands for twenty-one years, and afterwards commits a forfeiture, yet he ſhall be bound by his covenant.

Brownl. 125. Wheeler and Heydon, *per* Haughton.

But if a parſon makes a leaſe for thirty or forty years, if he ſo long live, with covenants for enjoyment thereof accordingly, this ſo qualifies the leaſe and covenant, that though his death will determine the leaſe, yet it will be no breach of the covenant. But as by ſuch leaſe and covenant he takes upon him to do no other act whereby to avoid the leaſe: therefore, if he reſigns, or otherwiſe voids the living, an action of covenant will lie againſt him. But if this clauſe were added, *viz.* "*and ſhall ſo long continue* "*parſon*," then this clauſe leaves him at liberty to avoid it by reſignation, non-reſidence, or otherwiſe, becauſe it qualifies the leaſe to continue no longer than whilſt he continues parſon, and in the mean time leaves it in his election how long or ſhort a while that ſhall be.

Moor, 641. Webb. v. Hargrave.

A clerk entered into an obligation, the condition of which was that he being preſented, inſtituted, and inducted to a benefice then void, ſhould, upon requeſt of the patron, reſign; and he afterwards made a leaſe to the patron, and then was abſent for above eighty days together, whereby the leaſe became void; and then being requeſted by the patron to reſign, which he refuſed, the patron brought an action of debt upon the bond, to which the defendant pleaded the ſtatute of 13 *Eliz. c.* 20. & 14 *Eliz. c.* 11. and that after his induction he let the leaſe to his patron the plaintiff, and then was abſent above eighty days together, and averred that the obligation was made for the enjoying of the benefice let by the ſaid leaſe, and to the intent to compel him not to avoid the leaſe by abſence, for fear of being required to reſign, and demanded judgment, *&c.* upon which the plaintiff demurred; and the whole court held the plea good, and the averment to be very apt, becauſe the obligation being made generally to reſign upon requeſt, might well be averred to be for this particular purpoſe, and ſo void.

Cro. Eliz. 88. 490.

This caſe fully proves, that the bonds which have been attempted and taken from parſons upon making leaſes, with condition that they ſhould duly ſerve the cure, and not be abſent from their benefice by the ſpace of eighty days, when they appear, or can be averred to be given for ſecurity of leaſes made by ſuch parſons, will be void within theſe ſtatutes, and no recovery allowed thereupon. But bonds, with condition not to reſign, or do any other act which ſhould cauſe an avoidance at common law, though they are made for ſecurity of ſuch leaſes, yet they will be good and binding, unleſs the parſon can ſhew an avoidance by abſence for above eighty days, and alſo aver that the bond was given to prevent ſuch avoidance; for otherwiſe, if the leaſe becomes void by reſignation, or other voluntary act of the parſon (except ſuch abſence for above eighty days,) the bond is preſently forfeited at common law; and the ſtatutes will no more relieve upon account of any abſence after, than they would againſt a covenant for that purpoſe. But if ſuch bonds were given, with a condition in the diſjunctive, not to be abſent above eighty days, nor to reſign

reſign or do any other act, which ſhould cauſe an avoidance of the leaſe at common law; *quære*, whether the whole bond be abſolutely void, or if it ſhall be good or bad, according as the avoidance firſt happens to be either upon theſe ſtatutes or at common law?

A parſon let his rectory for three years, and covenanted that the leſſee ſhould have and enjoy it during the ſaid term, without expulſion, or any thing done or to be done by the leſſor; and was alſo bound in an obligation to the leſſee for performance of covenants; and afterwards, for not reading the articles, was *ipſo facto* deprived by the ſtatute 13 *Eliz. c.* 12. whereby the leaſe became void: yet it was the opinion of all the juſtices, that the bond was not thereby forfeited, becauſe the leſſee was not ouſted by any act done by the leſſor, but rather for a nonfeaſance, and ſo out of the compaſs of ſuch covenant; as if one be bound not to do any waſte, permiſſive waſte is not within the danger of it. But otherwiſe it would have been, if the leſſor had covenanted not to omit the doing of any thing whereby the leaſe ſhould become void. 4 Leon. 38, 9. pl. 104. Degg. 128. Comp. Incumb. 364.

So, if one be bound by obligation to make ſuch a leaſe for twenty-one years, this is good, and ſhall bind him: but then it ſeems, that if this leaſe become afterwards void for non-reſidence, and the bond be put in ſuit, if it be averred that the bond was given for ſecurity of ſuch leaſe againſt non-reſidence, this will avoid the bond alſo. 3 Bulſ. 203. Comp. Incumb. 364.

If the parſon's leſſee aſſign over his leaſe to another, and the parſon be abſent above eighty days in a year, the leſſee may alſo plead the ſtatutes of 13 *Eliz. c.* 20. & 14 *Eliz. c.* 11. for the avoiding of his own aſſignment and agreement with the aſſignee; becauſe if he aſſigned over no more than what the parſon demiſed to him, ſuch aſſignment muſt be ſubject to the ſame determination the original leaſe itſelf was; and if that be determined, he who claims under the parſon, may as well ſhew it in avoidance of his own aſſignment, as the parſon might in avoidance of his own leaſe. Bulſ. 111. Comp. Incumb. 364.

It hath been held, that if a parſon makes a leaſe for years, which after becomes void by the ſtatutes for non-reſidence, and there is an obligation for performance of covenants, although there be ſome covenants which do not concern the leaſe compriſed in the indenture, yet is the bond entirely void; otherwiſe all the meaning of the ſtatute would be defrauded by putting a lawful covenant into the indenture. Cro. Eliz. 529, 30. Lee & *Ux.* v. Colehill.

Though the ſtatutes aforeſaid make void leaſes, bonds, &c. where the parſon is non-reſident, and neglects to ſerve the cure for above eighty days together, yet ſuch leaſes or bonds, &c. are are not void *ab initio*, but only from the time that ſuch abſence of eighty days ſhall be completed: for the words of the ſtatute are, *ſhall endure no longer but while the leſſor ſhall be ordinarily reſident*, (therefore ſo long it ſhall endure,) *and ſerve the cure without abſence above eighty days in one year; but that every ſuch leaſe, immediately upon ſuch abſence, ſhall ceaſe and be void*; therefore, till ſuch abſence Comp. Incumb. 364. Degg. 124.

ſence of above eighty days be accompliſhed, the leaſe is good and in being.

Cro. Eliz. 78. Wallis and Cox. Cro. Eliz. 245.

Accordingly it hath been adjudged, that if ſuch leaſe by indenture be made, containing covenants on the leſſor and leſſee's part, and after by abſence for above eighty days both the leaſe and covenants become void; yet an action of covenant well lieth for the leſſor or leſſee, for any covenant broken before the end of the eighty days abſence. But if the leſſor was abſent for above eighty days, though part of the time incurred pending the action, and

3 Leon. 102.

before plea pleaded, yet it is a ſufficient abſence, and may be pleaded in avoidance of the leaſe.

Dyer, 372. a. b.

Therefore, if in ſuch caſe an action of covenant be brought, the defendant muſt not only plead the ſtatutes, which make the leaſe and covenants void, but muſt alſo plead the performance of covenants to the time of the eighty days abſence expired.

Cro. Eliz. 490. Earl of Lincoln v. Hoſkins.

If thoſe ſtatutes are pleaded to avoid any action, care muſt be taken not only to allege the abſence or non-reſidence fully, but alſo that the ſtatutes be truly recited: therefore, where the ſtatute of *Eliz.* was recited with this clauſe, *tam diu* (where the words are *tam cito*) *quam, &c. aut aliqua pars inde venerit ad aliquam poſſeſſionem, vel uſum inhibitum, vel, &c.* (which words, by 14 *Eliz. c.* 11. are repealed, and appointed to be omitted,) judgment was given againſt the party for this miſrecital, without any regard to the matter in law.

Comp. Incumb. 362. Leon. 100. St. John v. Pettit.

Though the ſtatute of 13 *Eliz. c.* 20. allow a parſon or vicar that hath benefices to demiſe the one of them, upon which he ſhall not be ordinarily reſident, to his curate, yet it is thought from 14 *Eliz. c.* 11. that if ſuch curate leaſe the ſame over to another, though he himſelf is not abſent above forty days in any one year, if the incumbent or parſon be abſent above eighty days in the ſame year, that this ſhall avoid the curate's leaſe; becauſe 14 *Eliz. c.* 11. ſays, that all leaſes, bonds, *&c.* of benefices and eccleſiaſtical livings with cure to be made by any curate ſhall be of no other nor better force, validity, or continuance, than if the ſame had been made by the beneficed parſon himſelf that demiſed or ſhall demiſe the ſame to any curate. Yet by *Tanfield*, when a parſon leaſeth to his curate, who leaſeth over, the ſtatute doth not make the leaſe void by any abſence of the parſon, but of the curate only for forty days; for otherwiſe, as he held, the intent of the ſtatute might be eaſily fruſtrated, which was, that he that ſerves the cure ſhould be the occupier of the glebe and tithes belonging to the church, and none other: but *quære?*

Comp. Incumb. 362.

But admitting that the parſon's abſence for above eighty days ſhould not avoid the curate's leaſe, yet we muſt diſtinguiſh who ſhall be ſaid a ſufficient curate for that purpoſe; and that is only one who is legally admitted by the ordinary of the place, according to the laws of the land: for otherwiſe he is no curate, although he ſerves the cure, and is reſident; ſo that if the parſon ſhould make a leaſe of the glebe and tithes to ſuch a nominal curate, yet by the parſon's abſence for above eighty days the leaſe will be avoided; and if they ſhould be ſequeſtered, in this caſe according

according to the ſtatute, the parſon cannot plead that they are let to his curate, becauſe he is no curate in law, and his having a cure there is an offence againſt the law, of which it is not reaſonable that either the incumbent or curate ſhould take advantage.

Note; It has been held, that a parſonage may be a manor; as, if, before the ſtatute *quia emptores terrarum*, the parſon, with the patron and ordinary, had granted parcel of the glebe to divers perſons to hold of the parſon by divers ſervices; this makes the parſonage a manor: and if the ſame be a copyhold manor, then, notwithſtanding all the ſtatutes before rehearſed, parſons and vicars, as well as all other eccleſiaſtical perſons, may grant copies for life, in tail, or in fee, according to the cuſtom of the manor: for the copyholder doth not derive his eſtate out of the eſtate or intereſt of the lord only, but from the cuſtom, and is ſaid to be in by the cuſtom, without any regard to the perſon of the grantor; and theſe grants by copy are good without the confirmation of the patron and ordinary, and are not avoided by non-reſidence or death, *&c.* of the parſon; neither do any of the ſtatutes aforeſaid extend to rectories and tythes that are impropriated and become lay-fee, and remain in the hands of laymen, but that they may do with them as with any other inheritance, whereof they are ſeiſed. But appropriations in the hands of biſhops, colleges, or other eccleſiaſtical perſons are liable to the aforeſaid ſtatutes and rules, as other inheritances whereof they are ſeiſed; and ſo are impropriations, if by preſentation, *&c.* the vicarage be reſtored to the church out of which it was endowed; for by ſuch preſentation they are become for ever after preſentable, and the impropriation is deſtroyed.

Comp. Incumb. 362. Roll. Rep. 202, 203. 4 Co. 23, 24.

In debt upon bond to perform covenants in a leaſe made by the defendant, the parſon, to the plaintiff, the defendant pleaded, that the leaſe was void by the ſtatute of 14 *El.*, becauſe he was abſent from his benefice above the ſpace of eighty days; part of which time incurred pending the action, and before the plea was pleaded. It was the opinion of the court, that the plea was good (*a*). But exception was taken to the pleading, becauſe the defendant ſays, that the ſaid church is a parochial church, *cum curâ animarum*, but does not ſay, that it was ſo at the time of the leaſe and obligation made; for it may be, that at the time of the leaſe there was a vicar, and then it was not *cum curâ animarum*. And upon that exception judgment was given for the plaintiff.

3 Leon. 102. Coxe's caſe.

[(*a*) As the full ſtatutable time had not incurred at the commencement of the action, and the ſtatute could therefore not *then* attach, this plea would *now*, it ſeems, be adjudged bad upon that ground. Evans v. Proſſer, 3 Term Rep. 188. Whether, *at law*, a clergyman may plead his non-reſidence in order to diſcharge himſelf of the obligation of his contract, is a point which doth not appear to have been yet judicially determined. Whether, *in equity*, he ſhall come forward as plaintiff, and inſiſt upon the breach of a poſitive law, and a neglect of his paſtoral duties, in avoidance of an agreement fairly entered into, is a point, one would think, too clear to admit of a doubt. And yet an attempt of this kind was not long ago made by Mr. Wm. Atkinſon, the parſon of Hillington in Norfolk, who filed a bill in the Exchequer for an account of tythes, and to ſet aſide a compoſition he had entered into with his pariſhioners, (among whom was his patron,) upon the ground that ſuch compoſition was void, becauſe, in the words of his bill, "*he was abſent from Hillington and without being reſident therein or ſerving the ſaid cure for above four-ſcore days in one year after the ſigning of the agreement of the 14th of October 1784*;" (the compoſition he had entered into with his pariſhioners;) "*and that he was abſent above four-ſcore days in 1785, and before the 10th of October in that year, and had not any other benefice during all that time.*" His bill was diſmiſſed with coſts. Atkinſon Clk. v. Sir Martin Browne Folkes, and others, July 13, 1792.]

Godb. 29. pl 38. Marrow's caſe.

Debt upon a bond with condition to pay ſuch a ſum, the defendant pleads the ſtatute 14 *Eliz. c.* 11. that all covenants, bonds, *&c.* made for the enjoying of leaſes made of ſpiritual livings by parſons, *&c.* ſhould be void, and avers that his bond was made for the enjoying of ſuch a leaſe. But, becauſe the condition was expreſsly for payment of money, the juſtices held it clear law, that the bond was good, and out of the ſtatute: and ſo by this caſe it appears, that ſuch averment will not hold good againſt an expreſs condition to another purpoſe. And this differs from *Hargrave* and *Webb*'s caſe, which was only to reſign generally on requeſt, and therefore might well and conſiſtently be averred to be to the intent to compel him not to avoid the leaſe by abſence, for fear of being required to reſign.

(G) Of the Conſent or Confirmation of others to Leaſes made by Eccleſiaſtical Perſons: And herein,

1. Where Confirmation is neceſſary either in reſpect of the Leaſes or Eſtates made, or of the Perſons making the ſame.

Comp. Incumb. 366. Co. Lit. 44, 45.

AS to this it is to be obſerved, that no confirmation whatever of any leaſe or eſtate made by eccleſiaſtical perſons not conformable to the eight rules or qualities before-mentioned, will bind the ſucceſſor, except only in the caſe of the concurrent leaſe: for that not being conſtrued to be within the reſtraint either of the 1 *Eliz. c.* 19. or 13 *Eliz. c.* 10. remains as it did before at common law; and as at common law confirmation was neceſſary to make ſuch leaſe good againſt the ſucceſſor, not being warranted by 32 *H.* 8. *c.* 28. (unleſs the old leaſe were ſurrendered or expired within one year after the making of the new leaſe), ſo it is ſtill, and with confirmation will bind the ſucceſſor. This therefore ſeems to be the chief, if not the only uſe of confirmation, as to any perſons allowed to make leaſes within 32 *H.* 8. *c.* 28. But there appears this difference between concurrent leaſes made by archbiſhops or biſhops upon the 1 *Eliz. c.* 19. and concurrent leaſes made by other eccleſiaſtical perſons on the 13 *Eliz. c.* 10.: for upon the 1 *Eliz. c.* 19. the concurrent leaſe is not reſtrained to any certain time before the expiration of the firſt leaſe, but may be made three, four, five years, or more, before the expiration thereof, ſo that both leaſes in the whole do not exceed twenty-one years, upon the conſtruction before taken notice of, that the ſecond leaſe is void, or at leaſt good by eſtoppel only, for ſo many years as are then to come of the firſt leaſe: but concurrent leaſes to be made by any of the eccleſiaſtical perſons within the reſtraint of 13 *Eliz. c.* 10. will not be good to bind the ſucceſſor, unleſs the former leaſe for years be ſurrendered or expired within three years next after the making of ſuch new leaſe: and this is expreſsly provided for, not by the 13 *Eliz. c.* 10. but by the 18 *Eliz. c.* 11. as hath already been ſhewn.

3 Co. 75. 10 Co. 60. a.

We are next to conſider where confirmation was neceſſary at the common law, and where it continues ſo at this day, in reſpect of

of the perſons making any leaſes or grants of their eccleſiaſtical poſſeſſions. The perſons who were reſtrained by the common law from making any leaſes, grants, or eſtates, to bind their ſucceſſors without confirmation, were only ſole corporations, as biſhops, abbots, deans, parſons, vicars, prebendaries, and ſuch like; for corporations aggregate might make what leaſes they pleaſed, without confirmation of any other perſons whatſoever; but the prudence of the common law never thought fit to truſt ſuch ſole corporations with any alienation or diſpoſition of their poſſeſſions to bind their ſucceſſors, without the concurrence and confirmation of other perſons. And though biſhops and abbots were conſtrued to have the whole eſtate and right of the land in themſelves, which parſons, vicars, prebendaries, and ſuch like, had not, yet as to the binding their ſucceſſors they had no more power than the others, without the concurrence and confirmation of the perſons ſubſtituted and appointed by law for that purpoſe.

And where ſuch ſole corporations make any concurrent leaſe upon the ſtatutes before-mentioned, the law continues the ſame at this day, and they muſt be confirmed in the ſame manner as any other leaſes or eſtates made by the ſame perſons muſt have been at the common law. Comp. Incumb. 366. Co. Lit. 44.

So alſo parſons, vicars, *&c.* can make no leaſe at this day, though it be with conformity to the eight rules before-mentioned, to bind their ſucceſſors, without confirmation of the ſame perſons who by common law were required to confirm all leaſes, grants, or eſtates made by them; for they are expreſsly excepted out of 32 *H.* 8. *c.* 28. and, conſequently, continued as they were at common law till 13 *Eliz. c.* 10. impoſed a total reſtraint on them, as well as all other eccleſiaſtical perſons, to make leaſes to bind their ſucceſſors for any longer term than twenty-one years, or three lives. And though by that ſtatute they are left at liberty, as well as other eccleſiaſtical perſons, to make ſuch leaſes, yet having no ability by 32 *H.* 8. *c.* 28. to make them ſolely, as other ſole corporations had; therefore, to make good even ſuch leaſes againſt their ſucceſſors, they muſt have the confirmation of the ſame perſons, and in the ſame manner, as they muſt have had at the common law before the making of any of thoſe ſtatutes. Co. Lit. 44. b. Cro. Eliz. 18. Comp. Incumb. 367.

The grants of ancient offices belonging to eccleſiaſtical perſons are not within any of the ſtatutes before-mentioned, but remain as they did at common law, and therefore may be granted with the ancient fee: but then all ſuch grants muſt be confirmed to bind the ſucceſſor, becauſe they muſt have been ſo at the common law. 10 Co. 60. *Vide* tit. *Offices.*

2. What Perſons are to confirm ſuch Leaſes or Eſtates, and in what Manner.

As to the perſons who are to confirm ſuch leaſes or eſtates, we muſt take notice that this varies according to the nature of the perſons who make ſuch leaſes, and the nature of the title of the perſons who are to confirm the ſame. [It is ſaid by Jones, J. *in argument*, that a recuſant though diſabled to preſent, ſhall yet be patron to confirm the leaſe of the incumbent. Sir W. Jones, 22.]

Co. Lit. 300. b. Bro. tit. Leaſes 64. Co. 153. 11 Co. 19. b.

Therefore, if a parſon makes a leaſe for three lives, or twenty-one years, or leſs, obſerving the rule before-mentioned, this is to be confirmed only by the patron and ordinary, and no confirmation of the dean and chapter is required thereto; for they have nothing to do with that which the biſhop doth, as ordinary, in the lifetime of the biſhop.

Bro. tit. Leaſes 64. Co. Lit. 300. b.

But if the biſhop be patron of the church in right of his biſhoprick and alſo ordinary, then the dean and chapter ought likewiſe to confirm all leaſes made by the parſon, becauſe in ſuch caſe the advowſon of the church is parcel of the biſhoprick, which cannot be charged to bind the ſucceſſor without the concurrence and confirmation of the dean and chapter; and how far the ſucceſſor of the parſon will be bound in ſuch caſe, will appear hereafter.

Dyer, 239. Pent. 80. Hodges v. Tucker.

So, where a prieſt in the cathedral church of *Wells* being parſon imparſonee of the church of *W.* made a leaſe by indenture for 100 years before 13 *Eliz. c.* 10. rendering rent to him and his ſucceſſors; and this was confirmed by the dean and chapter only, without any confirmation of the biſhop, who was patron and ordinary; then the parſon died, and his ſucceſſor accepted the rent, and after, before 13 *Eliz. c.* 10. made a leaſe for forty years, which was confirmed by the biſhop, dean, and chapter; it was adjudged, that the firſt leaſe was *ipſo facto* void and determined by the death of the parſon who made it, ſo that no acceptance of the rent by the ſucceſſor after could make it good, for want of the patron and ordinary's conſent.

Dyer, 61. b. 206. b. 240. a. Plow. 529. Roll. Abr. 481. Co. Lit. 300. b.

So, where a prebendary in a cathedral church, or an archdeacon, made a leaſe for years of parcel of their poſſeſſions, to which confirmation was requiſite, and this was confirmed only by the dean and chapter, without any confirmation of the biſhop; it was held, this leaſe ſhould not bind the ſucceeding prebendary or archdeacon, becauſe the biſhop is patron and ordinary of every prebend, and may be ſo of an archdeaconry; and therefore, to make good leaſes by them againſt their ſucceſſors, the biſhop's confirmation ought likewiſe to be had, as well as the dean and chapter's.

Dyer, 356. a. b. Leon. 235. Co. Lit. 320. Roll. Abr. 479. 2 Bulſ. 290. 11 H. 6. 9.

But upon the books there ſeems a manifeſt diverſity between the confirmation of the biſhop, as patron and ordinary, without confirmation likewiſe of the dean and chapter, and their confirmation without the biſhop's; as alſo between the reſignation, deprivation, or tranſlation, and the death of the biſhop, who ſo alone confirmed as patron or ordinary: for if any dean, archdeacon, prebendary, parſon, or vicar, had made any leaſe for years at the common law, or ſhould make ſuch leaſe at this day, whereto confirmation is requiſite, and the biſhop, as patron and ordinary, confirms ſuch leaſe, without any confirmation of the dean and chapter, and then the dean, archdeacon, prebendary, parſon, or vicar dies, or is removed, and the biſhop collates another as patron and ordinary; yet cannot ſuch incumbent avoid the firſt leaſe, though it was not confirmed by the dean and chapter, becauſe he came in purely by the collation of the biſhop, as patron and ordinary, without any aid or concurrence from the dean and chapter; and therefore, as *Littleton* ſays, ought to hold himſelf content, and

Lit. § 548. Co. Lit. 343. b.

agree to that which his patron and ordinary have done, for he comes in ſubſequent to ſuch charge: but, as appears by the caſes before put, the confirmation of the dean and chapter alone, without the biſhop's confirmation likewiſe, will not be effectual to bind the ſucceeding archdeacon, prebendary, parſon, vicar, *&c.*, becauſe he derives no title under them, nor comes in with their aſſent or concurrence; for they have nothing to do with the collation of any perſon, but the biſhop does it abſolutely, and in virtue of his own power as patron and ordinary; and therefore if ſuch leaſes want his confirmation, thoſe who come under him may avoid them, notwithſtanding any confirmation of the dean and chapter, under whom they derive no title: but becauſe ſuch advowſon or right of collation is alſo parcel of the poſſeſſions of the biſhoprick, and to bind the ſucceeding *biſhop*, the confirmation of the dean and chapter is requiſite; as in all other caſes where the biſhop, who is a ſole corporation, makes any diſpoſition of the poſſeſſions of his biſhoprick: therefore without ſuch confirmation of the dean and chapter, the ſucceeding biſhop, or his incumbent, ſhall avoid ſuch leaſe. But here another diverſity ariſes between the tranſlation, reſignation, or deprivation of the biſhop, and his death. In the firſt caſe it is held, that the leaſes confirmed by him alone, without the confirmation of the dean and chapter, will bind the ſucceeding biſhop, and his incumbent, during his life; but in caſe of ſuch biſhop's death, ſuch leaſes ſo confirmed by him alone, as patron and ordinary, will not bind the ſucceeding biſhop or his incumbent: and a diverſity is taken where a biſhop, *&c.* makes any eſtate, leaſe, grant of a rent-charge, warranty, or any other act which may tend to the diminution of the revenues, which ſhould maintain the ſucceſſor, there, the reſignation, deprivation, or tranſlation of the biſhop, *&c.* is all one with his death; but where the biſhop is patron and ordinary, and confirmeth a leaſe made by the parſon without the dean and chapter, and after the parſon dieth, and the biſhop collateth another, and then is deprived, tranſlated, or reſigns, yet his confirmation remaineth good; for, ſays my lord *Coke*, the revenues that are to maintain the ſucceſſor are not thereby diminiſhed. But this ſeems a very precarious reaſon; and a better reaſon of the diverſity ſeems to be this; that when the biſhop, as patron and ordinary, has by deed under his hand and ſeal ſubſcribed his confirmation of the leaſe, this ought to be binding upon him, at leaſt during his own life; and therefore though he be afterwards tranſlated, deprived, or reſigns, yet, ſince theſe are either by his own immediate acts, or occaſioned by his default, it is not reaſonable they ſhould be allowed to avoid or derogate from his own acts, which otherwiſe would have bound during his life; for the law never permits any to avoid or derogate from his own acts: but theſe reaſons have no place after the biſhop's death, for then his confirmation is at an end, and can be no longer binding on his ſucceſſor, ſince he had no power to charge the poſſeſſions of the biſhoprick any longer than during his own life, without concurrence and confirmation of the dean and chapter, who are by law ſubſtituted and appointed to that purpoſe.

Dyer, 106. b. 221. b. Plow. 528. Bro. tit. *Leaſes*, 64. tit. *Confirmation*, 21. 30.

But yet it is moſt adviſable to have the confirmation likewiſe of the dean and chapter upon ſuch leaſes made, and in ſeveral books their confirmation is either pleaded or admitted, ſince without it the leaſe cannot bind any longer than during the biſhop's life who ſo confirmed it.

In ſome caſes the confirmation of the patron is neceſſary, and in ſome not: wherein this diverſity is taken in the books, that ſuch ſole corporations, as have not the abſolute fee and inheritance in them, as prebendaries, parſons, vicars, and ſuch like, if they make any leaſes or eſtates, there, to bind their ſucceſſors, the patron muſt confirm the ſame; but ſuch ſole corporations as have the whole eſtate and right in them, as biſhops, abbots, *&c.*, or ſuch corporations aggregate as have the whole fee and inheritance in them, as dean and chapter, maſter, fellows, and ſcholars of any college, hoſpital, *&c.*, theſe may make leaſes to bind their ſucceſſors, without any confirmation of the patron or founder, though the biſhop, abbot, dean, maſter, *&c.* were preſentable; and the reaſon of this diverſity appears in the nature of the right with which each is inveſted.

Roll. Abr. 481. Dyer, 273.

But if a parſonage or vicarage be a donative, then the confirmation of the patron alone is ſufficient to all leaſes, *&c.* made by the parſon or vicar, and ſhall bind the ſucceſſor without the confirmation of any other.

Co. Lit. 300. b. Comp. Incumb. 372.

If there be a patron paramount, as well as an immediate patron, confirmation of the immediate patron, without the other's confirmation, is not good: as, if a parſon be patron of the vicarage of the ſame church, and the vicar make a leaſe, confirmed by the parſon and ordinary, this is not good without the confirmation of the patron of the rectory alſo, becauſe both have an intereſt in the poſſeſſions of the vicarage.

2 Roll. Abr. 479. Leigh and Hallier. Cro. Eliz. 587. Dr. Herbert and Munday. Sid. 57. Keb. 280. Gie and Rider.

If the biſhop of *A.* be patron of the church preſentative of *B.*, which lies within his dioceſe, and this be the corps of a prebend in the church of *A.*, and the biſhop of *A.* be alſo patron of the church of *C.*, which is alſo preſentative, and lies in the dioceſe of the church of *D.*, and afterwards the church of *C.* be lawfully annexed and united by the aſſent of the biſhops, deans, and chapters of both dioceſes, to the ſaid prebend of *B.*, and afterwards the biſhop of *A.* collate *J. S.* to the ſaid prebend, which now by the union conſiſts of both churches, and inſtal him in the cathedral church of *A.*, and then the prebendary make a leaſe for years, which is confirmed by the biſhop, dean, and chapter of *A.*, and not by the biſhop of *B.*, yet this is a good confirmation; for by the union the biſhop of *D.* hath annexed the church of *C.* to the prebend of *B.*, and ſo hath deprived himſelf of the power of confirmation as ordinary; for after the union, the prebendary is inveſted in both churches by his inſtalment, without any preſentment, admiſſion, inſtitution, or induction to the church of *B.* or *C.*

Comp. Incumb. 370.

If the dean of any cathedral church make a leaſe or grant of any of his poſſeſſions, whereof he is ſole ſeiſed, to bind his ſucceſſors, and confirmation be neceſſary thereto; this muſt be confirmed by the biſhop and chapter of the ſame church, and not by the king

king, although he be the patron of ſuch deanery; becauſe, as hath been ſaid, the dean and chapter have the whole fee and inheritance in themſelves, and then the patron's concurrence or confirmation is not neceſſary. But it ſeems to be a doubt, whether the confirmation of the biſhop be neceſſary to ſuch grant or leaſe; and ſeveral books ſeem to hold, that the confirmation of the chapter alone, without the biſhop, is ſufficient to make good the dean's leaſes or grants that need confirmation. But yet it is laid down as a rule in the *Parſon's Counſellor*, that the biſhop's confirmation, as well as the chapter's, is neceſſary to all leaſes and grants made by the dean; and what is ſaid by *Fitz.* that the biſhop and chapter are in law looked upon but as one body, ſeems alſo to favour this opinion; for it is reaſonable that the whole body ſhould conſent to the granting of their poſſeſſions, and not that the biſhop, who is the head of the body, ſhould be unconcerned therein: alſo, the poſſeſſions of the dean are ſaid to be derived from and carved out of the biſhoprick, and the biſhop *de jure*, is ſaid to be patron of the deanery, which are all ſtrong arguments to prove the biſhop's confirmation neceſſary, though no book caſe can be found expreſsly to warrant it, but rather the contrary, as appears by the caſes firſt cited, wherein no notice is taken of the biſhop's confirmation, or that it was neceſſary; *ideo quære?*

Dyer, 40. b. 273. a. b. 349. pl. 18. Plow. 538. Roll. Abr. 478. 481. Degg. 120. F.N.B. 194.

3 Co. 75. b. 17 E. 3. 40. Regiſt. Orig. 230.

But if ſuch deanery be merely donative, then the king's conſent and confirmation, as patron, muſt be obtained, and that without the biſhop's confirmation is ſufficient, as in all other donatives, wherewith the biſhop has nothing to do.

Comp. Incumb. 371.

The dean of *Wells* might anciently have paſſed his poſſeſſions belonging to his deanery, with the aſſent of the chapter, without the biſhop's confirmation; afterwards, the deanery was ſurrendered by the dean thereof, with all the poſſeſſions thereunto belonging, and ſo diſſolved by act of parliament; the diſſolution was confirmed, and a new deanery erected, and the nomination of a new dean, and his ſucceſſors, given by the act to the king and his ſucceſſors; and it was thereby alſo enacted, that the dean and his ſucceſſors might demiſe, grant, or part with any of their poſſeſſions, in the ſame manner and form as the ancient deans might and uſed to do: in this caſe, if the new dean make any leaſe or grant of any of his poſſeſſions, the biſhop's confirmation was not neceſſary thereto, but only the chapter's, becauſe that alone was ſufficient before; neither is the confirmation of the king requiſite, becauſe this is not a mere donative of the king, though he hath the nomination of the dean; and by the ſtatute the new deanery is made of the ſame nature as the old one was, which could not be a donative, becauſe the dean and chapter might, without the conſent or confirmation of any others, have paſſed away their poſſeſſions.

Dyer, 173. Wallround and Pallard. Roll. Abr. 478. 481.

It has already been ſhewn, that all leaſes or grants made by archbiſhops or biſhops, whereto confirmation is neceſſary, are to be confirmed by the dean and chapter; for the law, not thinking fit to truſt the biſhop alone with the diſpoſition of his poſſeſſions to bind his ſucceſſors, did for that reaſon (amongſt others) conſti-

3 Co. 75. 10 Co. 60. a. 2 Co. 39. 6 Co. 34. b.

tute the dean and chapter to give their conſent and confirmation to all leaſes or grants made by him for that purpoſe.

Dyer, 58. a. b. 282. b. Noy, 94. Co. Lit. 301. Roll. Abr. 477. Leon. 234. 50 E. 3. Statham, tit. Aſſiſe, Biſhop of Litchfield and Coventry's caſe. 12 Co. 71. Latch. 237.

But if a biſhop hath two chapters, and makes a leaſe of any of the poſſeſſions of the biſhoprick, whereto confirmation is neceſſary, and this is confirmed only by one dean and chapter, this will not bind the ſucceſſor of the biſhop; for both are but one in reſpect of the biſhop, if the biſhop is choſen by both. So it is, if a biſhop be patron of an advowſon in right of his biſhoprick, and collate a clerk, who makes a leaſe for years, and the biſhop and one dean and chapter only confirm it; this will not bind the ſucceeding clerk of the ſucceeding biſhop, for want of confirmation by the other dean and chapter. But though both deans and chapters have uſed to confirm ſuch leaſes, yet if one dean and chapter have ſurrendered their poſſeſſions to the king, and then the biſhop or his clerk make a leaſe, whereto confirmation is neceſſary, and this is confirmed by the remaining dean and chapter only; this is good, and ſhall bind the ſucceſſor; becauſe by the ſurrender the one dean and chapter is diſſolved, and are as if they never had been: and although after ſuch ſurrender, the dean and chapter, who ſo ſurrendered, were again erected, yet confirmation by the other would be ſufficient; as was held by the greater part of the juſtices in *Ireland*, and by five juſtices in *England*, who certified their opinion to be ſo into *Ireland*.

12 Co. 71.

If two biſhopricks, that were originally diſtinct, are by lawful authority united, and the uſage hath been ſince the union, that the ſeveral deans and chapters have made confirmations ſeverally, *viz.* each dean and chapter of the leaſes or grants of the poſſeſſions of their reſpective biſhoprick, but the charter of union is not extant, or cannot be found; ſuch ſeveral confirmation is good; becauſe it ſhall be intended, by reaſon of the uſage, that the union was made ſpiritually, and in ſuch a manner, that, notwithſtanding the ſame, all leaſes and grants ſhould ſeverally be confirmed as they were before the union: and this, either to prevent confuſion, or by reaſon of the remoteneſs of the ſeveral deaneries; and then *modus & conventio vincunt legem*, and ſuch confirmation by the dean and chapter, of their own original poſſeſſions, is good. *Secùs*, if the union were made generally, for then both ought to confirm.

Dav. 1. Roll. Abr. 477.

If a biſhop hath no dean and chapter, then his grants are to be confirmed by the clergy of his dioceſe, where confirmation is neceſſary; for the law will not truſt any ſole corporation with the diſpoſition of his poſſeſſions, as hath been before obſerved.

Comp. Incumb. 367.

Whenever a dean and chapter are to confirm any leaſe or grant, the dean himſelf muſt join with the chapter, and confirmation by his ſubdean, deputy, or proctor, will not be ſufficient: for they have no power to charge the poſſeſſions of the church, neither is any ſtranger capable of being a dean-ſubſtitute or proctor, but only one of the chapter.

31 H. 4. 84. Bro. tit. Corporation, 17. Dav. 47. Palm. 461. Latch. 237.

Therefore, where upon a compoſition for tithes a parſon granted an annuity to the abbey of *Battel*, and this grant was confirmed by the biſhop, dean, and chapter, being patrons; but in the deed of confirmation it appeared that the dean was abſent, and did not

put his ſeal thereto, but that the chanter, who was his commiſſary, did it for him; it was held, that though the dean might have a commiſſary or deputy to exerciſe his ſpiritual juriſdiction, yet that ſuch deputy or commiſſary cannot charge the poſſeſſions of the church.

A leaſe was made by the free chapel and college of *Windſor* under the common ſeal, but the dean or warden himſelf was not party to the leaſe, but one who was his deputy in his abſence; and upon a ſuit in Chancery, to ſet aſide the leaſe, a ſtatute of the college was ſhewn for the authority of the deputy to exerciſe and perform the office of dean in all things *in perſon. & collegium, &c.* yet the judges held, that the confirmation by the deputy was not good, for that he had no authority to confirm this leaſe by the college ſtatute provided; for that by the word *collegium*, all the poſſeſſions of the college were not to be underſtood, but only the ſite and circuit of the college, or place of its ſituation. Which caſe ſeems to prove, that if by the ſtatutes of a church or college, the deputy-dean may confirm grants and join in the making of leaſes, as if the dean himſelf was preſent and joined therein, that then ſuch confirmation will be good; for the founder or patron may make what law he pleaſes for the regulation of the corporation, and when he has inveſted the deputy-dean with ſuch power, this has the ſame ſanction with any other laws for the regulation of that corporation. Dyer, 233. b. Comp. Incumb. 308. Latch. 251. Palm. 480.

As a deputy-dean, generally ſpeaking, cannot confirm leaſes, ſo neither can he who is but a mere commendatory dean, *viz.* a dean by *recipere in commendam*; for though he may take the profits, becauſe that was one end of his having the deanery *in commendam*, and may, with the chapter, chooſe a biſhop, and alſo exerciſe ſpiritual juriſdiction, and ſue or be ſued by that name, becauſe thoſe acts are of neceſſity, and for the advantage of the deanery; yet cannot he confirm leaſes, for this is merely a voluntary act, and ſuch commendatory dean is but *depoſitarius*, and not a dean complete. But if a dean be elected biſhop, and before his conſecration obtain a diſpenſation to hold his deanery *in commendam*, ſuch dean may well confirm leaſes, *&c.* and if he be tranſlated to another biſhoprick, and after his election, and before conſecration, obtain a diſpenſation to hold the ſame deanery *in commendam* with his ſecond biſhoprick, his old title remains; and confirmations, and other acts done by him as dean, are as good in law as if he had never been made biſhop: for there is a great difference between a *recipere in commendam*, and *retinere in commendam*; the one comes in purely by virtue of the diſpenſation, and has no other title; the other comes in legally at firſt as dean, and by virtue of the diſpenſation is only enabled to continue ſo ſtill; for that gives him no original new title, as in the other caſe, and therefore he is as much dean as he was before. And the ſame diſtinction holds between *recipere* and *retinere in commendam*, in caſe of biſhops; for a mere commendatory biſhop in the *recipere* cannot confirm leaſes, *&c.* but in ſuch caſe the archbiſhop is to do it. Alſo, the guardian of the ſpiritualties cannot confirm Noy, 94. Palm. 460. 480. Latch. 237. 250. Jon. 158. &c.

firm leaſes; for ſuch confirmation, being a mere voluntary act, and being to transfer a right to another, none are capable of it but thoſe who have the eſtate and right in themſelves, which ſuch commendators in the *recipere*, ſubſtitutes, rectors, deputies, and guardians of the ſpiritualties have not.

Where there is a mere commendatory dean in the *recipere*; *Quære*, whether the biſhop's leaſes and grants are not to be confirmed by the clergy of the dioceſe, in caſe where there is no dean and chapter, or by whom elſe?

Comp. Incumb. 368. All leaſes or grants, which need confirmation of a dean and chapter, are to be confirmed by the dean and major part of the corporation, and being ſo confirmed are good, though ſeveral of the particular members diſſent, or are not preſent; for the dean and major part of the chapter make the corporation, and the others have no negative voice to hinder ſuch majority from doing any corporate act; for otherwiſe, by the corruption or perverſeneſs of one or two members, the whole corporation might ſuffer; and that this was the law, appears by the following act of parliament:

33 H. 8. c. 27. "Albeit that by the common laws of this realm of *England*, "all aſſents, elections, grants, and leaſes, had, made, and granted, "by the dean, warden, provoſt, maſter, preſident, or other "governor of any cathedral church, hoſpital, college, or other cor- "poration, by whatſoever name they be incorporated or founded, "with the aſſent and conſent of the more or greater part of their "chapter, fellows, or brethren of ſuch corporation, having "voices of aſſent thereunto, be as good and effectual in the law, "to the grantees or leſſees of the ſame, as if the reſidue of the "whole number of ſuch chapter, fellows, and brethren of ſuch "corporation, having voices of aſſent had thereunto conſented "and agreed; yet the ſaid common law notwithſtanding, divers "founders of ſuch deaneries, hoſpitals, colleges, and cor- "porations within the ſaid realm, have, upon the foundations "and eſtabliſhment of the ſame deaneries, hoſpitals, colleges, "and other corporations, eſtabliſhed and made, amongſt other "their peculiar acts, local ſtatutes, and ordinances, that if any "one of ſuch corporation, having power and authority to aſſent "or diſſent, ſhould and would deny any ſuch grant or grants, "that then no ſuch leaſe, election, or grant, ſhould be had, or leaſed, "or granted; and for the performance of the ſame have been, and "be daily thereunto ſworn; and ſo the reſidue may not proceed "to the perfection of ſuch elections, grants, and leaſes, accord- "ing to the courſe of the common laws of this realm, unleſs "they ſhould incur the danger of perjury; for the avoiding "whereof, and for the due execution of the common law uni- "verſally within this realm, and every place, in one conformity "of reaſon to be uſed, be it ordained, eſtabliſhed, and enacted, by "the authority of this preſent parliament, That all and every par- "ticular act, order, rule, and ſtatute, heretofore made, or hereafter "to be made, by any founder or founders of any hoſpital, col- "lege, deanery, or corporation, at or upon the foundation of any "ſuch hoſpital, college, deanery, or corporation, whereby the grant, "leaſe,

" leaſe, gift, or election, of the governor or ruler of ſuch hoſ-
" pital, college, deanery, or corporation, as have or ſhall have
" voice or aſſent to the ſame, at the time of ſuch grant, leaſe,
" gift, or election, hereafter to be made, ſhould be in anywiſe
" hindred, or let, by any one or more, being the leſſer number of
" ſuch corporation, contrary to the form, order, and courſe of
" the common law of this realm of *England*, ſhall be from
" henceforth clearly fruſtrate, void, and of none effect, with an
" abrogation of all oaths heretofore taken to ſuch effect, and a
" penalty of 5*l.* on any perſon who ſhall for the future give
" ſuch oath."

When the dean and chapter are to confirm any leaſe, there ought not only to be a majority of them, but they ought alſo to be perſonally preſent, and *capitulariter congregati* in one place; which, with other circumſtances relating to the manner of their confirmation, will appear by the following caſe, which was thus:

The biſhop of *Fernes* makes a leaſe for years; the chapter, conſiſting of eleven perſons, *viz.* the dean and ten prebendaries, confirm it in this manner, *viz.* The dean makes one *J. S.*, a mere layman, his proctor or ſubſtitute, to give his aſſent to all leaſes or grants; this proctor, and three of the prebendaries only meet together, and fix the chapter ſeal to the confirmation of this leaſe, which confirmation was made in the name of the dean and chapter; after that, three others of the prebendaries, at ſeveral days, by themſelves, ſubſcribe their names to the ſaid confirmation; and after the death of the biſhop, his ſucceſſor enters upon the leſſee: it was adjudged lawful; for that the leaſe was void after the death of the biſhop who made it, for want of confirmation; 1. Becauſe no confirmation was made by the dean himſelf, but only by the proctor, which was not ſufficient; for he was merely a ſtranger to the chapter, and not capable of ſuch procuration; and therefore all he did was void both by the canon and common law; for in the canon law the rule is, *abſens non poteſt demandare votum ſuum, niſi uni de capitulo;* and there is another rule, *oportet quod procurator ſemper inſtitutus ſit de collegio;* and another, *votum dari non poteſt per literas:* and agreeable to this is the rule of the common law; for in the parliament the peers may give their vote by procurator or proxy, but their proctors muſt be barons, and members of the ſame houſe; and a ſtranger is not capable of being a proxy; and admitting he were, yet where a corporation paſſes any intereſt, the members thereof cannot give their aſſent by proctors or ſubſtitutes; and ſo the doubt in *Dyer* ſeems to be reſolved.

Dav. 42, 43. &c. dean and chapter of Fernes's caſe. Dyer, 145. Roll. Abr. 479.

Dyer, 145.

2. It was adjudged, that though the deed of a corporation needs no delivery, as the deed of a natural perſon does, but that the fixing of the corporation ſeal gives perfection to it, yet the major part of the corporation ought to be preſent when the ſeal is ſo affixed; for the major part of the chapter make the corporation, and their act is the act of the corporation, though the others do not agree; but here was only the proctor of the dean and three of the chapter preſent when the ſeal was affixed,

Dav. 47, 48. &c. 2 Roll. Abr. 23. Show. Par. Caſes, 29.

affixed, which is not ſufficient; for there ought then to be a majority preſent, otherwiſe it may be ſaid to be *cum aſſenſu*, but not *conſenſu*, and it ought to be *cum aſſenſu & conſenſu* of the dean and chapter: for as a body natural cannot do any perfect act, if it be diſmembered, the head in one place, and the hands in another; ſo neither can a body politick: and therefore they ought to be *capitulariter congregati* in a certain place. But it was agreed, that they are not confined to meet in their chapter-houſe, but may meet at any other place: but at ſuch meeting and ſealing there ought to be a majority then preſent; for if they ſet their names at ſeveral times, and in ſeveral places, after, this makes it not to be the act of the corporation, but *factum ſingulorum* in their ſingular and private capacity, and ſo ſhall not bind. It was alſo held, that the major part of the members being aſſembled, ought to give their voices and conſents ſingly and diſtinctly, as in the choice of knights of the ſhire, and not in a confuſed and uncertain manner; and when the major part ſo conſent, their conſent ought to be expreſſed by their fixing of the ſeal to the deed of confirmation or other grant.

Dyer, 282. b. in margin.

The corporation of the mayor, bailiffs, and burgeſſes of *Windſor* made a leaſe for years, one bailiff only aſſenting; and this was held a void leaſe, if there were two bailiffs; but as to the burgeſſes, it was held, that if the greater part of them aſſented, this would be ſufficient, though they were not preſent at the ſealing, if their aſſent was had before: but *quære*; for the foregoing caſe ſeems to be an authority that there muſt be a majority preſent at the time of the ſealing; for that is the act which expreſſes their conſent; and unleſs there be a majority then preſent, no aſſent at any other time can make that good, which, for want of a majority, was void when it was done. But in that caſe it appears, that the conſent of the majority was not had till after the ſealing; whereas in this caſe the conſent of the majority was before the ſealing, though ſuch majority was not preſent at the ſealing; and therefore *quære*, if this makes any difference?

Dyer, 40. Chaſin's caſe. Plow. 199. Roll. Abr. 478. 8 H. 7. 7, 8. 2 Leon, 176. 4 Leon, 11. Clerk's caſe. Bro. tit. Confirmation, 30. tit. *Faits* (45). Co. Lit. 300, 346. Godb. 210. Ireland and Barker.

But here a material difference is to be obſerved between a real intereſt and a bare authority or power only, as to the manner of concurring in ſuch leaſes. For if a dean be ſeiſed of lands in right of him and his chapter, or maſter or warden of an hoſpital or college in right of himſelf and the brothers and ſiſters or fellows of the ſame college, or a mayor in right of himſelf and the commonalty, and the dean, maſter, warden, or mayor, make a leaſe by indenture between the dean and chapter, maſter or warden, and the brothers and ſiſters or fellows of the ſame hoſpital or college, or between the mayor and commonalty of the one part, and *J. S.* of the other, whereby the dean with the aſſent and conſent of the chapter, or the maſter with the aſſent of the brothers and ſiſters, or the warden with the aſſent of the fellows and ſcholars, or the mayor with the aſſent of the commonalty, leaſe ſuch lands to *J. S.*, and with ſuch aſſent or conſent put thereto their common ſeal; this is a void leaſe; for the chapter, brothers and ſiſters, fellows and ſcholars, or commonalty, are

equally

equally ſeiſed, and have an equal right and intereſt in the lands with the dean, maſter, warden, or mayor, and therefore ought to join in the leaſing or granting part of the deed, and not only to give their aſſent, for they all make but one perſon in law; and a body cannot be diſtinct, ſo as that one part may aſſent to the acts of the other. But if the dean were ſole ſeiſed of the lands in right of his deanery, the maſter or warden in right of their maſter or wardenſhip, or the mayor in right of his mayoralty, then the leaſe of the dean, maſter, warden, or mayor alone, with the aſſent and conſent of the other perſons before-mentioned, is ſufficient; becauſe the dean, maſter, warden, or mayor only are ſeiſed and have a real intereſt, and the other perſons before-mentioned have no intereſt at all, but only a bare right or power of aſſenting to the leaſes or grants of their reſpective heads, and therefore their aſſent or conſent is ſufficient, without joining in the leaſing or granting part. So, if an abbot or prior be ſeiſed of lands in right of the abbey or priory, yet, becauſe the monks are all dead perſons in law, and not capable of having any lands, of being empleaded, and ſuch like acts; therefore, though they, together with the abbot or prior, conſtitute and make up but one body, yet the abbot or prior only have the power of leaſing, and the aſſent or conſent of the convent muſt be had and expreſſed by affixing their common ſeal, in the ſame manner as where the chapter, having no intereſt in their own right, are to aſſent to the leaſes of their dean. So likewiſe, where a parſon makes a leaſe for years, he only is to grant or leaſe the lands, and the patron and ordinary are only to give their conſent by affixing their reſpective ſeals, and expreſſing their conſent or aſſent in the body of the deed; for the parſon is the principal grantor, and the others have not any real intereſt in the lands, though the law has thought fit to require their aſſent to all leaſes or eſtates to be made by the parſon.

A dean, ſeiſed of lands in right of him and his chapter, made a leaſe for years; the chapter confirmed this leaſe by a diſtinct deed; and it was held not good, becauſe their deeds being ſevered cannot operate at all, ſince they are but one entire body, and therefore cannot ſever in their acts. But if after ſuch leaſe they had all joined in a confirmation, this had amounted to a new leaſe, and been good as to the joint act of them all, as the original leaſe itſelf would have been, if all had joined in the leaſing part. Dyer, 40. b. in margin.

A leaſe for years was made in this manner; *præpoſitus, ſocii & ſcholares Collegii Reginalis in Oxonia*, guardianus *hoſpitalis*, &c. and exception taken, that it ought to have been *guardiani*, in the plural number, for the college conſiſts of many perſons, and each of them is capable, and therefore not like an abbot or convent: but *per curiam* it was held good, for the college is but one body, and as one perſon, and therefore *guardianus* is ſufficient to deſcribe it by. 1 Leon. 134. 4 Leon. 85. Provoſt of Queen's College, Oxon.

As a patron may confirm explicitly by his deed or writing, ſo may he alſo confirm by conſequence of law: for if a parſon makes 5 Co. 15. Newcomb's caſe. Cro.

Car. 38. Roll. Rep. 361. Co. Lit. 301. Roll. Abr. 481.

makes a leaſe for years to the patron, who grants or aſſigns it over to another, this amounts to a confirmation in law by the patron, becauſe confirmation being nothing but an aſſent under the hand and ſeal of the party confirming, ſuch aſſent in this caſe ſufficiently appears by his aſſigning over the leaſe to another. But without ſuch aſſignment, the ordinary's confirmation will not make good the leaſe to the patron to bind the ſucceſſor, becauſe in the acceptance of the leaſe the patron was only paſſive, and executed nothing under his hand and ſeal which could amount to a confirmation, as in the other caſe, where he makes an actual aſſignment over. But in caſe of ſuch confirmation in law, the patron ought to be abſolutely ſeiſed of the advowſon; otherwiſe it will bind only according to the eſtate he hath therein, as will appear hereafter. But *quære*, if the aſſignment in this caſe were without writing, if that would be good, or could amount to a confirmation?

Dyer, 52. 338. Cro. Eliz. 447. 472. 5 Co. 81. Co. Lit. 297. Moor, 479. 481. Co. Lit. 300. Bendl. 238. And. 47. Hetley, 75.

Another difference obſervable in the manner of confirming ſuch leaſes as we are treating of is, as to their duration or continuance. For if a parſon makes a leaſe for twenty-one years from this day, and the patron and ordinary confirm his eſtate therein for ſeven years, or, reciting the leaſe, confirm *dimiſſionem prædict. & etiam indenturam eidem ſcripto confirmationis annexam, & omnia in eadem content., quoad ſeptem annos ſolummodo, & non ultra*, yet is the eſtate or leaſe well confirmed for the twenty-one years; for when they confirm the eſtate of the leſſee, that is entire, and cannot be divided. So, where a prebendary made a leaſe of a rectory, parcel of his prebend, for ſeventy years, before the ſtatutes, and the biſhop, reciting the demiſe, confirmed the *ſaid demiſe or leaſe* for fifty years, and no more, and the dean and chapter likewiſe confirmed the ſame in the ſame manner, it was held by all the juſtices, that they might confirm ſeverally, and that their confirmation was extendible to the whole ſeventy years; for when they confirm *dimiſſionem prædict.*, they confirm that demiſe or leaſe, which comprehends and includes the whole term of ſeventy years, and then the words *pro termino* fifty only, *& non ultra*, come too late, and are repugnant to the confirmation of *dimiſſionem prædict.*, which included the whole term of ſeventy years. But it was agreed, that if after ſuch recital of the demiſe they had confirmed the *land* to the leſſee for fifty years only, this had been a good confirmation for fifty years only, and no ſuch repugnancy in the confirmation: and ſo, if the demiſe had been of thirty acres, they might have confirmed the leaſe as to one or more acres, or might have confirmed all, or part, on condition.

Cro. Eliz. 79. 21 H. 7. 41. F.N B. 49. Co. Lit. 343. b.

And a diverſity was taken between a bare aſſent without any right or intereſt, and an aſſent coupled with a right or intereſt; for the termor, who is to perfect an act by his attornment, cannot aſſent for a time, nor upon condition, nor for part of the thing granted, but it ſhall enure abſolutely to all, becauſe he having but a bare right cannot qualify or apportion it; but the biſhop, who is patron, and the dean and chapter, have an intereſt in the parſonage or prebend, and every part of it; for the patron hath *jus conferendi*

and a releaſe to the patron of an annuity in the time of vacation is good, and the patron and ordinary may charge the glebe in the time of vacation, and therefore having an aſſent clothed with an intereſt may qualify it as they pleaſe. Another difference was taken in the caſes before-mentioned between a leaſe for years and an eſtate of freehold or inheritance. For if a parſon or prebendary make a leaſe for years, confirmation may be made of the *land*, as has been ſaid, for a leſs number of *years*, or of the *leaſe* for a leſs number of *acres;* for the years or acres are ſeveral, although the leaſe or term, or land are one; ſo that if a leaſe be made for five years, rendering 20*l. per annum* rent, the years are ſeveral, ſo that an action of debt will lie for the rent every year. But if a parſon or prebendary before the ſtatutes had made a leaſe for life, a gift in tail, or a feoffment in fee, and confirmation had been made of the land to the leſſee, donee, or feoffee for an hour, this would be good for ever; for the freehold or inheritance paſſing by one and the ſame livery, is entire, and then the confirmation, which is an act of leſs notoriety, cannot break or divide it; for ſuch confirmation being an aſſent to an act which paſſed the whole, muſt extend to the whole which paſſed by the act.

. What Eſtates they who make ſuch Confirmation are to have.

As to the eſtate they who make ſuch confirmation ought to have, to make the leaſe effectually binding upon the ſucceſſors, his regards chiefly the patron, whoſe advowſon or right of patronage, being a temporal inheritance, and conſidered as ſuch, is to be governed by the ſame rules as other temporal inheritances are; and therefore his confirmation, being in nature of a charge upon the advowſon, is to be directed by the eſtate which he hath in the advowſon, and can continue no longer than that endures. Comp. Incumb. 372.

Therefore, if the patron be but tenant in tail, or tenant for life, his confirmation ſhall bind only ſuch incumbents as come into the church during his own life: and accordingly it was agreed, by Coke and *Dodderidge*, that if a parſon makes a leaſe for years, which is confirmed by the patron and ordinary, the patron being tenant in tail, and the patron and parſon both die, and the iſſue in tail doth preſent another, his preſentee ſhall hold the rectory diſcharged of ſuch leaſe. And alſo they agreed, that although the iſſue in tail, after a preſentation, levies a fine, yet the preſentee of the conuſee, when the church becomes void again, ſhall hold it diſcharged; becauſe the confirmation was defeated by the preſentation of the iſſue in tail before the fine levied. But if the patron, tenant in tail, diſcontinues the eſtate-tail, the leaſe confirmed by him ſhall ſtand good during the diſcontinuance: or if the eſtate-tail be barred, it ſhall ſtand good for the whole term: for now the eſtate of the patron, in reſpect whereof the eſtate was only voidable by the preſentee of the iſſue in tail, is become an abſolute and unavoidable fee. Co. Lit. 300. Roll. Abr. 480. Roll. Rep. 361. Bridg. 95. Leon. 234.

So, if the patron had a conditional eſtate in the advowſon, and confirms a leaſe of the parſon's, and after the condition is Co. Lit. 300. b

broken, this defeats alſo his confirmation, ſo that the ſucceeding incumbent ſhall not be bound by it; for his confirmation, which was in virtue of, and derived out of his eſtate in the advowſon, could not be more laſting than that eſtate itſelf was.

Dyer, 252. Roll. Abr. 480. If the chaplain of a chantry or free chapel, that was a donative, had made a leaſe for years before the diſſolution of chantries, and the patron of the chapel, being ſeiſed of the patronage in tail, had confirmed it, this ſhould not have bound the chaplain of the iſſue in tail; becauſe the tenant in tail could not, by any act of his, bind the iſſue in tail after his death: and in ſuch caſe, if the patronage of the donative came to the king, by the ſtatute of chantries, neither the king, nor his clerk, ſhould be bound by the ſaid leaſe. But if the donor had levied a fine after the confirmation, by which the iſſue in tail was bound from avoiding the leaſe, the king alſo ſhould be barred: and as the iſſue in the other caſe would not have been bound, no more would the king, who comes in ſubject to all the advantages or diſadvantages the iſſue in tail was capable of, or liable to.

Roll. Abr. 842. If tenant in tail of an advowſon, and the ſon and heir apparent, join in a grant of the next avoidance, and after the tenant in tail dies, the ſon ſhall avoid the grant, becauſe he hath nothing in the advowſon at the time of the grant made.

Dyer, 72. b. in margin. Leon. 234. Lancaſter v. Lucas. If a parſon make a leaſe for years, and there be three coparceners or tenants in common, who are patrons, all ought to join in the confirmation, elſe it will not bind the next incumbent; becauſe they are all but one patron; *per Coke:* but if there be a compoſition to preſent by turns, *quære*, if a leaſe confirmed by him, that hath the next turn when the church voids, ſhall not be good to bind his preſentee? But in the firſt caſe [*viz.* the caſe in Dyer] it is held, that if one of the patrons, and the ordinary, confirm the leaſe, and the parſon dies, and then the ordinary collates by lapſe, this confirmation by the one patron is good, and that the collatee ſhall not avoid it; and this is ſaid there to be adjudged upon long and good argument, and the caſe cited for it is *Lancaſter* and *Lucas;* which does not appear to be adjudged in *Leonard*, but is there ſaid to be adjourned? *ergo quære cauſam;* for the ordinary hath no intereſt, but preſents in right of the patron, and therefore his clerk ſhall be ſo far bound, and no farther, than the clerk of him who ſuffered the lapſe ſhould have been. But *Popham* argued that this title of lapſe was an intereſt in the ordinary, and not an authority only, and then all who come in under that intereſt ſhall be bound by the ordinary's confirmation of the firſt leaſe: and he ſaid, that at the beginning, the patron was not reſtrained to any time to preſent his clerk, but the ſix months were appointed, at the inſtance and ſuit of the ordinaries, by a canon confirmed in the council of *Lateran*; before which time the ordinaries had no any lapſes; but after the ſaid canon they had an intereſt, which the civilians call *intereſſe caducum & conditionale;* and it is ſuch an intereſt, that if the biſhop dieth before collation or preſentment ſo as the temporalties come to the king, the king ſhall preſent. *Quære* of this?

If the huſband and wife, patrons of a church in right of the wife, confirm a leaſe made by the patron, yet this ſhall not bind the preſentee of the wife, if ſhe ſurvives her huſband, nor her heirs, nor their preſentees, after her death; becauſe the deed was void *quoad* the wife, being a feme covert, and the huſband had nothing but in her right, which died with him. Dyer, 133. a. Roll. Abr. 479.

Though he who confirms as patron hath a fee-ſimple of the advowſon in him, yet if, before he confirms, he hath granted away the next avoidance, his confirmation of the preſentee's leaſe will not be good to bind the preſentee of the grantee of the next avoidance, unleſs ſuch grantee doth alſo confirm; and if the preſentee of him that hath the next turn doth enter and avoid ſuch leaſe (as he well may) and then dies, and the patron of the fee preſents a new incumbent, who is admitted, inſtituted, and inducted, this new incumbent ſhall hold the benefice diſcharged of the leaſe, as his predeceſſor ſhould have done, though he came in by the preſentation and admiſſion of the patron and ordinary, who confirmed the leaſe. So, if the biſhop were patron in right of his biſhoprick, and after ſuch leaſe made by the parſon, the biſhop, dean, and chapter had granted the next avoidance to another, and then after they had all confirmed the leaſe; yet upon the incumbent's death, if the grantee of the next avoidance preſents, and the clerk is admitted, inſtituted, and inducted, and avoids the leaſe, it ſhall never take place againſt any ſubſequent incumbent, though he come in by the ſame patron who confirmed ſuch leaſe. The reaſon of theſe caſes is, becauſe the grantee of the next avoidance, and his preſentee, come in by title paramount the making or perfecting of ſuch leaſe; and the preſentee, or parſon, having the whole fee in him, when he had once defeated the leaſe, it ſhall never after revive or take place againſt any ſubſequent incumbent. And though *Littleton* ſeems to be of opinion, that the parſon hath not the right of the fee-ſimple in him, yet he explains himſelf to mean as to the bringing of a writ of right; for otherwiſe it is the act of the parſon which charges or gives, and the patron and ordinary only aſſent, and then the leaſe being avoided by him who hath the fee-ſimple of that land which was ſo leaſed, it can never after be ſet up again, being totally defeated by his title paramount. Another reaſon may be, that having granted the next avoidance before ſuch leaſe made or perfected, the grantee is now become the preſent patron, and ought to concur in all acts whereby the poſſeſſion is to be charged: for as before ſuch grant, the patron's confirmation, who had the whole fee in him, would have been ſufficient; ſo now, having granted away part of that fee, the grantee ought to join likewiſe, ſo that the confirmation may be by all who have any intereſt in the parſonage, as well thoſe who have the preſent and poſſeſſionary intereſt, as thoſe who have the future and reverſionary intereſt; ſince otherwiſe the confirmation is not complete, and the leaſe is then liable to avoidance for want thereof. Moor, 67. 481. Dyer, 72. b. 133. a. Cro. Car. 582. Jon. 454. Roll. Abr. 480. Co. Lit. 46. a. 7 Co. 36. Hob. 7.

If a church be full of a parſon, and after another be made parſon and inducted, and he make a leaſe for years, which is confirmed Roll. Abr. 477. 9 H. 6. 34.

firmed by the patron and ordinary, yet the leaſe is void; becauſe he who made it was not parſon, the church being full before.

Roll. Abr. 477. 9 H. 6. 34. 10 H. 6. 11. Degg. 120.

So, if a church be void, and one enter and occupy of his own wrong, without any preſentation or inſtitution, and occupy as parſon, and make a leaſe for years, which is confirmed by the patron and ordinary; yet this is void, becauſe the leſſor was no incumbent; for none can be parſon or incumbent without preſentation or collation. So, a leaſe by a parſon, vicar, prebendary, &c. before induction or inſtalment, though confirmed, ſhall not bind the ſucceſſor, becauſe till then they have nothing in the temporal poſſeſſions.

9 H. 6. 33, 34. Roll. Abr. 480.

But if a church be void, and one preſent by uſurpation, and the incumbent of the uſurper, after admiſſion, inſtitution, and induction, make a leaſe for years, which is confirmed by the uſurper as patron, and by the ordinary, and after, in a *quare impedit*, the true patron recover, and remove the incumbent; yet it ſeems the leaſe ſhall ſtand, becauſe there was a patron *de facto*, who made and confirmed ſuch leaſe; and the parſon coming in by all the ſolemnities of law when the church was void, the people could take notice of no other, and therefore all acts done by him, and legally confirmed, are good. But *Rolle* cites this caſe, that the ſucceſſor of the rightful patron, after recovery, ſhall avoid ſuch leaſe, becauſe it was not made or confirmed by a rightful parſon or patron; *ideo quære?*

Dyer, 244. Plow. 400. Co. Lit. 352. Co. 155. a. 10 Co. 48. a

King *Ed.* 6. being patron of a church full of an incumbent, by his letters patent grants the advowſon to the biſhop of *Coventry* and *Litchfield* and his ſucceſſors, and grants that, after the avoidance of the church by death, reſignation, or otherwiſe, the ſaid biſhop, and his ſucceſſors, ſhould hold the ſaid church *in propriis uſus*; the biſhop after, by indenture, makes a leaſe for forty years, to begin at ſuch a time as the ſaid parſonage ſhould come to the hands of him, or his ſucceſſors, by death, reſignation, or otherwiſe; and this is confirmed by the dean and chapter; the biſhop dies; then the incumbent dies; and the ſucceſſor of the biſhop enters, and makes a leaſe for twenty-one years, &c. And by the juſtices it was held, that the firſt leaſe was abſolutely void; for the leſſor had nothing in the parſonage impropriate during the life of the incumbent, and he ſurvived the leſſor, and therefore he could never take effect: and it could not be good by eſtoppel; becauſe the truth of the caſe appeared in the indenture of leaſe itſelf, that he had nothing during the incumbent's life. This caſe further proves, that the whole fee is in the preſent incumbent; and, as in the caſes before-mentioned, the avoidance of a leaſe by the preſent incumbent ſhall be an avoidance of it for ever; ſo in this caſe, for want of the preſent incumbent's joining, the leaſe ſhall never ariſe.

4. At what Time ſuch Confirmation is to be made.

Co. Lit. 300. b.

As to the time of confirmation, generally ſpeaking, it is no material, whether it be before or after the making of the leaſe which

which is to be ſo confirmed, ſo it be made in the lifetime of the parties who make the leaſe; for the confirmation is but an aſſent or agreement by deed to the making ſuch leaſe or grant, and not a confirmation of the eſtate itſelf, as will appear more fully by the following caſes and diverſities.

If a diſſeiſor makes a charter of feoffment to *A.* with a letter of attorney to deliver ſeiſin, and, before ſeiſin given, the diſſeiſee confirms the eſtate of *A.*, or the deed made to *A.*, this is clearly void, though livery be made after; for this muſt enure as a confirmation of the eſtate, which cannot be good before the eſtate paſſed, as before livery it did not. But if a biſhop had made a charter of feoffment before the ſtatutes with a letter of attorney, and the dean and chapter, before livery, confirm the deed, this is a good confirmation, and livery made after is ſufficient. So, if the biſhop had granted a reverſion, the dean and chapter might confirm the deed or grant before attornment. Co. Lit. 301. a. 3 Leon. 17. 4 Leon. 223. Biſhop of Rocheſter's caſe.

So, if a biſhop at the common law had granted lands by deed to the king, and, before enrolment, the dean and chapter, by their deed, confirm the deed of the biſhop, and after the deed of the biſhop is enrolled, this is a good grant and confirmation; becauſe, as to the biſhop, it was a perfect deed, and therefore capable of being confirmed; though to enable the king to take, there wanted enrolment, which might be at any time after. The ſame law, if the biſhop had made a leaſe for years to the king, confirmation of the leaſe before enrolment would be good. Co. Lit. 301. a. Roll. Abr. 478. Palm. 466. Latch. 240. Dimmock's caſe.

So, if the patron and ordinary had by deed given licence to the parſon to grant a rent-charge out of the glebe, and the parſon had granted it accordingly, this was good, and ſhould bind the ſucceſſor, though it was not a confirmation ſubſequent, but a licence precedent. Co. Lit. 300. b. Roll. Abr. 480. 7 H. 4. 15. Bro. Nov. Caſes, 201.

So, if a biſhop makes a leaſe for years at this day, which needs confirmation; and the leaſe is made on the ſecond of *May*, and confirmed on the firſt of *May*, this is a good leaſe, by *Catlin* and *Southcot*; but *Wray* objected, that a leaſe cannot be confirmed before it be made; to which they replied, that the aſſent before was a good confirmation of the leaſe made after. Owen, 33.

So, where a biſhop made a leaſe the ſecond of *May*, which was confirmed the third of *May*, and ſealed the fourth of *May*; this was held a good confirmation.

So, where the deed of confirmation bore date before the deed confirmed, but by agreement the deed confirmed was firſt delivered, the confirmation was held good; for a confirmation is but a mere aſſent by deed to the grant, and therefore may be either before or after the grant or leaſe itſelf, or at the time of the leaſe or grant; as, if a parſon makes a leaſe, with the aſſent of the patron and ordinary, this is a good confirmation; and ſo where the dean and chapter are to confirm likewiſe, if their reſpective ſeals are affixed. 2 H. 6. 8. Roll. Abr. 480. Dyer, 106.

And yet it hath been holden on the contrary; that if a confirmation be made and delivered before the grant or leaſe to be confirmed, Roll. Abr. 480. 8 H. 6. 6.

firmed, that this is not a good confirmation; and though, after the grant or leaſe, the deed of confirmation be delivered again, yet that will not make it good, for that it was a deed by the firſt delivery; and the ſecond delivery will not make it good as an aſſent, becauſe the aſſent ought to be by deed, and the firſt delivery was void. But that confirmation may be made before the grant or leaſe be confirmed, the other caſes are expreſs, and the reaſon of the thing ſeems likewiſe to make for it; for the confirmation being nothing but an aſſent or agreement that the biſhop or parſon may make ſuch leaſe, &c. when this aſſent appears under ſeal, and a leaſe, &c. made purſuant to it, there can be no reaſon to impeach the leaſe after, which has all the ſanction that the law requires *viz.* the concurrence and aſſent of the perſons appointed by law to that purpoſe, and before or after are only circumſtances of time, which ſeem not material when the aſſent, which is the ſubſtance, ſufficiently appears.

Moor, 66. pl. 180. Therefore, if a biſhop makes a leaſe for twenty-one years according to the ſtatutes, and after makes a concurrent leaſe for years of the ſame land to another, and after, before any confirmation of the ſecond leaſe, the biſhop makes another concurrent leaſe to a third perſon, which is immediately confirmed, and after the ſecond leaſe is confirmed alſo; in this caſe the ſecond leaſe ſhall be good and effectual by the confirmation, although the laſt leaſe was confirmed before it, becauſe the confirmation adds nothing to it, nor conveys any intereſt, but only makes it more perdurable and effectual.

5 Co. 15. Newcomen's caſe. Cro. Eliz. 18. Higgins v. Grant. Cro. Car. 38. Cro. Jac. 53. And upon this reaſon it hath been adjudged, that leaſes made before 13 *Eliz.* *c.* 10. for more years than are allowed thereby, being confirmed after the ſaid ſtatute, are good, and ſhall bind the ſucceſſor; for the confirmation is only an aſſent, and when it is made relates to the making of the leaſe, which being before the ſtatute, remains at common law, and, by conſequence, binds the ſucceſſor: alſo, ſuch confirmations being only to perfect leaſes made before that ſtatute, are not within the intent thereof.

Cro. Eliz. 430. Moor, pl. 636. Sir Edward Denny and Eakinſtal. So, where an archdeacon, impropriator of a parſonage, 12 *Eliz.* let part of his glebe for fifty years, and the biſhop, patron of the archdeaconry, and the dean and chapter, 15 *Eliz.* confirmed the leaſe, and then the archdeacon died; it was held, 1. That the ſtatute 1 *Eliz.* *c.* 19. extended only to the immediate poſſeſſions of the biſhoprick, and here the land let was not any part of the poſſeſſions of the biſhoprick, but of the archdeaconry; and the confirmation, though it is neceſſary, yet at moſt it amounts only to an aſſent, and the intereſt paſſes from the archdeacon and not from the biſhop. But if the biſhop had been diſſeiſed of any of the poſſeſſions of the biſhoprick, and after had confirmed the land to the diſſeiſor, this would not bind his ſucceſſors, becauſe here the confirmation paſſed an intereſt, and without ſuch confirmation the biſhop himſelf might have entered and reſtored the poſſeſſion, and no act of his ſingly can bind his ſucceſſor. 2. It was adjudged that this confirmation, though after 13 *Eliz.* *c.* 10. ſhould bind the archdeacon

archdeacon's ſucceſſor, becauſe the leaſe to which it relates was made before the ſtatute, and that ſtatute reſtrains only from alienating, not from confirming.

But if a biſhop, parſon, or any other ſole eccleſiaſtical corporation, makes a leaſe for years, which needs confirmation, this confirmation ought to be made in the life and during the incumbency of the leſſor; for after his death, reſignation, deprivation, or other amotion, the leaſe is become void for want of confirmation; and then confirmation made after cannot revive it, though it be made in the vacation before any ſucceſſor comes in. Co. Lit. 301. 21 H. 7. 1. Degg. 118. 4 Leon. 78. In which laſt book the contrary is held by Clench.

But if a parſon makes a leaſe for years, which is not confirmed by the biſhop or patron then in being, but by the ſucceeding biſhop and ſucceeding patron, this is a good leaſe, and ſhall bind the ſucceſſor, becauſe the leaſe was abſolutely good againſt the parſon himſelf who made it, and the confirmation was only neceſſary to make it binding on the ſucceſſor; and in this caſe, the leaſe being duly confirmed during the incumbency, had all the ſanction the law requires; for there is no prefixed time for the confirmation of ſuch leaſes, ſo it be made during the life and incumbency of the leſſor. 5 Co. 15. Cro. Car. 38.

5. How far a Regard is to be had to the true naming of the Corporation or Perſons who confirm.

Herein we ſhall only obſerve, that corporations aggregate, as dean and chapter, mayor and commonalty, warden and fellows, &c. may make or confirm leaſes, without expreſſing either the chriſtian or ſurname of the dean, mayor, warden, &c. becauſe in their politick capacity, as a corporation aggregate, they continue always the ſame, and are ſaid never to die: but in leaſes or confirmations by a biſhop, dean, mayor, &c. or other ſole corporation, both their chriſtian and ſurname, or at leaſt their chriſtian name, ought to be expreſſed, becauſe they are ſubject to death and ſucceſſion, &c. and therefore muſt be particularly named to ſhew whoſe leaſe, &c. it was; and ſo ſome hold too in the firſt caſe. Bro. tit. Leaſes 45. Dyer, 83. 86. 106. 11 Co. 21. Hob. 32. Leon. 307. But for this *vide* head of Corporations.

(H) Of void or voidable Leaſes by Eccleſiaſtical Perſons: And herein,

1. Againſt whom Leaſes not purſuant to the Statutes, or otherwiſe defective, are void or only voidable.

HERE it is to be obſerved, that if a biſhop grants the next avoidance of a church, which is not warranted by 1 *Eliz.* c. 19. becauſe it is a thing which lies merely in grant, out of which no rent can be reſerved; or makes a leaſe of the advowſon of a church; or grants an annuity out of the poſſeſſions of his biſhoprick; or makes a leaſe of tithes for three lives, or a leaſe of any other of his poſſeſſions, not purſuant to all or any of the eight rules before-mentioned; yet in none of theſe caſes is ſuch leaſe or Cro. Eliz. 440. And. 241. Sav. 119. 3 Co. 59. Cro. Jac. 173. 2 Brownl. 164. Cro. Eliz. 207. 690.

Hard. 326. Co. Lit. 45. a. 10 Co. 59. b. 2 Leon. 138. Leon. 308. Roll. Rep. 169 Keb. 182. 11 Co. 73. a.

grant void or voidable by the biſhop himſelf who made it, but remains good againſt him during ſuch time as he continues biſhop. But as to the ſucceſſors of the biſhop, ſuch leaſes or grants are void or voidable, as the caſe happens to be, as will appear hereafter. And the reaſon ſuch leaſes or grants are good againſt the biſhop himſelf, who made them, is, becauſe they were ſo at the common law, and the ſtatutes were made only for the benefit of the ſucceſſors, that they ſhould not be bound by thoſe acts of their predeceſſors, which might turn to their prejudice and diſadvantage; but not to give the biſhop himſelf power to avoid or derogate from his own acts, which would be againſt all rules both of law and equity, and therefore was not within the meaning of the ſaid ſtatutes; for then he would be empowered by act of parliament to do wrong to other perſons, which it cannot be preſumed the parliament intended to allow.

Roll. Rep. 151.

So, where a biſhop, by deed enrolled, gave lands to the queen, without the conſent of the dean and chapter, yet it was held, that this was good againſt the biſhop himſelf who made ſuch gift.

Brownl. 21. Moor, 875. 2 Brownl. 134. 158. 3 Co. 60. Leon. 308. Co. Lit. 45. a.

So, for the reaſons before-mentioned, though the 13 *Eliz. c.* 10. ſays, that all leaſes, gifts, grants, *&c.* made by any perſons or corporations therein mentioned, contrary to the tenor of that act, ſhall be utterly void and of none effect to all intents, conſtructions, and purpoſes; yet it hath been adjudged, that a leaſe made by a dean and chapter againſt the ſaid ſtatute ſhall not be avoided, nor any covenants therein contained, during the life and continuance of the dean that made the leaſe; ſo that if they have made a leaſe for years of any of their poſſeſſions, and before the expiration thereof made a concurrent leaſe alſo for the ſame lands, and then make a third leaſe for lives, with expreſs covenant, that the grantee for lives ſhall enjoy the land againſt the ſecond or concurrent leaſe; and grantee for lives being in poſſeſſion is evicted, and brings covenant againſt the dean and chapter; in this caſe, though the leaſe for lives be void by the 13 *Eliz. c.* 10. yet it was agreed by the juſtices, that becauſe the dean who made the leaſe for three lives was living, and continued dean at the time of the eviction, the leaſe was not void, and, by conſequence, an action was well maintainable againſt the dean for breach of the covenant therein contained.

See however Lord Hale's note in Co. Litt. 45. a. and 4 Co. 73. a.

11 Co. 67. 78. b. Roll. Rep. 171.

So, where a maſter and fellows of a college, by deed enrolled, made a leaſe for years, not warranted by that ſtatute, and afterwards ſuffered a fine, and five years to paſs without claim; though this was void againſt the ſucceeding maſter, yet by conſtruction the leaſe and fine were held good againſt the college, (though it be a corporation aggregate that never dies,) during the life of the maſter, who was party to the leaſe, and made no claim; becauſe he was the head and principal part of the corporation.

Hetley, 24. Co. Lit. 45. a. Comp. Incumb. 380.

So, if a dean, archdeacon, prebendary, parſon, or other ſole corporation, make leaſes of their ſole poſſeſſions, not warranted by the ſaid ſtatutes, yet they ſhall bind themſelves during their whole

whole time, becauſe the ſtatutes were made to provide chiefly for the benefit of the ſucceſſors, and not to relieve the parties themſelves againſt their own acts or grants; though it was held by *Popham*, that if a parſon made a leaſe without reſerving any rent, that this ſhould not bind even himſelf; but *quære?*

But where there is a chapter that hath no dean, as the chapter of the collegiate church of *Southwell*, there, grants or leaſes made by them contrary to 13 *Eliz. c.* 10. are void *ab initio* againſt themſelves: and ſo, of leaſes or grants by any other corporation aggregate, who have no head or principal perſon; for they muſt be either void *ab initio*, or good for ever, becauſe they continue always the ſame, and one has no ſuperiority or power more than another: but in caſe of a dean and chapter, maſter and fellows, *&c.* though they are a corporation aggregate, and never die, yet leaſes or grants made by them, contrary to the ſaid ſtatutes, ſhall bind during the time of the dean, maſter, *&c.* who was party thereto, becauſe ſuch dean, maſter, *&c.* who are the head of the corporation, are ſubject to death and ſucceſſion, as other ſole corporations, and therefore ſhall have no aid from the ſtatute to avoid their own leaſes; but only their ſucceſſors, for whoſe benefit the ſtatute was made, together with the chapter. But if the dean and chapter, maſter and fellows, *&c.* were all equally ſeiſed, and the dean and maſter ſolely ſhould make a leaſe, though it were in all reſpects warranted by the ſtatutes, yet this leaſe ſeems void *ab initio* at common law, becauſe the dean, maſter, *&c.* had no ſole ſeiſin whereof to make any leaſe at all; but the chapter in the one caſe, and fellows in the other, having an equal eſtate and intereſt, ought to have joined in ſuch leaſe or grant, and for want of their joining, ſuch leaſe or grant ſeems void at common law, as it would be for a miſnomer, *&c.* and then the leſſee cannot hold it againſt the dean and chapter, if they ſeek to avoid it.

Mod. 204. 2 Mod. 56. Hard. 326. Leon. 308. 3 Co. 60. Co. Lit. 45. a. 325. b. 341.

As leaſes and grants, not warranted by the ſtatutes, are not void againſt the leſſors and grantors themſelves, ſo neither are leaſes or grants made without due confirmation, where confirmation is neceſſary, but only by the grantor's death or amotion.

Dyer, 239.

If a biſhop makes a defective or voidable leaſe or grant, not only the ſucceſſor, but alſo the king, when the temporalties come into his hands, may take advantage thereof, by avoiding it during the vacancy of the biſhoprick, in privity and right of the biſhop. But this ſhall not ſo abſolutely avoid the leaſe, but that the ſucceeding biſhop may make the ſame either good or void, at his election, as to himſelf; and this either expreſsly, as by actual agreement to the leaſe or grant of his predeceſſor; or implicitly, as by acceptance of rent incurred after the death of his predeceſſor; or doing any other acts, which amount to an agreement in law. And therefore this differs from the caſes before put, where avoidance of a leaſe by a parſon ſhall avoid it, not only for his own time, but alſo againſt all his ſucceſſors; ſo that they can never after ſet it up again, or affirm it by any act of theirs whatſoever: for the parſon hath the whole fee-ſimple in him as much as any of his ſucceſſors can ever have; and therefore when he once

7 Co. 7. The Earl of Bedford's caſe.

avoids the leaſe, as to the whole fee-ſimple which he hath, he avoids it for ever, ſo that it can never after revive; but the king hath not the fee-ſimple in the temporalties, but only the cuſtody or guardianſhip of them during the vacation of the biſhoprick, which is but a temporary and qualified intereſt; and therefore what he does ſhall not be binding on the ſucceſſor. But if the ſucceſſor himſelf avoids ſuch leaſe or grant, then it is the ſame with the other caſe, and no ſucceeding biſhop after can revive or ſet it up again, becauſe it was avoided by one who had the whole fee-ſimple and eſtate in him.

But here a difference is to be obſerved betwixt ſuch leaſes as are actually void by the death, *&c.*, of the leſſor, and ſuch as are only voidable. And here again we muſt diſtinguiſh; 1. Between the perſon leaſing. 2. Between the things leaſed, and the leaſes themſelves. And becauſe the common law, with reſpect to theſe diſtinctions, holds good ſtill, where the ſeveral ſtatutes before-mentioned are not purſued, we ſhall conſider how the common law ſtood in theſe particulars, which, together with the reaſons thereof, will ſhew how the law is at this day upon the ſtatutes.

The firſt diſtinction to be obſerved is between the perſons leaſing; that is, between ſuch ſole corporations as had the whole fee-ſimple abſolutely in them, as biſhops, abbots, *&c.*, and ſuch ſole corporations as were looked upon only to have a qualified fee-ſimple, as parſons, vicars, prebendaries, provoſts in cathedral churches, and others who were preſentative or collative, and not elective.

Bro. tit. Acceptance, 9, 10. 26. tit. Confirmation, 21. tit. Dean, 20. tit. Leaſes, 18, 19. 32, 33. 52. F.N.B. 50. Plow. 264. Cro. Eliz. 18. Poph. 121. Dyer, 46. 231. Co. Lit. 45. b. 102. 341. 6 Co. 8. a. Hetl. 88. Roll. Abr. 481. Roll. Rep. 361. Bridgm. 94. 3 Co. 65. Raym. 166. 2 Keb. 325.

As to leaſes by parſons, vicars, *&c.*, if by the common law any of theſe had made a leaſe for years of any of the poſſeſſions of their church, without confirmation of patron and ordinary, *&c.*, ſuch leaſes by their death, or other avoidance, had become abſolutely void without entry or other ceremony, ſo as no acceptance of the rent, or other act done by the ſucceſſor, could affirm or make them good or binding over againſt themſelves. But leaſes for years by biſhops, abbots, *&c.*, though without confirmation of the dean and chapter, or aſſent of the convent, were not abſolutely determined by their death, *&c.*, but continued good till ſome act done by the ſucceſſor to avoid them: for they have, and always were allowed to have, the whole fee-ſimple and inheritance of their poſſeſſions in themſelves; and therefore, before the third council of *Nice*, *anno* 710, might by their ſole alienation, without the confirmation of the dean and chapter, have bound their ſucceſſor for ever: and though by that council ſuch alienations are reſtrained, as hurtful and injurious to the church, and the confirmation of the dean and chapter made neceſſary; yet this is only *quoad* binding the ſucceſſor; for the fee-ſimple continues ſtill in them; and therefore leaſes for years made by them ſubſiſt after their death or removal, as they would do, if they had been made by a tenant in fee of any lay poſſeſſions, till the ſucceſſor comes to avoid them by aid of the canons made at that council, which have received a ſanction from our law.

So,

So, it was in caſe of abbots, priors, or deans, &c., where they were ſole ſeiſed; if they had made a leaſe for years of any of their poſſeſſions, this had not abſolutely determined by their death, &c., becauſe they had the whole fee-ſimple in them; and therefore ſuch leaſes continued good till the ſucceſſor came to avoid them, for want of confirmation of the perſons ſubſtituted by law for that purpoſe. *Vide* the authorities *ſupra*.

Therefore, where a prebendary made a concurrent leaſe for years of tithes, rendering the ancient rent, without confirmation of the dean and chapter, it ſeems to be allowed, that this was not abſolutely void by his death, &c., but only voidable; and then acceptance of the rent by the ſucceſſor would make it good during his time: for leaſes not warranted by thoſe ſtatutes remain at common law, which makes them only voidable, not actually void upon the death, &c. of the perſon who makes them. Hard. 156. Sir John Thoroughgood and Sir Henry Herbert.

The ſecond diſtinction to be obſerved is, between the things leaſed and the leaſes themſelves.

It has been before obſerved, that leaſes for years by parſons and vicars determine abſolutely by their death, without entry, or other ceremony; but if they make a leaſe for life or lives, and die, or are removed, yet the leaſe continues good till ſome act done by the ſucceſſor to avoid it: the reaſon is, becauſe ſuch leaſe for life or lives being an eſtate of freehold, could not paſs without the ſolemnity of livery and ſeiſin; and therefore to defeat that, there muſt be an act of equal notoriety, *viz.* the entry of the ſucceſſor; and by conſequence, if the ſucceſſor before ſuch entry accepts the rent, or does any other act ſignifying his conſent to ſuch leaſe, this affirms the ſame during his time, ſo as he can never after avoid it, becauſe it was only voidable, not actually void by the leſſor's death, &c., and, conſequently, capable of an affirmance. And the law is the ſame at this day, as to things which lie in livery. *Vide* the books *ſupra*.

But as to things which lie in grant or prender, there ſeems a diverſity between the common law and the law as it ſtands at this day upon the before-mentioned ſtatutes: for if a biſhop makes a leaſe for lives of a portion of tithes, or other things not manurable, reſerving the ancient rent, and dies, &c., and his ſucceſſor accepts the rent, yet this acceptance ſhall not bind him, becauſe the leaſe was abſolutely void by the biſhop's death, &c., who made it without entry, or other ceremony. And the reaſon of its being ſo abſolutely void is, becauſe the things leaſed lying only in grant or prender, no rent could be thereout reſerved, recoverable by the ſucceſſor; for diſtrain he could not, becauſe there was nothing wherein a diſtreſs might be taken; and an action of debt would not lie (*a*), becauſe the leaſe being for lives, no action of debt was maintainable till after the lives ended; and therefore ſince his acceptance of the rent due at one day will not enable him to ſue for it, if afterwards denied, he ſhall not be bound by ſuch acceptance. But if the tithes, or other things lying in grant, had been ſet for years, there, the ſucceſſor's acceptance of the rent would have bound him during his time, becauſe, then, he might have an action of debt for any arrears that ſhould incur after. And this conſtruction Cro. Jac. 173. Comp. Incumb. 380-1. Palm. 175. Degg. 134. 318. Bro. tit. Leaſes, 41.

[(*a*) But by 5 Geo. 3. c. 17. Debt will now lie upon ſuch leaſes for lives.]

conſtruction ſeems to ariſe wholly from the ſtatutes before-mentioned, which as appears before, were made wholly to provide for the ſucceſſor, that he might not be impoveriſhed or prejudiced by the acts of his predeceſſor: for at common law all leaſes for life or years, as well of things which lay in grant as of things which lay in livery, were only voidable after the biſhop's death, &c., not actually void: and herein the law at this day, as to biſhops, appears to be the reverſe of the common law as to parſons, vicars, &c., for as their leaſes for years were abſolutely void by the death, &c., but their leaſes for life or lives only voidable; ſo here the biſhops' leaſes for lives are abſolutely void by their death, &c. whereas their leaſes for years are only voidable by their ſucceſſor: but *quære*, whether the common law made any ſuch diſtinction as to things in livery and things in grant, either in caſe of biſhops or parſons, vicars, &c.? for the only diſtinction taken notice of in the books is, between biſhops, &c., who had the whole fee abſolutely in them, and parſons, vicars, &c., who had only a qualified fee; and between leaſes for years by parſons, vicars, &c., and leaſes for life or lives made by them. But it ſeems clear, that if the law be ſo at this day as to biſhops, when they make leaſes of things in grant, ſo it is as to all other eccleſiaſtical perſons (except parſons, vicars, &c.), within the ſtatutes before-mentioned, that leaſes for lives of things in grant determine abſolutely by their death, for the reaſons before given; but leaſes for years of ſuch things in grant are only voidable by the ſucceſſor, not abſolutely void. But as to parſons, vicars, &c., leaſes for years made by them, whether of things in livery or things in grant, determine abſolutely by their death, if not duly confirmed, or the ſtatutes not purſued, becauſe then they remain at common law, where the death or other amotion was an abſolute determination of all leaſes for years in general made by them, and conſequently, of leaſes for years of things in grant, as well as others. And this diſtinction is the principal caſe between leaſes for lives of things in grant, and leaſes for years thereof, by biſhops and other eccleſiaſtical perſons within the ſaid ſtatutes (except parſons, vicars, &c.), that in the one caſe, they are abſolutely void by the death, &c., of the leſſor, and the other, only voidable, ſeems to be a reaſonable diſtinction, and to reconcile all the books, which make it a great queſtion, if leaſes in general by biſhops, &c., not purſuant to the ſaid ſtatutes, are abſolutely void by the death, &c. of the leſſor, or only voidable. For if leaſes for years by them of things which lie in grant are only voidable, and not actually void, becauſe the ſucceſſor is not without ſome remedy for the rent, and therefore may adhere to the if he pleaſes, and affirm the leaſe for his time; much leſs are leaſes for years or lives of things which lie in livery (though the ſtatutes are not purſued), abſolutely void by the death, &c. of the leſſor, ſince in ſuch caſes the ſucceſſor has as full and ample remedy for the rent by diſtreſs or otherwiſe, as he would have had if the circumſtances required by the ſtatutes had been purſued; and then *quilibet poteſt renunciare juri pro ſe introducto*; and if the ſucceſſor thinks fit to waive the defect of ſuch circumſtances, a-

2 Roll. Rep. 161. Ed. Coke's caſe. Jon. 406. Cro. Car. 95. 5 Co. 2. 10. Co. 60, 61. Cro. Jac. 173.

bide by the leaſe, it would be unreaſonable, and againſt the intent of the ſtatutes, to put it out of his power ſo to do, by making the eaſe actually void, ſo as no acceptance of the rent, or other act one by him, could affirm it. But where his acceptance of the ent at one day will not help him to any remedy for it the next, here, it would be unreaſonable that ſuch an unwary act ſhould rip him of the benefit intended for him by the ſaid ſtatute, and where he had no remedy for the rent, ſhould have none for the and neither, and would totally fruſtrate the deſign and intent of he act, and tend to the impoveriſhment of moſt ſucceſſors to cclefiaſtical perſons.

But this acceptance of rent (*a*), which ſhall affirm a voidable leaſe, Palm. 517. Biſhop of Oxford's caſe. muſt be by him who is perfect ſucceſſor: therefore, where the ucceſſor of a biſhop, before he had a reſtitution of the temporal- ies out of the king, accepted the rent reſerved by his predeceſſor pon a voidable leaſe, it was held, that notwithſtanding this ceptance, he might well enter and avoid the leaſe; becauſe be- ore ſuch reſtitution he was not perfect ſucceſſor; and then ſuch ceptance of the rent ſhall not bind him, any more than if he ad been a perfect ſtranger.

[(*a*) Acceptance of rent alone, unaccompanied with any other circumſtances, is not a ſufficient confirmation of a leaſe. It cannot be a confirmation, unleſs done with a knowledge of the title at the time; or, unleſs the remainder-man lies by, and ſuffers the tenant to lay out his money in improvements, in confidence of continuing tenant. *Per* Lord Mansfield, Cowp. 483.]

So, where a maſter of a college, or head of any corporation ag- 11 Co. 79. a. Roll. Rep. 172. Magdalen College's caſe. regate, accepts rent upon a voidable leaſe made by his predeceſ- or, and the reſt of the corporation, without authority in writing om the corporation to accept the ſame, this acceptance ſhall not ffirm the leaſe during the life or continuance of ſuch maſter or ead who ſo accepted it; for the right being as much in the llows, or other members of the college, as in the maſter, &c. imſelf, he cannot by any act of his own conclude or bind them om their entry upon any voidable leaſe. Beſides, he himſelf, in eir right, may enter to avoid ſuch leaſe, notwithſtanding his own ceptance of the rent.

If a biſhop's bailiff, of his own head, and without any order from Roll. Abr. 474. Hetley, 24. Cro. Car. 95. Wheeler v. Danby. he biſhop, receives rent upon a voidable leaſe made by the pre- eceſſor of the biſhop, this ſhall not bind the biſhop. But where biſhop made a leaſe for lives of certain lands, parcel of the manor f *A.*, reſerving rent, but not in all things purſuant to the ſtatutes, nd by conſequence, voidable by the ſucceſſor, and then the biſhop ied, and another was made, and the bailiff of the manor came to im, and ſhewed him in general, that there were certain rents in rrear of the ſaid manor, and thereupon the biſhop commanded im to receive the ſaid rents, which he did accordingly, and, mongſt the reſt, the rent upon the ſaid voidable leaſe, and after aid all the ſaid rents to the biſhop, without giving him notice articularly of that rent; this acceptance ſhall bind the biſhop, ecauſe he ought to take notice what leaſes are made by his pre- eceſſor, and what rent he himſelf received; for, if he had no tle, he ought not to have received the rent at all; if he had, he

muſt

muſt be ſuppoſed to know it; and then his acceptance of the re ſhews his aſſent to the leaſe upon which it was reſerved.

Poph. 121. Leon. 309. Alſo, it is to be obſerved, that ſo far as the leſſor is bound b any void or voidable leaſes, ſo far alſo the leſſee, his executors a aſſigns, whichſoever of them have the intereſt, are bound thereb and no further: therefore, when the leaſe is not void witho entry, if rent be in arrear after the death of the predeceſſor, th ſucceſſor hath remedy to recover ſuch arrears, if he chuſes to affir the leaſe; but if the leaſe be abſolutely void, the ſucceſſor hath n remedy at law for any rent incurred after the death of his pr deceſſor.

Leon. 309. So, the leſſee of a voidable leaſe, after the death of the leſſo may maintain an action of treſpaſs againſt any ſtranger, who ſha enter or do any other act of treſpaſs upon the land before the lea be actually avoided.

2. By what Means and in what Caſes ſuch voidable Leaſes m be made good.

Dyer, 239. Fitz. tit. Abbot, 9. Bro. tit. Accept-ance, 15. This in a great meaſure has been explained under the foregoi diviſion: it remains only to ſhew, that, beſides acceptance of t rent, there are other ways by which ſuch voidable leaſes may affirmed; as, by diſtraining for rent due at the death of the pr deceſſor; or by bringing an action of waſte againſt the leſſee; o in caſe the leaſe be for life or lives, by bringing an aſſiſe for t rent due after the death of the predeceſſor; or acceptance fealty from the leſſee: all theſe amount to an affirmance of fu voidable leaſes, and make them good againſt the perſon who affirms them, for his own time; becauſe theſe acts ſhew a ſu cient intent in the ſucceſſor to continue and acquieſce in the lea made by his predeceſſor.

3. The Manner of avoiding ſuch Leaſes as are only voidable.

Dyer, 222. Ayer and Ome. Sid. 7. Young and Wright. Dyer, 28. a. in margin. This may be done either by entry, where the leaſe is of thi corporeal and manurable; or by claim, where the leaſe is of thi incorporeal: as, where a leaſe for years is made, rendering re upon condition to be void for non-payment; this leaſe ſhall not void without a demand made of the rent: for if it were otherw it would be in the power of the leſſee to make the leaſe voi any rent day he thought fit, and ſo to add the wrong of making leaſe void to that of non-payment of the rent.

Moor, 52. Dyer, 222. And where an entry is to be made, this may be done either the bailiff of the party that would enter, or by other perſons puted for that purpoſe: but a bailiff, merely in virtue of his of cannot make an entry for his maſter without ſpecial warrant, cauſe his office is to manage his maſter's lands, and to take the fits thereof to his maſter's uſe; but to gain new lands, which maſter had not before, does not belong to his office as ba Beſides, an entry being a thing which the maſter may or may make, his bailiff ſhall not determine his election therein.

Where a corporation aggregate have title of entry to avoid a eaſe, they cannot command their bailiff to enter, unleſs it be by eed; for their parol command in ſuch caſe is void, and the entry hereupon tortious, becauſe as a body politick they are inviſible, nd incapable of acts as natural perſons are: but yet, *per curiam*, f one diſtrains as bailiff to a corporation, though in truth he be ot bailiff, yet he may make conuſance as ſuch, and if the corpora- ion agree thereto, it is good without deed, becauſe the command e had in ſuch caſe is not traverſable. Roll. Abr. 514. b. Dumper v. Syms. Bro. tit. Corporation, 9. 6 Co. 38. 4 Co. 119.

But a biſhop may by parol command his ſervant to demand a ent or make an entry, and this is good; becauſe as a ſole corpora- ion he is capable of the ſame acts as all natural perſons are. 4 Leon. 181. Wood v. Chiver.

A dean and chapter made a leaſe for years, rendering rent, but or default of payment the leaſe to be void; the rent was in ar- ear, and not paid: then they made a new leaſe to another perſon, nd affixed their ſeal to it in the chapter-houſe, before any entry ade upon the firſt leſſee, and at the ſame time made a letter of ttorney to one to enter and make delivery of this leaſe upon he land, who accordingly did it. It was objected, that this ſe- ond leaſe was void, becauſe the deed being perfected as the deed f the corporation, by their affixing their ſeal to it, the delivery fter by the attorney was void, it being perfect before; and the irſt perfection of it as a deed could not make it a good leaſe for ears, becauſe the firſt leſſee was in poſſeſſion, and they made no ntry to avoid it. But it was held to be a good leaſe, and that here was no other means for a corporation to make a leaſe but his: and *Gawdy* ſaid, it was not the deed or leaſe of the corpora- ion till delivery, as of another perſon; and therefore, where it is aid in *Davis* 44. to be agreed, that if a dean and chapter put heir chapter ſeal to a deed, this is a perfect deed thereby, without ny delivery; this muſt be underſtood when the dean and chapter re in poſſeſſion, not when they are out of poſſeſſion, or have only right: and ſo the diverſity appears to be taken upon the books; r otherwiſe the leaſe muſt be inevitably void in ſuch caſe; for ll it be ſealed, the attorney cannot deliver it as the deed of the orporation; and if the ſealing perfects it preſently as their deed, o that it cannot be delivered after, then it is void for want of an ntry, and ſo all ways the leaſe would be void; which would be a ery unreaſonable conſtruction, when it may be ſo eaſily avoided. nd in the latter books it is ſaid, that though the putting of the eal of a corporation aggregate to a deed carries with it a delivery, et the letter of attorney to deliver it upon the land ſuſpends the peration of it as an eſcrow till entry, *&c.* But yet the corpora- ion, if they think fit, may after the indenture of leaſe engroſſed ake a letter of attorney to another, to ſeal and deliver it as their eed or leaſe to the leſſee upon the land, without firſt affixing heir ſeal to it: and ſo it was done in the caſe of the warden and ellows of *All Souls College* in *Oxford*. But then, as it ſeems, the ttorney muſt affix the corporation ſeal to it, and not any other eal. Yet in one book it is held *per curiam*, that a corporation ggregate, as there the preſident, fellows, and ſcholars of *St. John's College* Cro. Eliz. 167. 2 Leon. 97. Willis v. Jermin. Dav. 44. 1 Roll. Abr. 23. Flud and Gregory. Vent. 257. 3 Keb. 307. Good v. Aſh. Leon. 106. Carter v. Claypool. Bulſ. 119. Preſident, &c. of St. John's College v. Lord Norris.

College in *Oxford*, making a leaſe, are to ſubſcribe and ſeal it, and then deliver it by their attorney, having a letter of attorney for it, and that they could not deliver it in any other manner; but whether the attorney might alſo affix their ſeal or not, is not mentioned in the caſe.

(I) Of Leaſes made by thoſe who have but a particular Eſtate or Intereſt in the Lands leaſed: And herein,

1. Of Leaſes made by Tenant in Dower or Curteſy.

Bro. tit. Acceptance, 14. 19. Tit. Leaſes, 17. 19. Plow. 30. 272. Cro. Car. 398, 399. Jon. 254. Vaugh. 80-1.

AS to theſe, it will be ſufficient to obſerve, that if tenant in dower or by the curteſy make a leaſe for years, reſerving rent, and die, this leaſe is abſolutely determined, ſo that no acceptance of the rent by the heir or thoſe in reverſion can make it good. For though their eſtate is *quodam modo* a continuance of the eſtate of the huſband or wife, yet it is a continuance of it only for life, and they have no power to contract for, or intermeddle with the inheritance, and, conſequently, their leaſes or charges fall off with the eſtate whereout they were derived, and the leſſee is become tenant by ſufferance by his continuance of poſſeſſion after.

2. Of Leaſes made by Tenant for Life.

Poph 105. Co. 147. Anne Mayhew's caſe. [(a) His leaſes are merely void upon his death, and therefore cannot be ſet up againſt the remainder-man by his acceptance of rent, and ſuffering the tenant to make improvements after his intereſt veſts in poſſeſſion. Doe v. Butcher, Dougl. 50. But *qu.* whether in ſuch caſe equity would not relieve? Stiles v. Cowper, 3 Atk. 692.]

Tenant for life can make no leaſes to continue longer than his own life (a). But if tenant for life makes a leaſe for twenty years generally, and after he in the reverſion confirms that leaſe, and then the tenant for life dies; though this at firſt would have determined by the death of the leſſor, yet the confirmation has made it good and unavoidable for the whole term. But if the leaſe had been for twenty years, if the leſſor tenant for life ſhould ſo long live, there, if the reverſioner had confirmed this leaſe, yet it would not prevent its voidance upon the death of the tenant for life. The diverſity between which caſes is this, that in the firſt caſe the leaſe being made generally for twenty years, nothing appears to the contrary but that it was a good leaſe for that time abſolutely; for the death of the leſſor, which would determine it ſooner, does not appear in the leaſe itſelf: then when the reverſioner, who alone could take advantage of that implied limitation, thinks fit to wave it, and confirms the leaſe, as it was made at firſt for twenty years abſolutely, this makes it *his own leaſe* for ſo much of the time as would have fallen into his reverſion by the death of the tenant for life, before the twenty years run out: but in the other caſe, the death of the tenant for life being made the expreſs limitation and circumſcription of the twenty years in the leaſe itſelf, no confirmation of that leaſe, as ſo limited, can enlarge it to extend beyond the life of the leſſor, that being the expreſs determination affixed to it.

And yet we find one caſe where it is held, that if a man makes a leaſe for twenty-one years, if the leſſee ſo long live, and after the leſſor and leſſee join in a grant by deed of the term to another, and after the firſt leſſee dies within the twenty-one years, that yet the grantee ſhall enjoy it during the reſidue of the term abſolutely. But to reconcile this caſe with the other, it muſt be intended, that in the aſſignment no notice is taken of the expreſs limitation affixed to the leaſe, but that they joined in an aſſignment of the leaſe for the reſidue of the twenty-one years, and then it may well be conſtrued to amount to a *confirmation by the leſſor* for that time, as the leſſor may confirm the land to the leſſee for any longer time, and thereby enlarge his eſtate or intereſt. 10 Co. 49. a.

If *A.*, leſſee for the life of *B.*, make a leaſe for years by indenture, and after purchaſe the reverſion, and then *B.* die, *A.* ſhall avoid his own leaſe, notwithſtanding he hath now an eſtate capable of ſupporting the leaſe for the whole term; for he may confirm the leaſe for years as it was, and avoid it by ſhewing his own eſtate in the lands at the time of that leaſe made; and he is not ſtopped to do this, becauſe the leaſe took effect in point of intereſt. Co. Lit. 47. b. 6 Co. 15. a. Roll. Abr. 878.

B., tenant for life of *C.*, and he in the remainder or reverſion in fee, join in a leaſe for years by indenture; this during the life of *C.* is the leaſe of *B.*, who then only had the preſent intereſt in the lands, and the confirmation of him in the remainder or reverſion; but after the death of *C.*, then this becomes the leaſe of them in the reverſion or remainder, and the confirmation of *B.*: for the leſſors having ſeveral eſtates in them in ſeveral degrees, the leaſe ſhall be conſtrued to move out of each one's reſpective eſtate and intereſt as they become capable of ſupporting thereof, which is the moſt natural and uſeful conſtruction of the leaſe, eſpecially as there can be no eſtoppel in this caſe, by reaſon of the ſeveral intereſts which paſſed from each. And therefore during the life of tenant for life, if the leſſee, being evicted, ſhould declare of a leaſe for both, this would be againſt him, as was adjudged, becauſe for that time it was only the leaſe of the tenant for life. Co. Lit. 45. a. Dyer, 234. b. Moor, pl. 196. pl. 939. Poph. 57. 6 Co. 14.

[*A.* tenant for life, and *B.* the reverſioner: *A.* only executes a leaſe, in which they are both named: upon *A.*'s death, this leaſe is totally void. And though *B.* ſhould execute it afterwards, it will not bind the leſſee; for it is not his covenant.] Ludford v. Barber, 1 Term Rep. 86.

Of derivative Leaſes, or by one who is but a Leſſee for Years himſelf.

As a leſſee for years may aſſign or grant over his whole intereſt; ſo he may grant it for any fewer or leſs number of years than he himſelf holds it; and ſuch derivative leſſee is compellable to pay rent, perform covenants, &c. according to the terms agreed in ſuch leaſe or agreement. *Vide* tit. Aſſignment and Covenant.

Alſo it is ſaid in (*a*) *Broke*, that a termor ſo granting may diſtrain for the rent, without any power reſerved for that (*a*) Bro. tit. Diſtreſs, 7.

that purpoſe, though a perſon who aſſigns his whole intereſt ca
not, becauſe he has no reverſion.

2 Vern. 175. 374. & *vide* Cro. Eliz. 157. Leon. 279. [Holford v. Hatch, Dougl. 183.

For a derivative leſſee is not liable to the rent reſerved on th original leaſe, otherwiſe than as his cattle may be liable to diſtreſs for rent-arrear to the original leſſor, as any ſtranger's levan and couchant may be; for there is no privity between him an the original leſſor, as there is between a leſſor and aſſignee; an therefore ſuch-a-one, though he take the whole term, except on day, ſhall not be liable to any of the covenants in the origina leaſe (*b*).

(*b*) Hence, a derivative leaſe cannot have the effect of working a forfeiture under a proviſo not to aſſign. Cruſoe v. Bugby, 3 Wilſ. 2 Bl. Rep. 766.]

Palmer v. Edwards, Dougl. 187. note. But ſuch a departure with the whole term, if bad as an aſſignment, not being in writing, would be ſupported as an under-leaſe againſt the grantor. Poulteney v. Hei 1 Str. 435. Dougl. 186.

[When the whole term is made over by the leſſee, although i the deed by which that is done, the rent and a power of entry fo non-payment are reſerved to him, and not to the original leſſe this is an aſſignment, and not an under-leaſe: and therefore, th original leſſor, or his aſſignee of the reverſion, may ſue or be ſue on the reſpective covenants in the original leaſe: and this, althoug new covenants are introduced in the aſſignment.]

Preced. Chan. 124. Colcheſter v. Arnot. 2 Vern. 383. S. C.

Leſſee of a prebend made an under-leaſe, and the leaſe bei pretty far ſpent, he requeſted the tenant to ſurrender, to enab him to renew, and offered to give any ſecurity to grant him a ne leaſe for ſo many years as he had to come in his old one; but th tenant was obſtinate and would not, unleſs his landlord compli with ſome demands of his; upon which the landlord brought his b in equity to enforce him to a compliance: but my Lord *Keeper* ſai though it were a benefit to the plaintiff, and no prejudice to t defendant, yet there being no agreement in the deed for that pu poſe, he could do nothing in it.

But now by the 4 *G.* 2. *c.* 28. § 6. it is enacted in the wor following, *viz.* " Whereas many perſons hold conſiderable eſta " by leaſes for lives or years, and leaſe out the ſame in parcels " ſeveral under-tenants, and whereas many of thoſe leaſes can " by law be renewed without a ſurrender of all the under-lea " derived out of the ſame, ſo that it is in the power of any ſi " under-tenants to prevent or delay the renewing of the prin " pal leaſe, by refuſing to ſurrender their under-leaſes, notwi " ſtanding they have covenanted ſo to do, to the great prejud " of their immediate landlords, the firſt leſſees; for prevent " ſuch inconveniencies, and for making the renewal of lea " more eaſy for the future, be it enacted by the authority afo " ſaid, that in caſe any leaſe ſhall be duly ſurrendered in or " to be renewed, and a new leaſe made and executed by the ch " landlord or landlords, the ſame new leaſe ſhall, without a f " render of all or any the under-leaſes, be as good and valid to " intents and purpoſes, as if all the under-leaſes derived there " had been likewiſe ſurrendered at or before the taking of f " new leaſe; and all and every perſon and perſons, in whom

" eſtate for life or lives, or for years, ſhall from time to time be " veſted by virtue of ſuch new leaſe, and his, her, and their exe- " cutors and adminiſtrators, ſhall be entitled to the rents, cove- " nants, and duties, and have like remedy for recovery thereof; " and the under-leſſees ſhall hold and enjoy the under-meſſuages, " lands, and tenements, in the reſpective under-leaſes compriſed, " as if the original leaſes, out of which the reſpective under-leaſes " are derived, had been ſtill kept on foot and continued; and the " chief landlord and landlords ſhall have and be entitled to ſuch " and the ſame remedy, by diſtreſs or entry in and upon the meſ- " ſuages, lands, tenements, and hereditaments compriſed in any " ſuch under-leaſe, for the rents and duties reſerved by ſuch " new leaſe, ſo far as the ſame exceed not the rents and duties " reſerved in the leaſe, out of which ſuch under-leaſe was de- " rived, as they would have had in caſe ſuch former leaſe had " been ſtill continued, or as they would have had in caſe the re- " ſpective under-leaſes had been renewed under ſuch new princi- " pal leaſe; any law," &c.

4. Of Leaſes made by a Diſſeiſor or Diſſeiſee.

If a diſſeiſor makes a leaſe for years, or grants a rent-charge, and the diſſeiſee confirms it, and after re-enters, yet he ſhall not avoid the leaſe or rent, becauſe by his confirmation of them he hath departed with ſo much of his ancient right, which incorpo- rates and mixes with the leaſe or grant, ſo that he can never after avoid them. Co. Lit. 300. Poph. 50.

If one be diſſeiſed of lands, and whilſt he is out of poſſeſſion he intend to make a leaſe for years, the way is to prepare a deed of leaſe, and after he hath ſigned and ſealed it, before any actual de- livery thereof, as his deed, to deliver it as an eſcrow to a third per- ſon, to be delivered as his deed after entry and actual poſſeſſion taken in his name; or after ſigning and ſealing before actual de- livery, he may make a letter of attorney to a third perſon, to enter upon the land in his name, and after ſuch entry to deliver it upon the land, or elſewhere, as his deed, to the leſſee; and though ſuch letter of attorney be affixed to the deed, (and to make it an effectual letter of attorney, it muſt be ſealed and delivered,) yet the ſealing and delivery of that by the leſſor, though affixed to the deed of leaſe, will not be conſtrued a delivery of the leaſe itſelf, becauſe no ſuch intent appears, but the contrary; and therefore the delivery of the letter of attorney ſhall have no more influence upon the deed of leaſe, than if it had not been affixed thereto: or ſuch diſſeiſee may prepare a deed of leaſe, and at the ſame time execute a letter of attorney to a third perſon, to enter upon the land, and after ſuch entry to ſign, ſeal, and deliver the leaſe as his act and deed to the leſſee: and all theſe ways are good, becauſe the delivery is the eſſential and finiſhing part of a deed; and if the poſſeſſion and ſeiſin be reduced before that comes, the delivery after is as effectual as if the whole deed had been prepared and executed after; becauſe till the delivery, the deed took no effect, Co. Lit. 48. b. Cro. Eliz. 483. Stephens v. Elliot. 3 Co. 55. Cro. Eliz. 446. Jennings v. Bragg. 2 Bendl. 81. 2 Roll. Abr. 25. Davis v. Bridges.

and when the delivery was, he was in actual poſſeſſion, and conſequently might make ſuch leaſe. But if ſuch diſſeiſee, being out of poſſeſſion, had ſealed and delivered the deed of leaſe as his deed, though he had after actually entered upon the land, and then delivered the leaſe again as his deed, yet no intereſt would paſs to the leſſee by either of theſe deliveries; for, as his deed, it took abſolute effect by the firſt delivery, and then the ſecond delivery, to make it his deed, was void and to no purpoſe; for a deed cannot have two deliveries: and the firſt delivery, to make it a leaſe, was void, becauſe he was then out of poſſeſſion, and had only a right of entry, which he could not transfer to a ſtranger; and therefore the leaſe is abſolutely void to carry any intereſt to the leſſee. And ſo it would be, if after ſuch delivery of it as his deed, he had made a letter of attorney to enter and deliver it as his deed upon the land; for the firſt delivery made it his deed effectually; but that could paſs no intereſt, becauſe he was then out of poſſeſſion; and the ſecond delivery to make it a deed was void, becauſe it was his deed by the firſt delivery, and therefore cannot be delivered again; and *quære*, in the caſe above-mentioned, if the letter of attorney were at the concluſion of the deed of leaſe, in the very ſame parchment or paper, whether the diſſeiſee could diſtinguiſh his ſealing and delivery of that as a letter of attorney ſo that it ſhould not amount to a ſealing and delivery of the deed itſelf, and thereby make void any after delivery, when the poſſeſſion and ſeiſin were reduced?

Cowp. 203.

Plow. 137.

The heir after the death of his anceſtor, before any actual entry, may make a leaſe for years, becauſe the poſſeſſion in law was caſt upon him immediately by the death of his anceſtor, and none had poſſeſſion in fact. But if a ſtranger firſt enter by abatement, then ſuch leaſe made by him after will be void; becauſe by the entry the ſtranger gains poſſeſſion in fact, which deveſts the poſſeſſion in law of the heir, ſo that the heir hath neither poſſeſſion in fact nor law, whereof to make a leaſe, and conſequently, the leaſe muſt be void.

Bro. tit. Leaſes, 57. Sav. 55.

If the heir of the king's tenant *in capite*, or in ſocage, before livery, or after office found, makes a leaſe for years, this ſeems to be good; for ſuch leaſe being only a contract between the leſſor and leſſee, may be made before any actual entry, by reaſon of the poſſeſſion and ſeiſin in law, which were caſt on him by the death of his anceſtor. But if he make a feoffment in fee, or a leaſe for life before livery ſued, theſe cannot be made without actual entry into the land to make livery of ſeiſin, and ſuch entry would be an intruſion upon the king's poſſeſſion, and amounts to a forfeiture, by attempting to take a freehold out of the king.

5. Of Leaſes made by Joint-tenants or Tenants in Common.

As to leaſes by joint-tenants and tenants in common, we ſhall here, for method ſake, ſet down ſome of the moſt remarkable caſes relating thereto, though theſe matters are more fully treated of under their proper heads.

1. The

1. Then, if two joint-tenants are in fee, and one lets his moiety to *J. S.* for years, to begin after his death, this is good, and ſhall bind the other, if he ſurvives; becauſe this is a preſent diſpoſition, and binds the land from the time of the leaſe made, ſo that he cannot after avoid it. But a deviſe for years in ſuch manner, by one joint-tenant, would not bind the other ſurviving, becauſe that is no preſent diſpoſition, nor binding upon the deviſor himſelf, inaſmuch as he may revoke or cancel his will, and ſo deſtroy that deviſe; and therefore ſuch deviſe, not taking effect to any purpoſe till his death, comes too late to prevent the ſurvivorſhip, which being the elder title, ſhall be preferred, and ſhut out the deviſe. So, all grants or charges by one joint-tenant out of the land, fall off with his life, and cannot affect the ſurvivor, becauſe they being no immediate diſpoſition of the land itſelf, that comes whole and entire to the ſurvivor under the firſt title, and, by conſequence, over-reaches all intermediate charge or grants thereout by the other joint-tenant who is dead. Co. Lit. 163. Bro. tit. Grants, 154. Roll. Abr. 848.

But if one joint-tenant grants *veſturam* or *herbagium terræ* for years, and dies, this ſhall bind the ſurvivor. So, if two joint-tenants are of a water, and one grants a ſeparate piſcary for years, and dies, this ſhall bind the ſurvivor; becauſe in theſe caſes the grant of the one joint-tenant gives an immediate intereſt in the thing itſelf whereof they are joint-tenants. Co. Lit. 186.

If two joint-tenants for life are, and one of them makes a leaſe for years of his moiety, either to begin preſently, or after his death, and dies, this leaſe is good and binding againſt the ſurvivor; the reaſon whereof is, that notwithſtanding the leaſe for years, the joint-tenancy in the freehold ſtill continues, and in that they have a mutual intereſt in each other's life, ſo that the eſtate in the whole, or any part, is not to determine or revert to the leſſor till both are dead; for the life of the one, as well as of the other, was at firſt made the meaſure of the eſtate granted out by the leſſor; and therefore ſo long as either of them lives, if the joint-tenancy continues, he is not to come into poſſeſſion. Now theſe joint-tenants having a reciprocal intereſt in each other's life, when one of them makes a leaſe for years of his moiety, this does not depend for its continuance on his life only, but on his life and the life of the other joint-tenant, whether of them ſhall live longeſt, according to the nature and continuance of the eſtate whereout it was derived; and then, ſo long as that continues, ſo long the leaſe holds good, and, by conſequence, ſuch leſſee ſhall hold out the ſurviving joint-tenant and the reverſioner, till the eſtate, whereout his leaſe was derived, be fully determined. But if a rent were reſerved on ſuch leaſe, this is determined and gone by the death of the leſſor, for the ſurvivor cannot have it, becauſe he comes in by title paramount the leaſe; and the heirs of the leſſor have no title to it, becauſe they have no reverſion or intereſt in the land: but *quære*, if the executors or adminiſtrators cannot maintain an action of debt or covenant, either upon the covenant in law, or expreſs covenant, for payment of the money, if there be any? Moor, pl. 514. Poph. 96. Harbin v. Barton. 3 Bulſ. 273. Roll. Rep. 401. Dyer, 187. Plow. 263. Cro. Jac. 91. 3 Bulſ. 131. Co. Lit. 184. b. Co. 96. Co. Lit. 185. a. Moor, 139.

Cro. Jac. 91. Moor, pl. 1074. Witlock v. Horton.

A. and *B.* joint-tenants for their lives; *A.* by indenture leaſes the moiety which he holds in jointure with *B.* to *C.* for ſixty years from the death of *B.*, if he the ſaid *A.* ſhould ſo long live, and demiſes the other moiety to *C.* for ſixty years from his own death, if *B.* ſhall ſo long live; then *A.* dies, and *B.* ſurvives: it was adjudged, that this leaſe was void for both moieties; for by the firſt words it was a good leaſe from *A.* of his part, upon the contingency of his ſurviving *B.*, but that never happened; and as to *B.*'s part, *A.* had no power to leaſe or contract for it during the life of *B.*, though he had happened after to ſurvive him, for that it was but a bare poſſibility, which could not be leaſed or contracted for; and therefore the leaſe was void in the whole.

Cro. Jac. 377. Roll. Rep. 309. 3 Bulſ. 130. Roll. Abr. 131. Daniel and Waddington.

A. and *B.* joint-tenants for their lives, *A.* leaſes his part for ſixty years, if he and *B.* ſo long live, then *B.* ſurrenders his part, and takes back a new eſtate; then *A.* dies, living *B.*: it was adjudged, that this leaſe made by *A.* was determined by his death; for the joint-tenancy, which would have given them, or their leſſees, an intereſt in each other's life, is by the ſurrender of *B.* determined and gone, and then the leaſe of *A.* ſtood ſingle on his own life, and conſequently, by his death is determined. So it would be, if after ſuch leaſe for years by one joint-tenant, they had made partition of the joint-eſtate, and then the leſſor had died, his leaſe would be at an end, becauſe the joint-tenancy, which ſhould have ſupported it after his death, is by the partition defeated and gone.

Co. Lit. 186. a. Cro. Jac. 83. 611. Moor, pl. 194. Roll. Abr. 851.

If one joint-tenant or tenant in common makes a leaſe for years of his part to his companion, this is good; for this only gives him a right of taking the whole profits, when before he had but a right to the moiety thereof; and he may contract with his companion for that purpoſe, as well as he may with any ſtranger.

6. Of Leaſes made by Copyholders.

Moor, 184. Salk. 186. pl. 5.

If a copyholder takes upon him to make leaſes, not warranted by the cuſtom of the manor, and without the lord's licence, this is a forfeiture of his copyhold, but no diſſeiſin to the lord; and the leaſe is good againſt every body but the lord.

Moor, 292. Hetl. 122. Bulſ. 189.

And it ſeems not to be material whether ſuch leaſe be by parol or in writing; but it muſt be a perfect leaſe, and muſt have a certain beginning and certain end, for otherwiſe the leaſe is void, and carries but an eſtate at will at moſt; which is no forfeiture.

2 Mod. 79. Richards v. Scley.

A., copyholder for life, having got *B.* to be bound with him for 100*l.* and given him a counter-bond, executes a deed, whereby reciting the counter-bond, and the eſtate *A.* had in the lands for life, *A.* covenants, grants, and agrees for himſelf, his executors, adminiſtrators, and aſſigns, with *B.*, that he, his executors and adminiſtrators, ſhould hold and enjoy theſe lands, from the making of the deed, for ſeven years, and ſo from the end of ſeven years to ſeven years, for and during the term of forty-nine years, if *A.* ſhould ſo long live, with a covenant, that if the 100*l.* were paid and *B* indemnified, the deed ſhould be void: the queſtion was whether

whether this would amount to a leaſe for forty-nine years, if the copyholder ſhould ſo long live; and ſo being in the caſe of a copyhold, and no cuſtom to warrant ſuch leaſe, be a forfeiture of the eſtate? And it was argued to be no leaſe, becauſe ſuch conſtruction would be a wrong to both parties; to the one, by defeating his ſecurity, and to the other, by a forfeiture of his eſtate; which would be unjuſt; when by conſtruing it only to be a covenant for the whole, each might be ſafe, and their intention anſwered; and it was ſaid, that the caſes, wherein ſuch words have been held to amount to a leaſe, were all of them of freehold, where no ſuch miſchief could enſue: but the court, notwithſtanding, inclined this was a good leaſe by the intention of the parties, and conſequently a forfeiture; for then the jury would have found it ſo; but if the words had been doubtful, and ſuch as would admit of divers conſtructions, there, to prevent a forfeiture, it ſhould be taken to be only a covenant; but here, the words are plain and clear: but no judgment was given.

A copyholder, by articles of agreement, covenanted and promiſed with another, that he ſhould hold for a year at *halves, according to the cuſtom of the manor*, at ſuch a rent, and ſo from year to year for five years: this was adjudged no forfeiture, for the prejudice that would enſue on ſuch conſtruction to the copyholder: alſo, the leaſe being worded *ſecundum conſuetudinem manerii* is tied up to the cuſtom of the manor; ſo that if there be no cuſtom to warrant this manner of leaſing, the leaſe itſelf falls to the ground: alſo, there was further in the leaſe a covenant, that if the leſſor put out the leſſee, he ſhould be allowed ſo much rent by way of retainer; ſo that the leſſee was at uncertainty whether he ſhould enjoy it during the whole term; for this gave the leſſor liberty to put him out, making the allowance agreed upon, and ſtipulated between them: and beſides, it was doubted if the words *covenant and promiſe that he ſhould enjoy* for ſuch a time, would amount to a leaſe, or were not rather relative to enjoying after a leaſe made: for the word *covenant* is none of thoſe reckoned up to make a leaſe; and in the caſes where it hath been ſo held, it was joined with the word *agreavit*, which imports a mutual conſent or agreement of both parties; and here, though there be the word *agreed* or *agreement*, yet it is only in the ſtyle of the articles. Alſo, here, the covenant is quietly to enjoy, which *a fortiori* does not make a leaſe, but regards only the manner of enjoying it after a leaſe made, and being only to hold at halves, it can be no leaſe. This is the manner of reporting this caſe, which ariſes ſo by jumps and ſteps, and is ſo incoherently put, that it is hard to conclude any thing from it relative to the matter before us: beſides that the giſt of the caſe ſeems to turn upon the words *holding at halves*; for they are to govern and explain the words *covenant and promiſe*, which of themſelves may be applied to ten thouſand other things, and have no meaning at all, till the ſubſequent words explain what it is he covenants and promiſes: and the words *holding at halves* are of ſo ambiguous and doubtful a ſignification, that according to the rule taken in the foregoing caſe, they might well leave room for

2 Keb. 267. Lenthall v. Thomas.

the court to make ſuch a conſtruction as ſhould prevent a forfeiture: and in one caſe it is expreſsly held, that *expoſing to half* is no leaſe, but only a liberty to plough and ſow, but paſſes no intereſt, nor can the leſſee have treſpaſs for breaking the ſoil: but in the ſame book it is ſaid, that if he had expoſed it to halves for two or three *crops*, this had been a leaſe.

Cro. Eliz. 143. Hare v. Cicely.

An infant copyholder, without licence of the lord, made a leaſe for years by parol, rendering rent, and at full age was admitted, and accepted the rent, and then ouſted the leſſee. In this caſe, though it was agreed, that a leaſe for years, rendering rent, by an infant, of freehold lands, was only voidable; yet it was urged, that in caſe of a copyhold it would be otherwiſe; becauſe the leaſe not being warranted by the cuſtom, would be a diſſeiſin to the lord, and, conſequently, a forfeiture of his copyhold, which being a great miſchief to the infant, the court ought rather to help him, by adjudging ſuch leaſe to be abſolutely void. But, notwithſtanding this, it was adjudged, that the leaſe was a good leaſe till avoided, and that a leaſe for years by a copyholder without licence is not a diſſeiſin: and admitting it ſhould be a forfeiture in this caſe, yet if the lord enters for it, the infant may re-enter upon him, and ſo is at no miſchief; and therefore he, having accepted the rent at full age, hath made it good and unavoidable. And *Jones* ſays, that it was held to be no forfeiture as to the lord; but that admitting it were, yet it was a good leaſe as to all ſtrangers; and that for this reaſon principally it was adjudged ſuch acceptance had made it good.

Latch. 199. Godb. 364. Jon. 157. Noy, 92. in all the S. C. between Aſhfield and Aſhfield.

A copyholder for life made a leaſe for a year by indenture, dated ſuch a day, and the ſame day, by another indenture, makes a ſecond leaſe to the ſame party for a year, to commence ſuch a day, being two days after the firſt leaſe ſhould expire; and by another indenture dated the ſame day and year, makes a third leaſe of the ſame lands to the ſame party, to commence ſuch a day, being two days after the ſecond leaſe would expire; and ſo betwixt each leaſe two days betwixt the beginning of the new leaſe and the end of the former; and if this was a forfeiture of his eſtate, becauſe the cuſtom of the manor warranted a leaſe but for a year only, was the queſtion? And it was agreed, that whether the cuſtom of the manor, or the general cuſtom of the realm, allows a copyholder to make a leaſe for a year, this ought to be a leaſe in poſſeſſion, and he cannot, after ſuch leaſe made, make another in reverſion; and theſe three leaſes being made all at one time, ſhall be intended one entire contract, and ſo a leaſe for three years, which is more than the cuſtom warrants, and, conſequently, a forfeiture: and the intervention of two days between each leaſe was but a fraud and covin to defeat the lord of his forfeiture, which ſhall not avail, and therefore it was adjudged againſt the copyholder, that he had forfeited his eſtate.

Cro. Car. 233. Jon. 249. Roll. Abr. 508. Matthews v. Wheſton.

So, where a copyholder, who by the cuſtom of the manor could make a leaſe for one year only, made a leaſe for a year excepting the laſt day of the year, & *ſic de anno in annum*, excepting the laſt day of every year, during his own life; this was adjudged, by

Cro. Jac. 308. Bulſ. 215. Roll. Abr. 507. Lutterell and Weſton.

the court, clearly to be a forfeiture, and the exception of a day at the end of every year to be only a ſhift to evade the cuſtom; which it cannot do; for it is a leaſe certain for two years at leaſt, excepting two days, which in effect, is a leaſe for more than one year; and if he might by ſuch exception of a day or two, at the end of two years, get out of the reach of a forfeiture, he might then make a leaſe for twenty years, or what other time he thought fit, which the law will not permit; and in *Bulſ.* this manner of leaſing appears expreſsly to have been by articles, by way of covenant, that he ſhould have the land in that manner, not by words of immediate leaſing, which make this a direct authority, that a covenant that he ſhall have or enjoy ſuch lands, amounts to an immediate leaſe, and not a covenant barely; and though it were in caſe of a copyhold, yet it would not ſave the forfeiture.

So, if a copyholder makes a leaſe for a year, *& ſic de anno in annum* during ten years, this is clearly a good leaſe for ten years, and if not warranted by the cuſtom, will be a forfeiture of his eſtate. Rol. Abr. 508. Bulſ. 190. Cro. Jac. 301. 2 Mod. 81.

Theſe caſes being ſo adjudged, and that a copyholder cannot, either by way of covenant, or of executory and renewable leaſes annually, prevent the forfeiture of his eſtate, if he exceeds the number of years warranted by the cuſtom, and has no licence from his lord for that purpoſe; let us ſee if there be any way yet found out to avoid this miſchief, and yet make over to the leſſee ſome certainty that he ſhall enjoy the lands after the term warranted by the cuſtom is expired, without which few will care to take leaſes for ſo ſhort a term as the cuſtoms of moſt manors generally allow; and we find one caſe where an attempt of this kind was made, and it ſeems to have ſucceeded accordingly: the caſe was this: A copyholder made a leaſe for a year only of his copyhold land, according to the cuſtom, and covenanted that after the end of this year the leſſee ſhould have or enjoy the ſame lands for another year, and ſo *de anno in annum* for ten years; this was held by *Yelverton* Juſtice to be no ſuch leaſe as would make a forfeiture, becauſe he had a lawful eſtate but for one year only; and the court agreed with him herein; and this ſeems to be a very reaſonable conſtruction; for when he had in expreſs terms leaſed it but for one year only, and after in the deed covenanted for the leſſee's having or enjoying it for a longer term, this variation in the manner of expreſſion muſt vary the ſenſe of it likewiſe; for now it appears that he intended by the covenant ſomething different from the leaſe itſelf, otherwiſe he would not have departed from that form of expreſſion, which was the moſt proper and natural whereby to ſignify his intention of leaſing; and then it would be unjuſt and unnatural to ſtrain the covenant, which has a meaning proper and peculiar to itſelf, to ſignify the ſame with the firſt part of the deed, which varies not only in form, but was alſo intended to quite another purpoſe. Cro. Jac. 301. Bulſ. 190. Lady Mountague's caſe.

And perhaps in ſuch covenant it may be ſtill better if it were worded *to permit and ſuffer* the leſſee to have, hold, and enjoy the lands in ſuch manner; for a covenant in that form, even of free- Roll. Abr. 848. 3 Bulſ. 252. 2 Mod. 81.

hold lands, will not amount to an immediate leaſe, becauſe the words *permit and ſuffer* prove that the eſtate is ſtill to continue in him from whom the permiſſion is to come; for if any eſtate thereby paſſed to the covenantee, he might hold and enjoy it without any permiſſion from the covenantor; and therefore in ſuch caſe the covenantee hath only the bare covenant for his ſecurity of enjoyment, without any actual eſtate made over to him.

Doe v. Clare, 2 Term Rep. 739.

[In ejectment for a copyhold, the defendant produced a paper-writing, written upon an agreement ſtamp, under the hand and ſeal of *T. Tidd*, of whom the leſſor of the plaintiff purchaſed, made between *T. Tidd* and *T. Clare* (the defendant), reciting, that *M. S.* was ſeiſed of the premiſes in queſtion for her life; and that *Tidd* had agreed with *Clare*, that *in caſe he ſhould be ſeiſed of the premiſes on the death of* M. S. *he would immediately on her death demiſe and let them to* Clare, on the terms and conditions mentioned: "Now therefore the ſaid *Tidd doth hereby agree to demiſe and let* "unto the ſaid *Clare* all, &c. and all ſuch copyhold premiſes as "he ſhall or may be entitled to on the death of the ſaid *M. S.*, "to hold *from and immediately after the death of* M. S. *for the term* "*of* 21 *years*, at the yearly rent of 12 *l.* 12 *s.* And the ſaid *Tidd* "doth hereby promiſe and agree to and with the ſaid *Clare*, that "he the ſaid *Tidd*, on the death of the ſaid *M. S.*, and on his "becoming entitled to the ſaid premiſes, *ſhall and will procure a* "*licence to let the ſaid premiſes.*" Lord *Kenyon* was of opinion, at the trial, that the inſtrument amounted to a leaſe, there being words of preſent demiſe contained in it, and therefore nonſuited the plaintiff. But on the motion for a new trial, his lordſhip ſaid, that having conſulted with the other judges, he was clearly convinced he was miſtaken in the opinion which he had holden at the trial; and that they were all of opinion, that the inſtrument in queſtion was an executory agreement only, and not a leaſe, for two reaſons: firſt, becauſe, if this were holden to be a leaſe, a forfeiture would be incurred; whereas that would be contrary to the intent of the parties, who had cautiouſly guarded againſt it by the inſertion of a covenant, that a licence to leaſe ſhould be procured from the lord: and ſecondly, the ſtamp is conformable to the nature of an agreement for a leaſe, and not to a leaſe itſelf.]

7. Of Leaſes made by Executors or Adminiſtrators.

Vide tit. Executors and Adminiſtrators.

Executors and adminiſtrators, as they may diſpoſe abſolutely of terms for years veſted in them in right of their teſtators or inteſtates; ſo may they leaſe the ſame for any fewer number of years; and the rent reſerved on ſuch leaſes ſhall be aſſets in their hands and go in a courſe of adminiſtration.

6 Co. 63. 67. b. Sir Moyle Finch's caſe. *Vide* 5 Co. 29. Prince's caſe.

So, where leſſee for fifty years of a reverſion expectant upon a leaſe for life makes his will in writing, and thereof appoints one *B.*, his ſon, an infant of three years of age, executor, and dies; adminiſtration is granted to *C. durante minori ætate* of *B.* generally; then *C.* makes a leaſe for ten years, without reſerving any rent

or aught appears; yet this leaſe was held good, becauſe, by the eccleſiaſtical law, *minor 17 annis non admittitur fore executor*; and herefore adminiſtration being granted generally during his mino-ity, the whole term and power of diſpoſing thereof, for that time, eſts as abſolutely in the adminiſtrator as it would have done in he executor himſelf, if he had been of an age capable of acting herein; becauſe for that time the teſtator died *quaſi inteſtatus*, nd the adminiſtrator for that time hath the ſame power as if he ad actually died inteſtate; and therefore ſuch leaſe is good, at aſt till the executor attains his age of ſeventeen years, when uch adminiſtration ceaſes: and ſome held, that ſuch leaſe would old good after, till the executor avoided it by actual entry, by eaſon of the general power which ſuch adminiſtrator had in the ean time; and therefore ſuch continuing acts are not *ipſo facto* etermined by the ceaſing of the adminiſtration, but are only oidable in the ſame manner as other leaſes would be, *viz.* by an ntry of the executor, when he comes to take upon him that office. ut if the adminiſtration had been ſpecial, *ad opus, commodum, & ilitotem* of the executor during his minority, *& non aliter, nec alio ndo*, as it was in *Prince*'s caſe, then none could make title by irtue of ſuch a leaſe made by ſuch ſpecial adminiſtrator, even uring the minority of the executor; for the nature and manner f the adminiſtrator's power appearing in the very title which the ſſee muſt make to ſuch leaſe, this leaſe would appear not to be urſuant thereto, becauſe it could not be of neceſſity, nor for the fe or advantage of the infant, ſince it could not take effect during he life of the tenant for life; and therefore ſuch leaſe would be ondemned as void preſently.

8. Of Leaſes made by a Bailiff of a Manor.

A bailiff of a manor cannot, by virtue of his office, make leaſes Bro. tit. Baily, 40, 41. tit. Leaſes, 37. Cro. Jac. 99. Roll. Abr. 339. e years; for his buſineſs is only to collect rents, gather the fines, ok after the forfeitures, and ſuch like; but he hath no eſtate or tereſt in the manor itſelf, and therefore cannot contract for any rtain intereſt thereout. But the lord of the manor may give m a ſpecial power to make leaſes for years, as he may do to any anger; and then ſuch leaſes, if they are purſuant to the power, d made in the name of his lord, will be good as leaſes by the d himſelf: for the bailiff, though he hath ſuch power, cannot ake them in his own name. But a general bailiff of a manor y make leaſes *at will*, without any ſpecial authority, becauſe ng to collect and anſwer the rents of the manor to his lord, if could not let leaſes at will, the lord might ſuſtain great preju-ce by abſence, ſickneſs, or other incapacity to make leaſes, when y of the former leaſes were expired; and ſuch leaſes at will are the benefit of the lord, and can be no ways prejudicial to m, becauſe he may determine his will, when he thinks fit.

But if a bailiff of a manor hath a ſpecial power to make leaſes 2 Chan. Ca. 202. Rothwell v. Sir Charles Huſſey. years, as he ought to make them in the name of his maſter, ſo y ought to be made in writing, that the authority may appear to

to be purſued: therefore, where a bailiff conſtituted by writing to receive rents, manage and let the lands, made a parol leaſe for eleven years, and the leſſee, being turned out at law upon an ejectment, brought a bill for relief in Chancery, the bill was diſmiſſed, becauſe he had only a parol leaſe, which the bailiff had no power to make.

9. Of Leaſes made by a Guardian.

Lit. § 123, 124. Co. Lit. 88, 89. Vaugh. 18.

A guardian in ſocage may make leaſes for years in his own name, and the leſſee may maintain ejectment thereupon; for this guardian is a perſon appointed, not by any ſpecial deſignation of the party, but by the wiſdom of the law, in reſpect of the lands deſcended to the infant; ſo that where no lands deſcend, there can be no ſuch guardian: and his office originally was to inſtruct the ward in the arts of tillage and huſbandry, that when he came of age he might be the better able to perform thoſe ſervices to his lord, whereby he held his own land: and though the office now be in ſome meaſure changed, as the nature of the tenure itſelf is ſince the time that the ſocage tenants bought off their perſonal labours and ſervices with an annual rent to the lord, yet it is ſtill called ſocage tenure, and the guardian in ſocage is ſtill only where lands of that kind (as moſt of the lands in *England* now are) deſcend to the heir within age: and though the heir after fourteen may chooſe his own guardian, who ſhall continue till he is twenty one, yet as well the guardian before fourteen, as he whom the infant ſhall think fit to chooſe after fourteen, are both of the ſame nature, and have the ſame office and employment aſſigned to them by the law, without any intervention or direction of the infant himſelf; for they were therefore appointed, becauſe the infant, in regard of his minority, was ſuppoſed incapable of managing himſelf and his eſtate, and, conſequently, derive their authority, not from the infant, but from the law; and that is the reaſon they tranſact all affairs in their own name, and not in the name of the infant, as they would be obliged to do, if their authority were derived from him: and if their authority were derived from him it would by no means anſwer the intention of the law in appointing them; for then all acts done by virtue of ſuch derivative authority could be of no more force than if done by the perſon himſelf who gave that authority, ſince none can communicate more power to another than he has himſelf; and that would invalidate all their contracts, and make them favour of the ſame imbecility as if made by the infant himſelf. Therefore, to enable them to take effectual care of the infant, and his affairs, the law has inveſted them, not with *a bare authority* only, but alſo with an *intereſt*, till the guardianſhip ceaſes; and to prevent their abuſing this authority and intereſt, the law has made them accountable to the infant, either when he comes to the age of fourteen years, or at any time after, as he thinks fit; and therefore their authority and intereſt extends only to ſuch things as may be for the benefit and advantage of the infant, and whereof they may give an account

count; which is the reaſon they cannot preſent to any benefice right of the heir, becauſe they can make no advantage thereof, or that would be ſimony,) and, conſequently, have nothing therein hereof they can give an account; and therefore the infant himſelf ſhall preſent thereto. *Vide* tit. Guardian.

From what has been ſaid it appears, that a guardian in ſocage th not only *a bare authority*, but *an intereſt* in the lands deſcended, d therefore, during that time, may make leaſes for years in his wn name, as any other who hath an intereſt in lands may do; r he is *quaſi dominus pro tempore*. And if he makes leaſes for ars to continue beyond the time of his guardianſhip, ſuch leaſes em not to be abſolutely void by the infant's coming of age, but ly voidable by him, if he thinks fit: for they were not derived rely out of the intereſt of the guardian, or to be meaſured there-, but take effect alſo by virtue of his authority, which, for the me, was general and abſolute; and therefore all lawful acts one during the continuance of that authority are good, and may bſiſt after the authority itſelf, by which they were done, is termined; and conſequently, the infant, when he comes of age, ay by acceptance of rent or other act, if he thinks fit, make ſuch aſes good and unavoidable. But a guardian by (*a*) nurture can- t make any leaſes for years, either in his own name, or in the me of the infant, for he hath only the care of the perſon and ucation of the infant, and hath nothing to do with the lands erely in virtue of his office; for ſuch guardian may be, though the fant hath no lands at all, which a guardian in ſocage cannot. Bro. tit. Garden, 19. 70. Cro. Jac. 55. 98. Shopland v. Ridler. 2 Roll, Abr. 41. Briſden v. Huſſey. (*a*) But *note*, a teſtamentary guardian, or one appointed purſuant to the ſtatute 12 Car. c. 24. is the ſame in office and intereſt with a guardian in ſocage. Vaugh. 179.

A. lets land to *B.* for four years, and the lands being holden in cage, and the heir under fourteen, the guardian in ſocage by an denture, before the firſt leaſe was expired, lets the ſame lands his own name to *B.* for eight years; and if by this acceptance a new leaſe from the guardian in ſocage the firſt leaſe was ſur- ndered, was the queſtion? and it is ſaid to be holden by the urt, that it was ſurrendered; or, if it could not be properly called ſurrender, for want of a reverſion in the guardian in ſocage, yet ey held, that at leaſt the firſt leaſe was thereby determined by ad- ittance of the leſſor's power to make ſuch preſent leaſe, which, if e firſt ſhould ſtand in the way, he could not do; and a guardian ſocage hath power to make leaſes for years. Though this caſe cited in (*b*) *Hutton* to be no ſurrender, yet it was in a caſe, where e queſtion was of a ſurrender ſtrictly and properly ſo called; d therefore though it were not to be cited for an authority of a rrender properly ſo called, yet it might amount to a determina- on of the firſt leaſe, which in the principal caſe, all the court greed that it did: but they held, it would be otherwiſe in ſe of ſuch leaſe made by a guardian *pur nurture*, for he can only ake leaſes at will; and therefore ſuch ſecond leaſe at will muſt e abſolutely void, when the leſſee was in poſſeſſion already by rtue of a leaſe for years. Leon. 158. 322. 4 Leon. 7. Owen, 45. 56. Willis and Whitewood. (*b*) Hutton, 105.

If a woman, who is guardian in ſocage to her ſon, marries again, d the huſband and ſhe join in a leaſe of the infant's lands, this aſe, upon the death of the huſband, becomes void; for the in- tereſt Plow. 293. Osborne's caſe.

tereſt which ſhe had in the lands was in right of the infant, a therefore ſhall not bind her, as thoſe acts ſhall in which ſhe joi with her huſband in parting with her own poſſeſſions.

10. Of Leaſes made purſuant to Authority.

Roll. Abr. 330. 9 Co. 76. b. 77. Cro. Eliz. 115. Moor, pl. 1106.

If one hath power, by virtue of a letter of attorney, to ma leaſes for years generally by indenture, the attorney ought to ma them in the name and ſtyle of his maſter, and not in his ow name: for the letter of attorney gives him no intereſt or eſtate the lands, but only an authority to ſupply the abſence of his maſ by ſtanding in his ſtead, which he can no otherwiſe do th by uſing his name, and making them juſt in the ſame manner a ſtyle as his maſter would do if he were preſent: for if he ſho make them in his own name, though he added alſo, by virtue the letter of attorney to him made for that purpoſe; yet ſu leaſes ſeem to be void, becauſe the indenture being made in h name, muſt paſs the intereſt and leaſe from him, or it can paſs from no body: it cannot paſs it from the maſter immediate becauſe he is no party; and it cannot paſs it from the attorney all, becauſe he has nothing in the lands; and then his adding *virtue of the letter of attorney*, will not help it, becauſe that letter attorney made over no eſtate or intereſt in the land to him, a conſequently, he cannot, by virtue thereof, convey over any another. Neither can ſuch intereſt paſs from the maſter imm diately, or through the attorney; for then the ſame indentu muſt have this ſtrange effect at one and the ſame inſtant, to dr out the intereſt from the maſter to the attorney, and from t attorney to the leſſee, which certainly it cannot do; and theref all ſuch leaſes made in that manner ſeem to be abſolutely vo and not good, even by eſtoppel, againſt the attorney, becauſe th pretend to be made not in his own name abſolutely, but in the na of another, by vitue of an authority which is not purſued. T caſe therefore of making leaſes by a letter of attorney, ſeems differ from that of a furrender of a copyhold, or of livery of ſe of a freehold, by letter of attorney; for in thoſe caſes when th

9 Co. 76, 77. Combe's caſe.

ſay, *we* A. *and* B., *as attornies of* C., *or by virtue of a letter of torney from* C., *of ſuch a date*, &c., *do ſurrender*, &c., *or deliver you ſeiſin of ſuch lands*; theſe are good in this manner, becauſe th are only miniſterial ceremonies or tranſitory acts *in pais*, the o to be done by holding the court rod, and the other by deliver a turf or twig; and when they do them as attornies, or by vir of a letter of attorney from their maſter, the law pronoun thereupon as if they were actually done by the maſter himſ and carries the poſſeſſion accordingly: but in a leaſe for year is quite otherwiſe, for the indenture, or deed alone, convey intereſt, and are the very eſſence of the leaſe, both as to paſſing it out of the leſſor at firſt, and its ſubſiſtence in the le afterwards: the very indenture, or deed itſelf, is the conveyan without any ſubſequent conſtruction or operation of law th upon; and therefore it muſt be made in the name and ſtyle of h who has ſuch intereſt to convey, and not in the name of attorn

orney, who has nothing therein; but in the concluſion of ſuch ſe it is proper to ſay, *in witneſs whereof* A. B. *of ſuch a place, . in purſuance of a letter of attorney hereunto annexed, bearing date a day;* or if the letter of attorney be general, and concern re lands than thoſe compriſed in the preſent leaſe, then to ſay, *urſuance of a letter of attorney, bearing date ſuch a day,* &c., *a true whereof is hereunto annexed, hath put the hand and ſeal of the ler,* and ſo to write the maſter's name, and deliver it as the act deed of the maſter; in which laſt ceremony of delivering it he name of the maſter by ſuch attorney, this exactly agrees h the ceremony of ſurrendering by the rod, or making livery, a turf or twig, by the attorney, in the name or as attorney of maſter; which proves that there is a great diverſity between g the name of the attorney in the making of leaſes, and uſing name in making a ſurrender of copyhold, or livery of ſeiſin freehold eſtate.

The king, by letters patent, gave authority to his ſurveyor to ke ſuch leaſes of ſuch lands, reſerving the ancient rent, and ſurveyor makes leaſes by indenture between the king *ex unâ te,* and *J. S. ex alterâ parte,* and the indenture *teſtatur quod inus rex dimiſit, &c.* and the concluſion was, *in cujus rei teſtiium* the ſurveyor *ſigillum ſuum appoſuit:* the court held theſe ſes to be void, becauſe not purſuant to his authority; for a liff cannot make leaſes in his own name, though it be but *de in annum,* and of lands uſually let, but he ought to make m in the name of his maſter; ſo here the ſurveyor ought not ave put his own ſeal to the leaſe, but the ſeal of the king; for hout the king's ſeal it cannot be his leaſe; and the manner of ding ſuch leaſe proves this, for the words are; *quod dominus per* A. B. *ſigillum ſuum appoſuit*; and a great caſe was cited, ere ſuch leaſe by a bailiff, in his own name, was held to be d. Moor, pl. 191. Dyer, 132.

In ejectment the caſe was, that one *A.* deviſed lands to *B.* his ſon ail, with divers remainders over, and makes one *C.* overſeer of will, and willed that he ſhould have the education of his ſon he came to the age of twenty-one, and to receive, ſet, and let, the ſaid *B.*, the ſaid lands ſo given him, and thereof to ac- nt to the ſaid *B.*, being allowed his charges, *&c.* *C.* makes a e for ſeven years in his own name, with reſervation of rent to ſelf; and this leaſe by computation, was to continue half a r after *B.*'s attaining his full age; and if this leaſe was good for part of the term, was the queſtion; *C.* being dead, and *B.* not of age? and it was argued to be good for the whole term, or eaſt during the minority of the ſon, and only void for ſo much ceeded the full age of the ſon, and that *C.* had an intereſt in land, and not a bare authority only; for then all leaſes muſt been made in the name of the infant, and ſo he might avoid whenever he thought fit, which the teſtator never intended mpower him to do. But *Popham, Clench,* and *Fenner* held that, his deviſe is, *C. was but a guardian for nurture,* and could not leaſes at his own will and pleaſure; for then he might make them Cro. Eliz. 678. 734. Piggot v. Garniſh.

them for one hundred years; but here he can only make leaſes
will, for there is no other time certain appointed, and he is but
the nature of a bailiff, and accountable; and therefore it was a
judged that the leaſe was void. From this caſe it appears, that
the authority had been ſufficient to enable him to have made lea
for years, ſuch leaſes made by him during the continuance of th
authority would not have determined therewith, but ſhould ha
ſubſiſted during the whole term for which they were made; a
the infant in ſuch caſe could not, when he came of age, ha
avoided them, as he may leaſes made by his guardian in ſocage,
he thinks fit, becauſe the leſſee would have been in by the will
deviſe, not by the guardian *pur nurture*, admitting the authority
deviſe had been ſufficient for that purpoſe, which in none of t
following caſes of deviſes it ſeems to be.

Moor, 774. Yelv. 73. Carpenter and Collins. Dyer, 26. b.

One deviſes land to his ſon when he comes to the age
twenty-four years, and in the mean time that his executor ſh
have the overſight and dealing of all his lands and goods: t
gives the executor no intereſt to make a leaſe certain for ye
but only an authority to overſee and order the land in right of
ſon, and for his uſe and benefit, as wanting diſcretion to man
it himſelf; but the whole eſtate remains in the mean time in
ſon by deſcent, and the executor can only make leaſes at will;
there is no expreſs deviſe to him of the lands till the ſon co
to twenty-four, nor any expreſs authority to make leaſes for ye
in the mean time; and the heir ſhall not be diſinherited, tho
but for a time, without a manifeſt intent in the will to that p
poſe. And where in that caſe, the ſon died before he came
twenty-four years of age, it was held, that whether the deviſe g
the executor an intereſt or an authority only, yet it determine
the death of the ſon, whenever that happened; for it was o
affixed to his care of the ſon, and, conſequently, determine
his death, and was never intended to exclude the next heir till
ſon ſhould or might have attained his age of twenty-four ye
and then the executor having power to make leaſes at will o
the next heir may, whenever he thinks fit, determine them
entry, or otherwiſe.

Cro. Eliz. 190. Parker and Plummer. Cro. Eliz. 252. Smith v. Havens. Hob. 285. Balder v. Blackbourn. Dyer, 210. pl. 24.

But if the words of the will had been that the executor ſh
have the land, or the profits of the land, to his own uſe, wit
account, till the ſon ſhould come to twenty-four, provided, o
the intent that he ſhould bring up and educate his chil
children; this would not only amount to a truſt and confid
in the executor, but would alſo fix ſuch an intereſt in him
anſwering the purpoſes of the will, as would go to his execu
though he ſhould die before the ſon attained the age of twe
four years; and the education of the child, or children, is no
matter of privity or confidence, but that another may do it as w
and, conſequently, in this caſe, ſuch executor may make leaſe
years, till the ſon ſhould or might attain to the age of twenty
years; and this would not determine, though the ſon ſhou
before that age, till by computation of time he might have att
that age, if he had lived.

One deviſed lands to his wife *de anno in annum*, till his ſon ſhould come to the age of twenty-one years: this was by all the juſtices held ſuch an intereſt as would determine by the death of the ſon, though before twenty-one; for the intent was only that his wife ſhould have the lands during the minority of the ſon, by reaſon of his ſuppoſed incapacity to manage them during that time, which reaſon is at an end by his death: and this the rather appears to be his intent by the words *de anno in annum*, which are executory and applicable to each ſingle year, and ſhew his caution, not to give it to his wife for any determinate number of years, leſt his ſon ſhould die in the mean time, whoſe death, or attainment of twenty-one years, he intended ſhould be the determination of the wife's intereſt. But by *Dyer*, it would have been otherwiſe, if the words had been, *till the ſon ſhould or might come to that age*; and therefore this caſe differs from *Boraſton*'s caſe, and the other caſes, which were adjudged, upon a ſpecial reaſon, that for payment of debts, or for the ſupport and proviſion of the deviſee or executrix, or for maintenance of his children generally, where he had ſeveral; there in ſuch caſes, though the ſon to whom it was deviſed at ſuch an age ſhould die before that age, yet the executrix, or deviſee, ſhould have ſuch an intereſt veſted in them for thoſe purpoſes, as ſhould not determine till the ſon ſhould or might have attained that age, if he had lived; and, conſequently, ſuch executrix, or deviſee, may make leaſes for years, which ſhall continue as long as their own intereſt therein.

Moor, pl. 143. 3 Co. 19, 20. Boraſton's caſe. Chan. Ca. 114. 2 Chan. Rep. 136.

11. Of Leaſes made purſuant to Powers in private Conveyances and Settlements.

As in the ſettlements of eſtates in families, it is uſual to limit out eſtates for life to the preſent takers, to prevent their power of alienation and defeating their iſſue of the proviſion intended them by ſuch ſettlements; and yet it is neceſſary the land compriſed in ſuch ſettlements ſhould be continued in the occupation and manurance of tenants and farmers, who, being ſkilled in the arts of huſbandry, know beſt how to improve and manage them to advantage; therefore, to encourage the induſtry of ſuch farmers, it is become cuſtomary to empower the tenants for life to grant leaſes for a certain time, which otherwiſe they could not do, having themſelves but an uncertain intereſt determinable on their deaths. It will therefore be neceſſary to conſider theſe kind of leaſes, and how far their purſuing or deviating from the ſeveral powers whereon they are founded will invalidate them, and how far not; as alſo upon what ſort of ſettlements ſuch powers may be reſerved, and what not.

1 Burr. 120. *Vide ante* the caſe of Orby and Lord Mohun, letter (E); [and note, that the rules of law adopted in caſes of eccleſiaſtical leaſes, and of leaſes made by tenant in tail under the ſtatute of 32 H. 8. apply equally to leaſes made by virtue of powers in ſettlements.]

Tenant for life, upon a ſettlement made 12 *Jac.* 1. had power to make leaſes of all or any of the lands which at any time heretofore have been uſually demiſed or let in poſſeſſion for three lives, or any number of years determinable on three lives, or for twenty-one years, or under, reſerving the rent thereupon now yielded or paid, or more, ſo long as the leſſees, their executors and

Vaugh. 28 to 35. 2 Jon. 27 to 37. Triſtram v. Viſcounteſs Hastingſaſs.

and aſſigns duly pay the rents, and perform the conditions, according to the true meaning of their indentures of leaſe. The tenant for life makes a leaſe of ſeveral parts of thoſe lands, for years determinable on three lives, ſo long as the leſſees, their executors and aſſigns, duly pay the rents, &c. (*verbatim* as in the power), reſerving the ſame rents which were reſerved 12 *Jac.* 1. when the ſettlement was made, and ſpecifying particularly what thoſe rents were; and there being other lands, called *Loſield*, which were found not to have been in leaſe ſince 12 *Eliz.* (when they were let for twenty-one years at 100*l. per ann.* rent), he now leaſes thoſe lands for twenty-one years, rendering 100*l. per ann.* rent, and with the ſame clauſe as in the other, *viz.* ſo long as the leſſees, their executors and aſſigns, duly pay, &c. The rents due at *Mich.* for the lands in the firſt leaſe were found to be in arrear, but paid in a month after; and the rent upon the leaſe of *Loſield* was duly tendered, but not received; and before the next rent-day the defendant, as heir at law in remainder, entered, upon whom the leſſees re-entered to maintain their leaſes, &c. 1. It was agreed, that the limitation in the ſeveral leaſes, ſo long as the leſſees, their executors and aſſigns duly pay, &c. was well warranted by the power being *in terminis* the ſame with the power, and therefore was good. 2. That by non-payment of the rent at the days, the leaſes were determined, ſo that no acceptance after could ſave or ſet them up again. 3. It ſeemed to be agreed that the firſt leaſe was good, becauſe expreſsly found, that the rent reſerved were the ſame as were reſerved 12 *Jac.* 1. and that neceſſarily implies that thoſe lands were then in leaſe, and being ancient lands, they ſhall be preſumed to have been uſually demiſed; and the rather, becauſe no doubt was made of this at the trial. But 4. It was adjudged that the leaſe of *Loſield* was not warranted by the power; 1. Becauſe the qualifications annexed to the power of leaſing ſhew, that land not ſo qualified was not to be leaſed: now the land to be leaſed by virtue of this power, was ſuch as had been actually let, which muſt be twice at leaſt; but *Loſield* appears to have been let but once; therefore not within the power: alſo, *uſually* may ſignify the common continuance of land in leaſe; as land leaſed for 500 years long ſince is land uſually demiſed, though it were demiſed but once; but then the words *at any time*, ſhew that it muſt be of lands which had been uſually at all times let, which *Loſield* was not, being out of leaſe for above twenty years before the ſettlement: but chiefly and laſtly the leaſe was adjudged void, becauſe the power was to make leaſes reſerving the rent thereupon now yielded or paid, *viz.* at the time of the ſettlement; and this land not having been leaſed for twenty years before, could be under no reſervation of rent at that time, and, by conſequence, the rent thereupon then reſerved (which was none) could not be reſerved upon any after-leaſe to be made; and the words (*or more*) will not hold, becauſe they are words of relation, and muſt refer to ſome rent before, which here was none at all: beſides, *more* or *leſs* are words of compariſon, and comparatives neceſſarily ſuppoſe a poſitive; but nothing or

rent is a mere privative. And yet the objection againſt this conſtruction ſeems conſiderable; for it was ſaid, that the words (*at any time heretofore uſually demiſed*) imply that ſome lands were not then in leaſe; therefore the clauſe of reſerving the rents, which were then yielded and paid, muſt extend only to the rent of ſuch lands as were then in leaſe, and not of the others, which were not then in leaſe: yet ſince he had a power of leaſing them, if they had been at any time theretofore uſually demiſed, he might leaſe them, reſerving what rent he pleaſed; and ſo is one (*a*) book expreſs in point as to the reſervation: but the difference between that caſe and this is, that there the power was to let all or any the lands generally, without any reſtraint; whereas this is reſtrained to lands *uſually* letten, which, as appears afore, this of *Loſield* was not, having been let but once; and therefore the very power of leaſing fails as to that; otherwiſe the reſervation of a rent, though none was reſerved before, ſeems no great objection againſt the leaſe: *ideo quære?* 2 Jon. 31. (*a*) 2 Roll. Abr. 262. Cumberford's caſe.

A ſettlement was made to the uſe of *A.* for life with remainders over, provided that the tenant for life may make leaſes of the premiſes, or any part thereof, ſo as upon every leaſe there be reſerved 5 *s.* an acre for every acre of the land or premiſes ſo demiſed: the tenant for life leaſes a rectory, (which was not included within the ſettlement, and conſiſted only of tithes, without any glebe,) reſerving rent, or without any rent at all reſerved; and if this were a good leaſe within this power was the queſtion? It was argued not, becauſe conſtruction is to be made upon the whole clauſe, and the latter words, which appoint the reſervation of 5 *s.* rent for every acre of land, ſhall reſtrain the general import of the word *premiſes* to land only, which can only conſiſt of acres; otherwiſe it may as well be ſaid, where a power is to make leaſes, ſo as the ancient rent be reſerved, that you may, by virtue of this power, leaſe lands which were never before demiſed, and that the words *ancient rent* ſhall only be applied to the lands which had been anciently or uſually demiſed. But it was anſwered and reſolved by the court, that this leaſe was within the power, and ſo would a leaſe of land, not uſually demiſed, in the caſe before put; for the power being general and affirmative at firſt to make leaſes of all or any part, the reſtraint which comes after under the *ſo as, &c.* ſhall be extended no farther than the very words themſelves import, that is, in the one caſe, to ſo much an acre for that which conſiſts of acres, and in the other, to the ancient rent for that which was anciently or uſually demiſed. And this reſolution was founded chiefly in *Cumberford's* caſe, where the power was to make leaſes of all or any part, ſo as ſuch rent, or more, were reſerved upon every leaſe as was reſerved within the ſpace of two years before; and a leaſe was made of part of theſe lands which had not been demiſed within two years before; and it was reſolved to be a good leaſe, and that he might reſerve any rent he pleaſed, becauſe the power was general to leaſe all; and therefore the reſtrictive clauſe ſhould be applied only to ſuch lands as had been demiſed within two years before: but *Hale*, in the principal caſe, ſaid, if Vent. 294. 2 Lev. 150. 3 Keb. 544. 547. Walker and Wakeman. 2 Roll. Abr. 262.

it had been *res integra*, he might perhaps be of another opinion. *Note* alſo, this caſe ſeems againſt the caſe of *Vaugh.* 35, before.

Goodtitle v. Tunucan, Dougl. 565.

[Lord *Ferrers* was tenant for life under a ſettlement, in which there was the following power, *viz.* "That it ſhould be lawful "for the tenants for life reſpectively, from time to time, and at "all times during their reſpective natural lives, and when they "ſhall reſpectively come into, and be in, *the actual poſſeſſion of the* "*aforeſaid manors and premiſes*, by virtue of the limitations afore- "ſaid, by indentures under their hands and ſeals, to demiſe all "or any of the ſaid manors, meſſuages, lands, tenements, and "hereditaments hereinbefore mentioned, or any part thereof, to "any perſon or perſons whomſoever, in poſſeſſion, but not by way "of reverſion or future intereſt, for the term of twenty-one years "abſolute, or any leſs abſolute term; or for any term or number "of years determinable upon one, two, or three lives, ſo as upon "every ſuch leaſe or leaſes reſpectively, there be reſerved and "made payable during the continuance of ſuch leaſe or leaſes "reſpectively, to be incident to, and go along with the imme- "diate reverſion or remainder of the premiſes ſo leaſed, ſo much "or as great yearly rents as, or more than now is, and are paid "and yielded, or agreed to be paid and yielded for the ſame, or "proportionably for any part thereof." Lord *Ferrers*, under this power, granted a leaſe to the defendant for ninety-nine years, if ſhe ſhould ſo long live. Part of the premiſes compriſed in the leaſe, conſiſted of manors and manerial rights which had never been leaſed before, and alſo of a fiſhery which had been let before, but was not at the time of the ſettlement. Since that time it had been let again at 15 *s.* It was objected, that the manors and fiſhery were not demiſable under the power. The manors had never been let; the fiſhery was not let at the time of the ſettlement; and the power required the rent then paid, or *more*, to be reſerved. Things then for which *no* rent was *then* paid, could not be meant to be comprehended. This would avoid the whole leaſe; for one entire rent was reſerved, and it could not be apportioned. But, by the court, the power is expreſs to demiſe the manors and fiſhery. They are particularly mentioned in the ſettlement, and the power goes to the whole. They pay under the leaſe as great a yearly rent, as at the time of the ſettlement, for they paid nothing then. The words, therefore, are complied with, and this objection could only ſtand upon *intent*. But no ſuch *intent* appears. The manors are nominal,—of no value,—no object of yearly income; the fiſhery worth only 15 *s.* a year. They are convenient to the leſſee living on the land, and of no use to the remainder-man. The intent was to give leave to demiſe all, reſerving as much rent in the whole, as had been reſerved before. Beſides, the words at the end of the power, "or proportionably for any part thereof," ſhew that it was the intent to the *quantum* of the rent, and not any particular part of the premiſes included in the ſettlement, was to guide the perſon in executing the power.

3 Term Rep. 677.

A., ten

A., tenant for life under a ſettlement, in which there was a power, that any perſon who ſhould be actually ſeiſed of the lands by virtue of the ſettlement might make a leaſe or leaſes for three lives, or for twenty-one years, of all or any part of the premiſes therein compriſed, *at ſuch yearly rents, or more, as the ſame were then let at*, granted a leaſe of the capital meſſuage for twenty-one years, but reſerved no rent. The queſtion was, whether the capital meſſuage was demiſable under this power? and the court held, that it was not. For the qualification annexed to the power of leaſing, that *the ancient rent muſt be reſerved*, manifeſtly excludes the manſion-houſe, and grounds about it, *never let*. No man could intend to authorize a tenant for life to deprive the repreſentative of the family of the uſe of the manſion-houſe; therefore, the words in ſuch a caſe ſhew, that the power was meant to extend only to what had been uſually let. By that means the heir enjoys all the premiſes in the ſettlement, juſt as they were held and enjoyed by his anceſtor, the tenant for life. He has the occupation of what was always occupied, and the rent of what was always let. The nature of the thing ſpoke the intent as forcibly as the moſt direct words would have done. It was demonſtration.

Bagot v. Oughton, 8 Mod. 249. 381. Foſt. 332.

Dougl. 574.

So, where a tenant for life under a will, with a power to let *all* or any part of the premiſes, *ſo as the uſual rents* be reſerved; and ſo as there ſhould not be at any one time any greater or larger eſtate upon any one *tenement*, or part of a tenement ſo leaſed, than for three lives, or for ninety-nine years, determinable on lives, either in poſſeſſion or reverſion; and ſo as ſuch leaſe or leaſes ſhould not be made diſpuniſhable of waſte; granted a leaſe *of tithes which were never leaſed before the making of the will*; the court held that ſuch leaſe was not warranted by the power, and therefore void. It was moſt manifeſtly the intent of the deviſor, that nothing ſhould be let, but what had been let before; that thoſe who were to enjoy the eſtate after him, were to enjoy it in the ſame manner as he had done. In all caſes on the conſtruction of powers, the ſingle point to be conſidered is, the intention of the creator of the power: that alone muſt govern.]

Pomeroy v. Partington, 3 Term Rep. 664.

[1 Burr. 120.]

If land hath been leaſed, by virtue of a contract, from year to year, for three years, this cannot be ſaid to be uſually let, becauſe this is but one leaſe, though renewable every year.

2 Roll. 262.

[Lands were conveyed on a marriage to truſtees and their heirs, to the uſe of one for life, remainder to his firſt and every other ſon in tail male, *&c.* with a proviſo, "that it ſhould be lawful for the tenant for life, and his wife, during their reſpective lives, and the ſon and ſons of their reſpective bodies, and the heirs male of ſuch ſon and ſons, and the heirs male of tenant for life, as they ſhould be ſeverally and ſucceſſively in poſſeſſion of the freehold by virtue of the limitations aforeſaid; and for the ſaid truſtees, and the ſurvivors and ſurvivor of them, and the heirs of ſuch ſurvivor, *during the minority* of any ſuch ſon or ſons, or iſſue male, at any time or times, by any deed or deeds to be ſigned and ſealed by him or them reſpectively, in

Right v. Thomas, 3 Burr. 1441. 1 Bl. Rep. 446.

" the preſence of two or more credible witneſſes, to demiſe, leaſe,
" &c. to any perſon, &c. either in poſſeſſion or reverſion for one
" life, or for two or three lives, &c. all or any part of the pre-
" miſes which *had been uſually ſo demiſed and letten*, ſo as there
" ſhould be no more than three lives in being at one time," &c.
A leaſe was afterwards made by indenture, &c. bearing date the 24th of *June* 1742, between the truſtees named in the ſettlement, (there being then a minority,) and *J. S.*, of part of the premiſes, in conſideration of a fine paid, a certain yearly rent, and a ſpecific ſum for a harriot. Several old leaſes of the premiſes were ſhewn, ſome in Queen *Elizabeth*'s time, and others in that of *Henry* 8th; ſome for years, and others for ninety-nine years, determinable upon three lives: and among the reſt, an indenture *tripartite* bearing date the 15th of *December* 1638, whereby one of the anceſtors of the preſent tenant for life, ſeiſed in fee, in conſideration of natural love and fatherly affection to his ſecond ſon, and for his better advancement, livelihood, and maintenance, covenanted to ſtand ſeiſed to the uſe of himſelf for life, then of his ſecond ſon, his executors, &c. for ninety-nine years, if his ſaid ſon, or any woman he ſhould marry, or any iſſue of his body, ſhould ſo long live, paying unto the heirs and aſſigns of the father the yearly rent of 4 *l.* payable quarterly; with covenants on the part of the ſon to pay the rent, and repair the premiſes. The queſtion was, whether a covenant to ſtand ſeiſed could be conſidered as an evidence of the uſual manner of demiſing? And by the court, it ſhould. There is no doubt, but that theſe lands had been uſually leaſed for lives; and the uſual profits made by fines. A covenant to ſtand ſeiſed entered into by the owner of an eſtate, is *a leaſe:* and the objection, that the covenant to ſtand ſeiſed in queſtion is by way of proviſion for a younger child, is of no weight; for it is every day's experience; nothing being ſo common as the making of theſe leaſes for the benefit of younger children.]

Co. 134. a. 139. Poph. 81. 8 Co. 71. a. And. 273. Harcourt v. Poole. 2 Roll. Abr. 261. 2 Jon. 35.

If a feoffment in fee be made to the uſe of *A.* for life, remainder to *B.* in tail, with power for *A.* to make leaſes reſerving, or ſo that he reſerve the accuſtomable rent, payable to all thoſe who ſhall have the reverſion or remainder; if *A.* make leaſes according, theſe leaſes derive their eſſence out of the feoffment, and after the are made do, in point of time, precede all the other eſtate limited by that feoffment; ſo that the rent thereupon reſerved, ſhall go with the reverſion or remainders thereby limited, as a rent properly ſo called, and not as a ſum in groſs; and therefore thoſe in reverſion or remainder may diſtrain, or have an action of debt for recovery of it, as if they were ſeiſed in fee, and had made the leaſe. And where one (*a*) book calls it a ſum in groſs, this is denied to be law in (*b*) another, and ſeveral books prove it a rent. But in (*c*) *Poph.* it is ſaid to have been a doubt, in the Lord *Dyer*'s time, if ſuch leaſes ſhould be good, unleſs there were a clauſe that the feoffees, and their heirs, ſhould ſtand ſeiſed to the uſe of ſuch leſſees; for which reaſon it may not perhaps ſtill be amiſs to inſert ſuch a clauſe, though ſuch leaſes have ever ſince been held to be good without ſuch clauſe: for ſince the ſame deed

(*a*) Co. 139. (*b*) In 2 Jon. 35., for which is cited And. 273. 2 Roll. Abr. 261. (*c*) Poph. 81.

limits the eſtates to *A.* and *B.* gives *A.* power to make leaſes for ſuch a determinate time, theſe leaſes cannot be derived out of the intereſt of *A.*, for that being but for his own life, is not commenſurate to ſuch leaſes, which at all events are to laſt for ſuch a time; and if ſuch leaſes were to determine at *A.*'s death, the power would be nugatory and idle, becauſe without it he might have made ſuch leaſes; but the power being to make leaſes which ſhall endure longer than the life of *A.*, theſe leaſes, when they are made, muſt be derived out of the ſame root as the eſtate of *A.* himſelf is, that is, out of the eſtate of the feoffees, who for that purpoſe have a kind of *ſcintilla juris* left in them to ſerve ſuch future leaſes when they are made, and by conſequence, muſt be ſeiſed to the uſe of ſuch leſſees; and then the ſtatute of 27 *H.* 8. *c.* 10. preſently carries the poſſeſſion accordingly; and the power, being coeval with the other eſtates, may well ſubject them to the execution thereof; ſince he who is maſter of his own eſtate, may diſpoſe of it upon what terms he thinks fit.

But theſe leaſes can only be made by virtue of ſuch powers upon eſtates executed by tranſmutation of poſſeſſion: therefore, if one bargains and ſells lands to another by indenture enrolled for the life of the bargainee, with power for the bargainee to make leaſes for three lives, or twenty-one years; yet this is of no effect to give him any ſuch power; for here is no tranſmutation of the poſſeſſion at law, but only a uſe raiſed by virtue of the conſideration, to which the ſtatute immediately carries a poſſeſſion, according to that uſe; but for the reſidue of the eſtate, it continues wholly in the bargainor, as it was before; and then the perſons who are to be the leſſees being unknown, no conſideration can ariſe from them to the bargainor, and by conſequence, no other uſe can then be drawn out of him. And if the uſe does not ariſe at the time of the bargain and ſale, it can never ariſe after; becauſe when the deed is once perfected, its operation, as to creating any new or further intereſt, is then at an end, and conſequently, no leaſes can be made upon ſuch a conveyance, for want of a conſideration to raiſe a uſe to the leſſees. Poph. 81.

So, if one covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to his wife for life, with divers remainders over, with a power for the covenantor, for divers good cauſes and conſiderations, to make leaſes for lives or years, *&c.* this power is perfectly void, ſo that he cannot by virtue thereof make leaſes, even to his ſons or daughters, or any other of his blood, much leſs to ſtrangers; becauſe ſuch general conſideration can raiſe no uſe at all, and no averment of a particular conſideration can help it, becauſe his intent appears to be general, with regard to the perſons to take ſuch leaſes, as to the conſideration whereon they are to be made; for his intent then was not to demiſe to one perſon more than to another; and ſince ſuch leaſes are to ariſe and take their effect out of the eſtate of the covenantor, there muſt be a conſideration to raiſe a uſe for that purpoſe at the time of the covenant made; which in this caſe there cannot be, *when neither the perſons nor the conſideration are known*: and if there be no conſideration Mildmay's caſe. Co. 176. Moor, 144. 372. 2 Roll. Abr. 260. Croſs v. Fauſtendich, Cro. Jac. 180. Baynes v. Belſon. Raym. 247. 3 Keb. 809.

ſideration to raiſe ſuch uſe at the time of the covenant perfected, it can never ariſe after, becauſe the further operation of the deed then ceaſes. But upon a *feoffment*, *fine*, or *recovery*, where the eſtate is *executed*, and a change of the poſſeſſion made preſently, there, no conſideration is requiſite to raiſe any of the uſes; and then, by virtue of the power which is created at the ſame time with the conveyance itſelf, the leaſe may be made at any time after.

Chan. Ca. 101. 263-4. Prince and Green v. Chandler. 40 Eliz. 3 Chan. Ca. 91. [Lord C. J. Treby, in his argument in Bath and Montague's caſe, aſſigns the ſame reaſon for ſupporting the leaſe.]

And yet where one covenanted to ſtand ſeiſed to the uſe of himſelf for life, remainder to his eldeſt ſon, with power for himſelf to leaſe a ſmall part for forty years, which he accordingly afterwards did, for a proviſion for a younger child; though at law this was not good, yet the Lord Chancellor *Egerton*, upon a bill in Chancery, decreed relief, becauſe the ſon claimed by the ſame conveyance by which the power was limited, and the conveyance was intended to have been by livery, but that the father was adviſed ſuch covenant to ſtand ſeiſed would do as well; and the law in *Mildmay*'s caſe was not then adjudged; ſo that neither the party nor his counſel did then know but that ſuch power was warranted by law.

Godb. 327. pl. 419.

A huſband ſeiſed of lands in right of his wife, he and his wife levy a fine to the uſe of themſelves for their lives, and after to the uſe of the heirs of the wife; proviſo, that it ſhall and may be lawful to and for the ſaid huſband and wife, at any time during their lives, to make leaſes for twenty-one years, or three lives; and the wife being covert, made a leaſe for twenty-one years: it was adjudged a good leaſe againſt the huſband, though made when ſhe was a feme covert, and although it was made by her alone, by reaſon of the proviſo. This is the caſe *verbatim*, as it is put in the book: but ſurely the reporter muſt be miſtaken; for, as it is put there appears no power for the wife ſolely to make leaſes, but only in conjunction with her huſband; therefore the power muſt be intended for the wife ſolely, or for the huſband and wife, *or either of them*; and then, no doubt, ſuch leaſe by the wife alone will bind the huſband, becauſe it takes its eſſence *out of the fine*, to which both were parties and conſenting.

Bayley v. Warburton, Com. Rep. 494.

[One ſeiſed in fee, on his marriage with a ſecond wife, ſettles lands on himſelf for life, then on his wife for life, then on the iſſue of that marriage, then to the uſe of his eldeſt daughter by his former wife, and to the heirs of her body, *&c.* There was a proviſo, that it ſhould be lawful for the wife, *during her life*, to demiſe the premiſes to any perſon for ſuch term, with and under ſuch conditions, reſtrictions and reſervations, in ſuch manner to all intents as tenant in tail might do by ſtatute 32 *H.* 8. for the term of one, two, or three lives, upon and under ſuch reſervations and rents, and in ſuch manner as tenant in tail was enabled to do by that ſtatute. The huſband died, and the wife married again, and ſhe and her ſecond huſband demiſed the premiſes purſuant to the power. Two queſtions were made; firſt, whether the leaſe made by the huſband and wife when the power was given to the wife alone, were a good exe-

tion of the power, or whether it were not ſuſpended by the marriage? Secondly, whether this leaſe by the huſband and wife ought not to have been made by fine? As to the firſt queſtion, the court held, that this was a good execution notwithſtanding the power. As to the ſecond, that no fine was neceſſary; for the eſtate of the leſſees was not derived from the leſſors, but aroſe out of the eſtate of the feoffees or releaſees named in the original ſettlement: that therefore, nothing more was requiſite to the raiſing of an eſtate to the leſſee, than what was required by the deed creating the power; which was only an indenture ſigned by the party making the leaſe, and made in ſuch manner as the 32 *H.* 8. requires in leaſes by tenant in tail.]

A., ſeiſed of a reverſion in fee expectant upon an eſtate for life to *B.*, covenants to levy a fine, *&c.* to the uſe of himſelf for life, remainder to the uſe of himſelf in tail, *&c.* with power to *A.* to make any leaſe or leaſes in poſſeſſion or reverſion of all or any the premiſes, provided that ſuch leaſe or leaſes do not exceed three lives at the moſt, or twenty-one years, and ſo as the accuſtomable rent be reſerved, payable during ſuch leaſe or leaſes: a fine is levied accordingly: then *A.* makes a leaſe to *C.* for ninety-nine years, if two lives ſhould ſo long live, to begin after the death of *B.*, rendering 14 *l. per annum* (the ancient rent) to him, his heirs and aſſigns, and to ſuch perſon and perſons to whom the inheritance ſhall after his death appertain; and if this was a good leaſe, purſuant to his power, was the queſtion? It was adjudged that it was: becauſe the firſt part of the power was to make leaſes abſolutely and indefinitely, in poſſeſſion or reverſion, and the reſtraint which came after was only that they ſhould not exceed three lives, or twenty-one years, which this leaſe does not; for though it is for ninety-nine years, yet it is determinable on two lives, which is leſs. Beſides, the power being to make leaſes as well in reverſion as in poſſeſſion, and for lives as well as years, could not have been executed, as to making leaſes for lives, in any other manner; for they could not be made for lives in reverſion, as they may for years determinable on lives; and a leaſe in ſuch manner was moſt conſonant to the nature of his eſtate, which was but a reverſion after the eſtate for life to *B.* But the court agreed, that if one hath power generally to make leaſes for three lives, he cannot make a leaſe for ninety-nine years, if three lives ſo long live; for this is not purſuant to his power, which was only to make leaſes for three lives; and there being no other liberty given in the power, he cannot vary from it, becauſe ſuch powers being to charge the inheritance of a third perſon, are to be taken ſtrictly. 2. It was adjudged, that the reſervation was good, becauſe ſuch leaſe, after it is made, comes in by virtue of the power above all the limitations, and takes its eſſence, not out of the eſtate for life, but out of the eſtate of the conuſees before all the other eſtates, and then they coming in after, in the nature of reverſioners, the reſervation to them is good.

8 Co. 69, 70. 2 Roll. Abr. 260. Whitlock's caſe, 3 Mod. 268-9. Lutwich v. Pigott.

It was ſaid by the judges, in 3 *Keb.* that the conſtruction in *Whitlock's* caſe, that a perſon, having power to make leaſes for

3 Keb. 746.

three lives, could not make a leaſe for ninety-nine years determinable on three lives, was too nice, and expreſsly contrary to the intent of the parties.

Mich. 8 Geo. 2. Rattle v. Popham, in B. R. 2 Stra. 992. [(a) The widow afterwards filed her bill in Chancery; and Lord Talbot held the leaſe to be warranted by the power, ſaying, that it was not *a defective*, but *a blundering execution*, and he decreed the defendant to pay all the coſts both at law and in equity. 2 Burr. 1147. 2 Ver. 64. And note, in the caſe of Zouch v. Woolſton, 2 Burr. 1147. the court of King's Bench were of opinion that whatever is an equitable, ought to be deemed a legal execution of a power.] (b) 8 Co. 70. Ley. 74. Co. 45. S. Rule laid down.

Yet in a late caſe, where *A.* made a ſettlement, and limited the eſtate to himſelf for life, remainder to his ſon *B.* for life, with ſeveral remainders over, with a power to *B.* when he came into poſſeſſion, *to aſſign or limit the ſame to any woman* that he ſhould marry, or *for the uſe or in truſt for her*, in lieu of her jointure; *B.* on his intermarriage, by deed reciting his power, demiſed the eſtate to truſtees for ninety-nine years, in truſt for her, if ſhe ſhould ſo long live: though it was agreed, that this was no greater eſtate than by the power he was enabled to make, being to determine on her death, and that an eſtate for years was, in the eye of the law, of ſhorter duration than an eſtate for life; yet it was reſolved, that the power being poſitive, and ſpecifying what eſtate was to be limited, ought to be conſtrued and purſued ſtrictly, being to ariſe out of the eſtate of a third perſon (a): and they agreed the rule laid down in (b) *Whitlock*'s caſe, that all poſitive particular powers muſt, in all material circumſtances, be poſitively and particularly purſued.

3 Keb. 44. Alſop v. Pine.

One had power in effect to make leaſes for the lives of *A.*, *B.* and *C.*, and he makes a leaſe to them for three lives, and the life of the longer liver of them: this was held to be ſufficient within the power, becauſe for three lives generally, and for three lives and the longer liver of them, is all one, ſince without ſuch words it would have gone to the ſurvivor.

2 Bulſ. 216. Cro. Jac. 347. Roll. Rep. 12. 2 Roll. Abr. 260. Fox v. Prickwood.

Tenant in fee makes a leaſe for life, and after levies a fine to the uſe of *J. S.* for fifteen years, remainder to the uſe of himſelf for life, with power for himſelf to make leaſes for twenty-one years, or three lives in poſſeſſion; and the queſtion was, if by virtue of this power he might make leaſes during the continuance of the term for fifteen years, or not till after that was ended? and *per curiam* clearly, he may make leaſes preſently in poſſeſſion; for the power iſſues out of the whole eſtate, and by virtue thereof he may make leaſes in poſſeſſion preſently, and need not ſtay till the term end, or the lands come into poſſeſſion; and the termor ſhall have the rent reſerved thereon: and they agreed, that as this power was, he could not make leaſes in reverſion, but the term of fifteen years was immediately ſubject to the power, and when that is executed it will charge the poſſeſſion.

Palm. 468. Cro. Eliz. 5. 6 Co. 33. Leon. 35. 3 Leon. 130. 4 Leon. 64. Moor, 159. Poph. 9. Yelv. 222.

Tenant for life, with power to make leaſes for twenty-one years, rendering the ancient rent, makes a leaſe for twenty-one years, to begin ſuch a day after: this is not purſuant to the power and conſequently void, becauſe *pro tempore* it is a future leaſe which this power does not warrant, but it ought to be made in poſſeſſion; for if he might make leaſes in reverſion, or *in futuro* though but a month after, he may as well make them to begin twen-

twenty years after, or after his death, and ſo defeat the intent of the power, which being to charge the eſtates of third perſons, is to be taken ſtrictly. Cro. Jac. 318. 2 Roll. Abr. 261. Raym. 247.

But where a huſband, ſeiſed of lands in right of his wife, made a leaſe for twenty-one years purſuant to 32 *H.* 8. *c.* 28. and after, by a private act of parliament it was enacted, that the huſband ſhould have thoſe lands for his life, remainder to his wife for life, and that all leaſes and grants thereof made or to be made by the huſband for three lives, or twenty-one years, reſerving the ancient rent, ſhould be good; and the huſband after made a leaſe of theſe lands, to begin after the expiration of the firſt leaſe; it was held good; for the lands being in leaſe at the time of the making of the act, the intent of the act ſeems to warrant ſuch leaſe in reverſion, and the rather, becauſe there was no reſtraint from making leaſes in reverſion, as there is in 32 *H.* 8. *c.* 28. which ſeems implicitly to give a power of leaſing them in reverſion: but they agreed, that if the lands had not been in leaſe at the time of making the act, or if a leaſe had been made in poſſeſſion purſuant to the act, the huſband could not in either of theſe caſes have made a leaſe in reverſion, or to begin at a future time; becauſe then the power might well be executed by making leaſes in poſſeſſion, which here, having but a reverſion himſelf, he could not. It was alſo held, that a commiſſion from the queen to make leaſes for twenty-one years, to ſave her the trouble of making them, would not warrant leaſes in reverſion. Dyer, 357. Leon. 36. 3 Leon. 71. 4 Leon. 66. 2 Roll. Abr. 261.

[So, tenant for life of the reverſion of lands that were in leaſe for lives, by virtue of a power under a ſettlement, (providing "that it ſhould be lawful for every perſon who ſhould be actually "ſeiſed of the freehold of the premiſes limited in uſe, to make "leaſes of any part thereof which had been uſually letten for lives "or years, of which he ſhould be ſo actually ſeiſed by virtue of "the limitations aforeſaid, by indenture, for any term not ex-"ceeding twenty-one years, or determinable on one, two, or three "lives, &c. ſo as there were not in any part of the premiſes ſo "leaſed at any one time, any more or greater eſtate or eſtates "than for twenty-one years or three lives, or for any number of "years determinable upon three lives,") made ſeveral leaſes for ninety-nine, to commence from the death of a remaining life in a former leaſe. And the queſtion was, if theſe leaſes were purſuant to the power? It was objected, that they were leaſes in reverſion. But it was anſwered, that when a man made a ſettlement of the *reverſion* of lands *demiſed* for life or years to the uſe of one for life, with power to make leaſes *generally*, he may make a leaſe during the continuance of a former leaſe, to commence after the former, as otherwiſe his power would be ineffectual. Coventry v. Coventry, Com. Rep. 312.

However, where *C.* under a power to make leaſes for one, two, or three lives, or for twenty-one years, reſerving the ancient rent, demiſed to *B.* for twenty-one years, to commence after the death of *I.* and *M.*, who were tenants for life at the time of making the ſettlement, and who lived for ſeveral years after; it was holden, that Baynes v. Belſon, Sir T. Raym. 247. But this caſe did not receive a deciſion,

but was adjourned, other queſtions ariſing therein. that the power was not well executed, the leaſe being to commence *in futuro.*]

And it is obſervable, that the court are ſtated by the reporter, to have founded their reſolution on this point on the caſe of Slocomb v. Hawkins, as reported in Yelverton, 222., and on that of Suſſex v. Wroth, as cited 2 Roll. Abr. 261. and 6 Co. 33., both of which caſes, as cited in the reporters referred to, apply only where reverſionary leaſes are made under a power *attaching* upon eſtates in *poſſeſſion*. Pow. on Powers, 419.

2 Roll. Abr. 261. Hele v. Green, adjudged on a ſpecial verdict.

One poſſeſſed of a manor for ninety-nine years, by his will deviſes it to *A.* his wife for her life, with power *to let, ſet, or make eſtates out of it, and that in as ample manner as I myſelf might, if I were living;* and after the death of *A.* he deviſes it to *B.* his daughter, and the heirs of her body begotten, and dies, and *A.* being his executrix, conſents to the deviſe, and after makes a leaſe of part of the ſaid manor to *C.* for ninety-nine years, if three lives ſo long live, and dies: this was adjudged a good leaſe againſt *B.* the daughter; though it was objected, that ſhe had power to diſpoſe of it only during her own life, becauſe otherwiſe ſhe might defeat the remainder limited to the daughter. But the court held that the diſpoſition made by her ſhould continue after her death, otherwiſe the power would be merely idle, ſince without it ſhe might have diſpoſed of it during her own life.

Lev. 176. Sid. 260. Raym. 132. Keb. 778. 910. Opey v Thomaſius; *& vide* Chan. Ca. 17.

One ſeiſed of lands in fee makes a leaſe for ninety-nine years if three lives ſhould ſo long live, and after ſettles the reverſion of himſelf in tail, with power to make leaſes for one, two, or three lives, or for twenty-one years in poſſeſſion; and after he makes a leaſe for twenty-one years, to begin after the expiration of the firſt leaſe; and if this was purſuant to his power, was the queſtion. And the court agreed, that where tenant in poſſeſſion makes a ſettlement with power to make leaſes generally, there, he can only make leaſes in poſſeſſion; but where he that makes the ſettlement had only a reverſion at the time, there, he may make leaſes out of that reverſion; for that agrees with the intention of the parties, which is to be the guide in the conſtruction of all ſuch powers; but here, the power being expreſsly to make leaſes in poſſeſſion, this leaſe, which was of the reverſion only, is not within the power, as the court ſeemed to agree; though it was urged, that a leaſe *in præſenti* of the reverſion was conſonant to the intent of the parties, and ſuch a leaſe in poſſeſſion as the nature of his eſtate would admit of; *ideo quære?* And *note*, the caſe of *Slocomb* and *Hawkins*, as it is reported in *Cro. Jac.* ſeems to impeach the doctrine agreed on by the court; for there it is put, that tenant in fee of a manor, which was then in leaſe for years, levies a fine thereof to the uſe of himſelf for life, remainder to his eldeſt ſon in tail, with power for the tenant for life to make leaſes at any time for twenty-one years; and before the firſt leaſe expired the tenant for life made a leaſe for twenty-one years, to begin after the determination of the firſt leaſe, and died; and though the ſettlement itſelf was of a reverſion, and the power general, yet this leaſe of reverſion was adjudged void; for that, as the court ſaid, it ought to have been a leaſe in poſſeſſion: but *Yelverton*, who reports the

Cro. Jac. 318. Slocomb v. Hawkins, Yelv. 222. S. C.

ſame caſe, mentions it as a ſettlement of lands in poſſeſſion, and that the tenant for life made a leaſe for twenty-one years, and after, before the expiration thereof, made another leaſe for twenty-one years, to begin after the expiration of the firſt leaſe; and this ſecond leaſe was adjudged clearly void, and contrary to the meaning of the power.

Deviſee for life, with power to make leaſes for twenty-one years, whereupon the old accuſtomed yearly rent ſhall be reſerved, makes a leaſe for twenty-one years, under the old rent, *&c.* and a year before the expiration of that leaſe he makes a leaſe to another for twenty-one years, *to begin preſently:* this leaſe ſeems to be good within his power as a concurrent leaſe, becauſe it is no charge upon the reverſion, nor is there any more than twenty-one years *in toto* againſt the reverſioner; but this power would not warrant the making of leaſes in reverſion; for then he might charge the inheritance *ad infinitum.* Leon. 147. 8. Read and Naſh.

[Lord *Ferrers* was tenant for life under a ſettlement in which there was a power, for the tenants for life, *reſpectively*, when they ſhould reſpectively come into and be in actual poſſeſſion of the premiſes ſettled, by indentures under their hands and ſeals, to demiſe all or any of the ſaid premiſes, or any part thereof, in poſſeſſion, but not by way of reverſion or future intereſt, *&c.* Part of the premiſes ſubject to the power were let by the agent for the tenant for life by agreement in writing, from the 15th *March* 1775, to occupy till the 10th *March* 1776, to three perſons, and the reſt was at the time of the leaſe in the occupation of tenants at will. Afterwards, on the 17th of *Auguſt* 1775, Lord *Ferrers*, by indenture, reciting the power, demiſed part of the premiſes to the defendant for ninety-nine years, from *Lady-day* then laſt, if ſhe ſhould ſo long live, at the yearly rent of, *&c.* It was objected to this leaſe upon motion for a new trial, (the defendant, the leſſee, having gotten a verdict in ejectment brought by the remainderman to recover the premiſes leaſed,) that it was a leaſe in reverſion, and therefore, contrary to the power and void; for it was contended that Lord *Ferrers*, at the time of this demiſe, could not grant an immediate leaſe in poſſeſſion, becauſe part of the premiſes were then let, under an expreſs agreement, for a term, of which ſeveral months were then to run; and though the reſt was ſtated to have been in the hands of tenants at will, yet, as the law then ſtood, they muſt be conſidered as tenants from year to year, and entitled to ſix months notice. Lord *Ferrers*, it was inſiſted, could not have brought an ejectment againſt any of them at the time of the demiſe, and therefore had no immediate poſſeſſory right; ſuch right, and the right to recover in ejectment being convertible. It made no difference to this queſtion, that the ſubſiſting leaſes were not by deed, ſince a parol leaſe for three years, or leſs, was equally effectual with a leaſe by indenture; and the court could not draw the line, and ſay, that a leaſe granted under a power like the preſent, ſhould be good although there was a ſubſiſting term of *ſeven months* at the time of granting it; but ſhould be void if there was a ſubſiſting term for *ſeven years*: the legiſlature only, or the parties could Goodtitle v. Funucan, Dougl. 565. See the power at large *ſupra*, 146. Give any long opinion in leaves by Gent. Anthony vol. 5. of my Law Books p. 178.

could draw ſuch a line. Sir *Orlando Bridgman*, the father of conveyancers, and who probably invented theſe powers, laid it down, it was ſaid, that all leaſes, where there was a particular eſtate out, were leaſes in reverſion. And the interpoſition of the legiſlature in 4 *Geo.* 2. *c.* 28. §6. to enable landlords to renew leaſes for lives, although the under-tenants ſhould not likewiſe ſurrender, corroborated this doctrine. But it was anſwered by the other ſide; firſt, that the tenants aſſented to this leaſe, and ſurrendered their poſſeſſion before the execution of it, in order to make it valid. This had been expreſsly left by the judge to the jury, who found that the defendant was in poſſeſſion at the time of the execution. Secondly, that if the jury had not found the leſſee to have been in poſſeſſion, *ſtill this would be good as a concurrent leaſe:* for this *Read* v. *Naſh* was cited, and the reaſon there given for ſupporting the leaſe was ſaid to be a ſtrong one; namely, that the inheritance was not charged in the whole with more than twenty-one years. No authority, it was ſaid, had been cited againſt this caſe, nor any anſwer given to the reaſoning in it. Thirdly, that, in reſpect of the power, all the ſubſiſting leaſes were leaſes at will; there was no outſtanding leaſe as againſt the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately; for, except in the caſe of leaſes under the power, (and theſe were not in many reſpects according to it,) the poſſeſſion would devolve upon him the inſtant of the death of the tenant for life. And for theſe reaſons, the court unanimouſly held the leaſe to be good, notwithſtanding this objection.]

9 Co. 76. a. Roll. Abr. 330. Tenant for life, with power to make leaſes for three lives, or twenty-one years, cannot make ſuch leaſes by letter of attorney by virtue of his power; becauſe ſuch leaſes not being derived out of the intereſt of the tenant for life, but by an authority derived from the tenant in fee, and to charge the eſtate of third perſons the truſt for that purpoſe is perſonal, and cannot be delegated to another.

Noy, 66. Cook v. Bromehill. *A.* makes a leaſe to *B.* for life, and after levies a fine to the uſe of *C.* for life, remainder to himſelf in fee, with a proviſo of power to make leaſes for twenty-one years, or three lives, and that the conuſees ſhould ſtand ſeiſed to ſuch uſes; afterwards *A.* covenants to ſtand ſeiſed to the uſe of *D.* in tail, with divers remainders over, and after grants the reverſion aforeſaid to *E.* for life, who diſtrains *B.* and avows; and judgment was given againſt the avowant; becauſe by the covenant to ſtand ſeiſed, &c. *A.* had deſtroyed his power of making leaſes, and, by conſequence, the grant to *E.* not being derived thereout, could not affect any of the preceding eſtates.

1 Chan. Ca. 23. Pawcy and Bowen. One hath power to make a leaſe for ten years, and he makes a leaſe for twenty years; yet in equity this is good for ten years, and ſo it has been ſettled ſeveral times.

Chan. Ca. 10. Pollard v. Greenvill. One having power to make leaſes for twenty-one years in poſſeſſion, made a leaſe to *A.* for twenty-one years in truſt for the payment of debts; but the leaſe was made to commence from

time to come, and ſo not purſuant to the power; yet, being made for the payment of debts, was ſupported in equity.

[Tenant for life of eſtates ſituate in *Ireland*, with full power of making leaſes for any term not exceeding thirty-one years *or* three lives, *to commence in poſſeſſion*, at the beſt improved rent that could be had for the ſame, made a leaſe "*from the date for and during the* "*natural life and lives of three perſons and the longeſt liver of them*, "*or, for the term, time, and ſpace of thirty-one years, to commence* "*from the date, which ſhould laſt longeſt, from thenceforth next en-* "*ſuing, fully to be complete and ended.*" On an ejectment brought, in the court of Exchequer in *Ireland*, by the heir at law and remainder-man, and a ſpecial verdict returned thereon, the queſtion was, whether this leaſe was good within the terms of the power? On argument before the barons, it was adjudged that it was good, which judgment was affirmed on a writ of error in the Exchequer-chamber there, before the Lord Chancellor of *Ireland*, aſſiſted by Lord *Annaly*, the Chief Juſtice of the court of King's Bench, the conſtituent members of that court. But Lord *Annaly* having delivered his opinion for reverſing the judgment, a writ of error was brought in parliament. It was there argued on the part of the remainder-man, that the leaſe was bad, for that it was in manifeſt oppoſition to the power; becauſe, inſtead of being a leaſe for one or other of the terms expreſsly, as the power directed, it was a leaſe for the one or the other as chance ſhould direct; and that he, being a purchaſer for the moſt valuable of conſiderations, had a clear right to exact a ſtrict performance of the condition annexed to his father's power of leaſing. But it was contended on the other ſide, that, in caſes of this kind, all a remainder-man could reaſonably expect was, that an eſtate, when it came to him, ſhould not be charged beyond what it was the intention of the ſettler to allow thoſe who ſtood before him to charge it. That it would not be ſo by the leaſe in queſtion, if it were conſtrued as a good leaſe for three lives, and no longer. That courts of law, who, in modern times, had adopted the ſame rules of conſtruction which prevailed in courts of equity, in the conſtruction of powers and of the inſtruments by which they were executed, would, when they had been exceeded, correct the exceſs, and ſupport the execution *ſo far* as it was warranted by the power. That the leaſe in queſtion, ſo far as it was a leaſe for three lives, was clearly warranted by the power; and this was apparently the primary object of the parties. Beſides this, they had a ſecond object in view, which was to ſecure the eſtate to the leſſee for thirty-one years, in caſe the leaſe for lives ſhould determine ſooner. But this, whether it was conſidered as concurrent or contingent, was not warranted by the power.—The leaſe was adjudged good; and the judgment affirmed.]

Commons v. Marſhall, 7 Br. P. C. 111.

If one makes a feoffment in fee to the uſe of himſelf for life, with power to demiſe, leaſe, grant, or deviſe the lands for three lives, or twenty-one years, yet this gives him no other power in effect than to limit the uſe of the land for three lives, or twenty-one years; for all leaſes to be made by him by virtue of ſuch power

Moor, 514. 611. 645. 2 Lev. 149. Vent. 291. 3 Keb. 512. accord. that it is the beſt

way to make no livery; but Hale thought it no forfeiture, becauſe by the ſealing of the deed the leaſe takes effect, and then the livery comes too late.

power take their eſſence out of the original feoffment: therefore, if he makes a leaſe for three lives, and makes livery of the land, this is a forfeiture of his own eſtate for life; becauſe he himſelf being only tenant for life, cannot out of that eſtate make ſuch leaſes; and when he takes upon him to make livery of the land, he takes upon him to make the leaſe as owner of an eſtate ſufficient for that purpoſe, which he is not; and to make ſuch leaſes no livery is requiſite, becauſe they taking effect out of the firſt feoffment, the livery made upon that is ſufficient to ſupply all the future limitations to be made in purſuance thereof. But if he purſues the words of the power, and ſays only, *I demiſe or leaſe ſuch lands to you for three lives*, this is ſufficient, and will be taken in execution of the power a good leaſe for three lives. So, if he only ſays, *I limit the uſe to you for three lives*, &c. this likewiſe is ſufficient, becauſe this in effect is the ſubſtance of his power, and the ſtatute preſently carries the poſſeſſion after ſuch uſe. So, if one hath power only to limit new uſes, and he gives or deviſes, &c. the land itſelf, this is alſo good, and enures to a limitation of the uſe, becauſe the uſe is but an equity to have the land itſelf, and when he gives, demiſes, or deviſes the land itſelf, he alſo gives all his uſe and equity therein, and then the ſtatute executes the poſſeſſion accordingly.

Carth. 427-8. 2 Salk. 537. pl. 1. 5 Mod. 244. 378. Ld. Raym. 267. Comyns, 37. pl. 25. Winter v. Loveday.

It was found by a ſpecial verdict, that *A.*, being ſeiſed of the manor of *M.*, did, on his ſon's marriage, ſettle the ſame to the uſe of himſelf for life, and after to the uſe of his wife for life, then to the ſon in tail; with the following proviſo or power; *viz. That it ſhould be lawful for the ſaid* A. *during his life, and for his wife, after his death, during her life, by deed indented to make leaſes either in poſſeſſion for the term of one, two, or three lives, or for the term of thirty one years, or for any other term or terms, number or numbers of years, determinable upon one, two, or three lives, or in reverſion for one or two lives, or for thirty years, or for any other term or number of years, determinable upon one or two lives; ſo as ſuch demiſe be not made of any the ancient demeſne lands, parcel of the ſaid manor, or of any other lands which for the ſpace of ſeven years have been uſed as demeſne lands, and ſo as the ancient rent be reſerved*: afterwards *A.* by deed makes an abſolute leaſe for thirty years of copyhold lands, parcel of the ſame manor, which were in the tenure of *J. S.* for the term of two lives, to commence after the two lives then in being. And in this caſe it was held by *Holt*, Chief Juſtice, *Turton* and *Eyre* Juſtices, *contra Rokeſby*, 1. That a leaſe of copyhold lands was not warranted by the power, being within the exception of ancient demeſne lands, all copyhold lands being ancient demeſne, it being an inſeparable quality of every copyhold, that it was time out of mind parcel of the manor. 2. It was held by the ſaid juſtices againſt *Rokeſby*, that a leaſe for thirty years abſolute in reverſion after two lives, might be made by *A.* or his wife of any lands which were in their power of leaſing; and herein *Holt* held, that a leaſe to commence at any day to come, is properly a leaſe in reverſion; but in this caſe it ſignifies *a leaſe to commence after ſome intereſt in being at that very time when the leaſe in reverſion was made*

trade; that this power to leaſe for life in reverſion muſt be taken to be a leaſe of the reverſion itſelf, and not a concurrent leaſe, and that it cannot be otherwiſe, becauſe a freehold cannot commence *in futuro*; and where there is a power given to make leaſes in poſſeſſion and reverſion, in ſuch caſe if a leaſe is made in poſſeſſion, and afterwards ſome life drops, he cannot make a new leaſe in reverſion of the ſame lands, becauſe his power is executed by making the firſt leaſe: that where a qualification is annexed to a power of leaſing, which, if obſerved, goes in deſtruction of the power, the law will diſpenſe with ſuch qualification; as where there is a power to make a leaſe of a manor, or of any part thereof, ſo as the ancient rent be reſerved, yet he may by this power make a leaſe of the ſervices, parcel of the manor, upon which no rent can be reſerved; otherwiſe the expreſs power would be defeated.

A man made a voluntary ſettlement on his ſon for life, and after to his firſt and other ſons in tail, with power to the ſon to make a leaſe in poſſeſſion for ninety-nine years, determinable on three lives, and alſo to make leaſes for ſixty years, to commence after his death, if he had iſſue male, to continue ſo long as he had iſſue male: the ſon makes a leaſe to his father in truſt for one of his younger children, but the leaſe was not purſuant to the power; yet it was decreed good, and taken to be a leaſe made by the father after a voluntary ſettlement. Abr. Eq. 342. Gooding v. Gooding.

[The Duke of *Montague* was tenant for life, without impeachment of waſte, with power to leaſe "reſerving ancient and accuſtomed rents, heriots, boons, and ſervices," under which power he granted ſeveral leaſes. In the former leaſes, the tenants covenanted "to keep in repair:" in thoſe granted by the duke that covenant was omitted. The Lord Chancellor, after taking ſome days to conſider of it, was of opinion, that that covenant was a boon, and beneficial to the remainder-man; and held theſe leaſes void for want of it. He ſaid, that he was clear upon the argument; but he took time, becauſe there was no caſe in point. The more he thought of it, the more he was convinced. The principle he reſted upon, was, "*that the eſtate muſt come to the remainder-man in as beneficial a manner, as ancient holders held it.*" Earl of Cardigan v. Montague, 6th June 1765, cited in 1 Burr. 122.

Under a power requiring the beſt rent that can be reaſonably gotten, to be reſerved payable during the term, there muſt be a covenant for payment; for under a mere reſervation, it is not payable till entry; and therefore, in fact, may never be payable during the term. Beſides, if there be no covenant to pay the rent, the leaſe may be aſſigned to a ſucceſſion of beggars. There muſt alſo be a clauſe of re-entry; elſe the ground may be unoccupied without any, or at leaſt a ſufficient diſtreſs upon it, ſo that the remainder-man can neither have his rent nor his land. The want of a counterpart too is an unuſual omiſſion, and very prejudicial. Taylor v. Horde, 1 Burr. 125.

But if the covenants be upon the whole ſuch as leave the parties on the ſame footing as under former leaſes, their differing in trifling circumſtances will not be material. Thus, it was objected Pow. on Powers, 579. Goodtitle

to

v. Funucan, Dougl. 505. *ſupra*, 146.

to the covenants in the leaſe from Earl *Ferrers* to Mrs. *Funucan*, (by one of which ſhe covenanted, that ſhe would pay half the land-tax, amounting to 7*l.* 10*s.* by the other of which the earl covenanted for himſelf, his heirs, *&c.* to free her from tithes and from levies and payments to the church,) that the covenants in the leaſe were not ſo beneficial to the remainder-man, as thoſe in the ancient leaſes; for that in the former leaſes, the tenants covenanted to pay all duties and taxes, except the land-tax; that church dues were particularly, by law, chargeable on the occupier; but by that leaſe the landlord covenanted to free the tenant from tithes and all levies and payments of the church. The new covenants were therefore leſs beneficial to the remainder-man, than thoſe in the former leaſes. By the court—The power made no mention of covenants. The *ground*, therefore, muſt be, that the preſent covenants were a fraud on the power, by leſſening the value of the reſervation; but on conſidering them fully, it appeared that what is thrown on the landlord was compenſated by what was paid by the tenant. She was to pay half the land-tax. As to the church-dues, the covenant ſeems to be collateral, and not to go with the land, or to bind the remainder-man, reſembling a covenant for quiet enjoyment. But if it did go with the land, there was no pretence of fraud on the power; the 30*l.* were *bonâ fide*, reſerved as an ancient rent. What was ſtipulated with regard to tithes was of no conſequence, ſince none were payable.

Doe v. Sandham, 1 Term Rep. 705.

As under a power to leaſe *reſerving the uſual covenants*, the omiſſion of a uſual covenant will vacate the leaſe, ſo the introduction of an unuſual covenant in ſuch caſe will have the ſame effect. Thus, where a tenant for life made a leaſe under a power in thoſe terms, containing a proviſo, " that in caſe the premiſes " were blown down or burned, the leſſor, or the perſons who " for the time being ſhould be entitled to the freehold and inheritance, ſhould re-build, otherwiſe the rent ſhould ceaſe," the leaſe was adjudged to be void; the jury having expreſsly found ſuch covenant to be unuſual.

Lord Mansfield, Burr. 124.

It is no objection to a leaſe under a power " that it is in truſt " for him who executes the power," provided the *legal* tenant be bound, during the term, in all requiſite covenants and conditions.]

(K) By what Form of Words Leaſes may be made

HERE it may be laid down for a rule, that whatever words are ſufficient to explain the intent of the parties, that the one ſhall deveſt himſelf of the poſſeſſion, and the other come into it for ſuch a determinate time, ſuch words, whether they run in the form of a licence, covenant, or agreement, are of themſelves ſufficient, and will in conſtruction of law amount to a leaſe for years as effectually as if the moſt proper and pertinent words had been made uſe of for that purpoſe: and on the contrary, if the

moſt proper and authentick form of words whereby to deſcribe and paſs a preſent leaſe for years, are made uſe of, yet if upon the whole deed there appears no ſuch intent, but that they are only preparatory and relative to a future leaſe to be made, the law will rather do violence to the words, than break through the intent of the parties: for a leaſe for years being no other than a contract for the poſſeſſion and profits of the lands on the one ſide, and a recompence of rent or other income on the other, if the words made uſe of are ſufficient to prove ſuch a contract, in what form ſoever they are introduced, or however variouſly applicable, the law calls in the intent of the parties, and models and governs the words accordingly.

My Lord *Coke* tells us, that the words *demiſe*, *grant*, *betake*, and *to farm-let*, and whatever other words amount to a grant, may ſerve for a leaſe for years. Co. Lit. 45. b. 2 Mod. 250.

So, he ſays, *dedi* is a ſufficient word to make a leaſe for years. Co. Lit. 301. b.

But there are ſeveral other words which are equally ſufficient to make a leaſe for years; therefore in caſe of the king, if he makes a leaſe for years, under the Exchequer ſeal, in theſe words; *ſciatis quod nos commiſimus cuſtodiam* of ſuch land to ſuch a one, this is a good leaſe, and the leſſee may plead it as a demiſe or leaſe of the land itſelf; for this ſufficiently ſhews the intent of the king to part with the poſſeſſion of the land for the time, and therefore amounts to an effectual leaſe; and this being the uſage in the Exchequer, all other courts are bound to take notice thereof. Bro. tit. Leaſes, 71. 4 Inſt. 111, 112. Co. Lit. 45. b. 2 Co. 17. a.

So, if one only licence another to enjoy ſuch a houſe or land till ſuch a time, this amounts to a preſent and certain leaſe or intereſt for that time, and may be pleaded as ſuch, though it may be alſo pleaded as a licence; and if it be pleaded as a leaſe for years and traverſed, the leſſee may give the licence in evidence to prove it. 5 H. 7. 1. Leon. 129. 3 Bulſ. 252. Sid. 428. Mod. 14. 2 Keb. 561. 2 Lev. 194. 3 Keb. 761. Hard. 366.

[So, where the owner of a houſe and brew-houſe, entered into partnerſhip, and aſſigned one-fifth, and covenanted that the partner ſhould reſide in the houſe, &c. it was holden, that he could not maintain an ejectment againſt the partner contrary to his own agreement. Beſides, that as a licence to inhabit, it amounted to a leaſe.] Right v. Proctor, 4 Burr. 2208.

So, if *A.* by articles covenants with *B.* that he ſhall have or enjoy ſuch land for ſuch a time, this is a good and effectual preſent leaſe, becauſe here are ſufficient words to prove a contract, that the one ſhall relinquiſh the poſſeſſion, and the other come into it. But if the covenant had been with *B.*, that *C.* a third perſon ſhould have or enjoy ſuch lands of *A.* for ſuch a time, or that the executors of *B.* ſhould have or enjoy it for that time, this would be no leaſe to *C.* or the executors of *B.*, but only a mere covenant with *B.*: for when theſe words have their natural and binding force as a covenant with *B.*, they cannot at the ſame time have a different conſtruction, and amount to a leaſe to *C.* or the executors of *B.*, who are ſtrangers to the contract and no parties to the deed, and when thoſe executors of *B.* are not yet Leon. 136. 303. Cro. Eliz. 1. 173. Owen, 97. Roll. Abr. 847. 3 Bulſ. 252. Fitz. tit. Aſſize, pl. 412.

in eſſe; neither can theſe words amount to a leaſe to *B.*, becauſe the intent is manifeſt that he himſelf is to have nothing in the land, but is only a truſtee of the covenant for *C.* or his executors. And further, if theſe words ſhould amount to a leaſe to *C.* or the executors of *B.*, when they came *in eſſe*, this would take off from their operation as a covenant with *B.*; for the ſame words cannot at the ſame time have two different conſtructions and operations; and it cannot be ſaid they are a covenant with *B.* by the firſt words, and a leaſe to *C.* or the executors of *B.* by the laſt words; for that *C.* or the executors of *B.* ſhall enjoy the land, is the very explanation of the covenant with *B.*, and gives life and force to it, and without that he covenants with *B.* for nothing; for till theſe words are added, the covenant with *B.* is but a dead letter, and has no meaning or ſenſe in it.

Bro. tit. Leaſes, 20. 30. 60. Noy, 14. Cro. Jac. 42. 659. Palm. 201. Leon. 118, 119. 3 Bulſ. 251. Cro. Car. 207. Jon. 231. Hob. 35. Moor, 861. 2 Brownl. 23. Roll. Rep. 397. 3 Bulſ. 204. Roll. Abr. 847. Yelv. 85. Brownl. 136. Cro. Eliz. 223. Bro. tit. Leaſes, 21. only *cent. per* Fineux.

So, where one by articles covenants, grants, and agrees with *J. S.* that he ſhall have ſuch lands, or have, hold, and enjoy ſuch lands for ſo many years, theſe are words ſufficient to ſhew a preſent contract for the leſſee's enjoying of theſe lands, and therefore amount to a preſent leaſe of them as effectually as if there had been the words *dimiſit*, *locavit*, or ſuch like: and though there were in the ſame articles a covenant to make a good and perfect leaſe, as counſel ſhould adviſe, yet that would not prevent or deſtroy the operation of the firſt words as a preſent leaſe; ſuch covenant only being *in majorem cautelam*, that the leſſee might require further aſſurance by fine, or the like, if he found it neceſſary. And the difference is, where ſuch articles, by way of covenant, are made by him who is owner of the lands; and where they are made by a ſtranger, or one who has then nothing in the lands: in the firſt caſe, they amount to a preſent and abſolute leaſe; but not in the other, becauſe a man cannot be ſuppoſed to leaſe what he has not: or if it might be ſo ſuppoſed, yet where it appears in the very articles that he has nothing in the lands, his covenant then can have no other conſtruction, but that he will procure the owner of the lands to permit the covenantee to hold and enjoy thoſe lands; which is the proper and natural interpretation of the words of the covenant, when he himſelf has nothing whereof to make a leaſe.

Cro. Eliz. 233. Leon. 104. Truſloe and Yewer. 2 Keb. 268.

A controverſy was between two perſons touching a leaſe for years, which of them had title to it, and they ſubmitted to the award of *J. S.*, who awarded that one of them ſhould have the land; this was held to be a good gift of the intereſt of the land; that is, an award, that the whole leaſe, or intereſt in the land for the term then to come, belonged to one, excluſively of the other. But if the award had been, that the one ſhould permit the other to enjoy the term, this, it is ſaid, would not have given him the intereſt in the land, nor would amount to a leaſe; this is, as I ſuppoſe, becauſe the permiſſion being to come from the other party, the intereſt muſt be ſuppoſed to be and continue in him; and therefore it could not amount to a leaſe, or an award of a leaſe: not to a leaſe, either from the arbitrator or the other not from the arbitrator, becauſe he had nothing in the land, and

was only to award what the other ſhould do; not to a leaſe from the other, becauſe it was only the act and award of the arbitrator: neither could it amount to an award of a leaſe from the other, becauſe it was only that he ſhould permit the other to enjoy the term, which he might do without making a leaſe; and the words being ſpoken by the arbitrator, who was a third perſon, cannot have the ſame operation, as if they had been ſpoken by one who had intereſt in the lands, but muſt be taken according to the literal ſenſe and meaning thereof.

Articles indented in writing were made between *A.* and *B.* in this manner: *Imprimis*, it is covenanted and agreed between the parties, that *A.* doth let ſuch lands for and during five years, to begin at *Mich.* next following, under 10*l.* a-year rent; or provided that the leſſee ſhall pay 10*l.* at *Mich.* and *Lady-day*, by even portions, during the term: alſo the ſaid parties do covenant, that a leaſe ſhall be made and ſealed, according to the effect of theſe articles, before the feaſt of *All-Saints* next enſuing: this was held to amount to an immediate leaſe, by reaſon of the firſt words in the preſent tenſe, and that the laſt words were only for making ſuch a leaſe in writing for further aſſurance; and the rather here, becauſe the leaſe to be ſealed was to be made after the beginning of the term. Cro. Eliz. 486. Moor, pl. 638. Roll. Abr. 847. 2 Roll. Abr. 449. Paſm. 201.

One ſaid to another, "*you ſhall have a leaſe of my lands in* D. "*for twenty-one years, paying therefore* 10*l.* per ann., *make a leaſe* "*in writing, and I will ſeal it:*" this was agreed by all the juſtices to be a good parol leaſe for twenty-one years, though no writing was made of it, (being before the ſtatute of frauds,) for the intent of the parties was ſufficiently expreſſed, and the making of it in writing was but for further aſſurance, and left to the leſſee, if he thought it neceſſary. 2 Bendl. 7. Moor, pl. 31. Cro. Eliz. 33. 306.

One made his will in this manner: "*I have made a leaſe to* J. S. *for term of twenty-one years, paying but* 20*s. rent:*" this was held a good leaſe or deviſe by the will for twenty-one years, and that the word *have* ſhould be taken in the preſent tenſe, as *dedi* is in a deed of feoffment, to comply with the intent of the teſtator. 2 Bendl. 34.

[On the 28th of *Nov.* 1760, *John Abrahall* and *P. Lloyd* entered into an agreement (ſtamped with a two ſhillings and ſixpenny ſtamp) with the defendant *Browne*, whereby they agreed, "with all convenient ſpeed to grant to him a leaſe of, and they "did *thereby ſet and let to him*," the premiſes in queſtion, to hold for twenty-one years, at the rent of 290*l. per ann.* payable half-yearly "*to the leſſors:*" the leaſe to contain the uſual covenants, and certain ſpecial ones, in one of which the words "*this demiſe*" occurred. The defendant entered in purſuance of the agreement, and paid rent up to the 1ſt of *March* 1774. The court held, that this was a good leaſe *in præſenti*, with an agreement to execute a more formal and perfect leaſe *in futuro*. The operative words *let* and *ſet* are in the preſent tenſe. A reference is alſo made to *this* demiſe. There have been fourteen years uninterrupted occupation under it, and five or ſix of them ſince the title of the leſſor Baxter v. Browne, 2 Bl. Rep. 973.

of the plaintiff accrued.] He has accepted rent, and thereby given the defendant every reaſonable hope of acquieſcence. Under ſuch circumſtances, if the words of this leaſe can import an *immediate* legal demiſe, the court will ſupport it as ſuch; and that they will, is evident from the caſes cited, *viz.* 1 *Roll. Abr.* 847. *Moor*, 459. *Noy*, 57.

Bury v. Nugent, 5 Term Rep. 165. in error from Ireland.

In ejectment, the leſſor of the plaintiff derived title from the defendant under an inſtrument, purporting to be a demiſe for twenty-one years of the premiſes in queſtion. The inſtrument was as follows: "Be it remembered that *J. B.* (the defendant) "hath let, and by theſe preſents doth demiſe, *&c.* unto *R. F.* "*&c.* for twenty-one years to commence the 5th of *May* or 1ſt "*November*, whichever firſt happens after the ſaid *J. B.* recovers "the ſaid lands from *M. O.* The ſaid *R. F.* covenanting and "agreeing on the foregoing conditions to pay *J. B.* 100*l.* yearly "and every year during the ſaid term, *&c.*; *leaſes* with power of "diſtreſs, and clauſes for re-entering, and all other clauſes uſual "between landlord and tenant, to be drawn and ſigned at the "requeſt of either party as ſoon as *J. B.* recovers the ſaid lands "from *M. O.*" *J. B.* recovered the lands from *M. O.* and was then in poſſeſſion of them. The court were clearly of opinion, that the inſtrument operated as a preſent demiſe, and that the agreement for a more formal leaſe was merely in further aſſurance.]

Where words of covenant, &c. will not, in the caſe of copyholds amount to a leaſe ſo as to work a forfeiture, *vide ſupra*, under leaſes made by copyholders.

But now, on the contrary, if the moſt proper form of words of leaſing are made uſe of, yet if, upon the whole deed, there appear no ſuch intent, but that it is only preparatory and relative to a future leaſe to be made, the law will rather do violence to the words, than break through the intent of the parties, by conſtruing a preſent leaſe, when the intent was manifeſtly otherwiſe.

Noy, 128. Sturgeon v. Painter.

Therefore, where articles were drawn between *A.* and *B.* in the manner: Articles agreed upon, *&c. Imprimis*, *A.* doth demiſe ſuch a cloſe to *B.* to have it for forty years, and a rent reſerved, with clauſe of diſtreſs, *&c.* In witneſs whereof, *&c.* and afterwards there was written in the ſame paper a memorandum, that the articles are to be ordered by counſel of both parties, according to the due form of law: here, becauſe the intent of both parties appeared by that memorandum, and by a leaſe actually drawn by counſel, but never ſealed, (upon ſome diſagreement between the parties,) it was ruled by the court, upon evidence in ejectment that theſe articles were not a ſufficient leaſe, and the jury found accordingly; and yet here was the form and words of a preſent and immediate demiſe or leaſe.

Roll. Abr. 848. Pleazance and Higham. 2 Mod. 81.

So, where articles of agreement are drawn between *A.* and *B.* in this manner: firſt, the ſaid *A.* is *contented* to demiſe ſuch lands, *&c.* to the ſaid *B.* from *Mich.* next for ſix years; and after theſe words, the rent reſerved is 100*l. per ann.* a re-entry for non-payment of the rent, a covenant for reparations, and a covenant to do ſuch other things; and theſe articles are ſealed and delivered

by the parties: yet they do not amount to a leaſe, but are only preparatory covenants or inſtructions towards a leaſe, and never were intended to have the force or effect of a leaſe themſelves; beſides that, the word *contented* imports only an approbation of ſomething to be done after. This caſe is cited in (*a*) *Cro. Jac.* in this manner: that if one covenants and grants with another that he ſhall *have and hold* ſuch lands for ten years, that this is a good and abſolute leaſe for that time; but if he covenants and grants that he ſhall *enjoy* thoſe lands for ten years, this is no leaſe, becauſe it founds only in covenant. *Quære* of the difference between *holding* and *enjoying*, for there ſeems none; therefore the caſe muſt be miſtaken.

(*a*) Cro. Jac. 172.

[On the trial of an ejectment the defendant produced in evidence a leaſe, as he ſtated, of the premiſes in queſtion, but which appeared to be an agreement upon paper, *unſtamped*, and not under ſeal, between the Earl of *Abingdon*, under whom the leſſor of the plaintiff claimed, and the defendant's father. In the ſubſequent part of it were theſe words, *viz.* "And further the ſaid Earl of "*Abingdon* doth hereby agree to let, and the ſaid *Richard Way* "agrees to rent and take for the term of ſeven, fourteen, or "twenty-one years, in caſe the ſaid Earl ſhall ſo long live, at and "for the rent of 1400 *l.* a year, to be paid half-yearly, (the ſaid "Earl to pay or allow all manner of tithes and taxes, both or-"dinary and extraordinary,) all his eſtate, *&c.* at *Rycot*. It is "agreed the ſaid *Richard Way* ſhall enter on all the ſaid premiſes "immediately, but not commence payment of rent until *Lady-day* "next. It is further agreed, that leaſes with the uſual covenants "*ſhall be made and executed* by the parties on or before *Michaelmas* "next." On the production of this it was contended, that this being produced as a leaſe, and not being ſtamped, could not be read in evidence; and the judge being of that opinion, the plaintiff had a verdict. But on a motion for a new trial, the court were of opinion, that it was *not* a leaſe. The caſe in *Noy*, 128. of *Sturgeon* v. *Paynter*, they ſaid, is in point. In the preſent caſe, there is alſo an expreſs ſtipulation that leaſes *ſhould be* drawn before *Michaelmas*: therefore, it plainly was not the intention of the parties that ſuch agreement ſhould operate as a leaſe, but only that it ſhould give the defendant a right to the immediate poſſeſſion, till a leaſe could be drawn. Had it been a leaſe, the court thought it ought to have been ſtamped (*b*).

Goodtitle v. Way, 1 Term Rep. 735.

(*b*) So now if only an agreement under 23 G. 3. c. 58.

Articles of agreement were drawn in the following manner: "Articles of agreement between *T. S.* and *D. J.*, entered into "in regard to his fulling mills, dry-ſalting mills, and other conve-"niencies for carrying on the ſaid trades: that the mills and con-"veniencies, with the iſlands and acre of land mintsfeet, called "*Aſhacre*, *he ſhall enjoy*, and *I engage to give him a leaſe in*, for the "term of 31 years from *Whitſuntide* 1784, at the rent of 110*l.*: "and that I will purchaſe one yard in breadth to be laid to the "*Race* from the *High Clews*, the length of *Charles Cloſe*: and that "if it be bought, *&c.*" Here, though the words *ſhall enjoy* are ſufficient to give the legal intereſt, yet the latter words reſtrain

Roe v. Aſhburner, 5 Term Rep. 163.

their operation, and clearly ſhew it was the intent of the parties, that there ſhould be ſome *further* aſſurance. It was in *fieri* at the time: and if a bill had been filed in a court of equity for a ſpecifick performance of the agreement, that court would not have told the party that he had a legal and executed contract, but would have decreed a leaſe according to the agreement. By the ſubſequent part of the agreement, the landlord was to acquire an additional piece of ground to be laid to the mill, without which the leaſe was not to be granted: this ſhews that there was to be ſome future inſtrument to give title to the party.]

Dyer, 150. Co. 155. Hob. 35. Moor, 480. Roll. Abr. 848. Bendl. pl. 115.

One made a leaſe for life, & *proviſum eſt*, that if the leſſee die within ſixty years, that then his executors and aſſigns ſhould enjoy the land in his right for ſo many years as ſhould be behind of the ſixty years from the date of the leaſe: this was held to be only a covenant, and no leaſe, for which there are divers reaſons aſſigned in the books; as firſt, becauſe the words purport an agreement, and not a grant, and ſo found only in covenant, which is a very unintelligible reaſon. Another reaſon given is, becauſe if it ſhould be conſtrued a demiſe, it muſt be void, becauſe there is no perſon *in eſſe* to take it; for the executors are not *in rerum naturâ*. Another reaſon given is, becauſe nothing of the ſaid term was given to the leſſee himſelf for life, as remainder to him and his executors for ſixty years. A fourth and laſt reaſon is, becauſe there is no certainty either of the beginning or ending thereof, and therefore it cannot be a good leaſe. But a better reaſon than any of theſe ſeems to be, that he having in the firſt part of the deed made a leaſe in expreſs and proper words, muſt be ſuppoſed to mean ſomething leſs in this laſt part of the deed, which varies ſo widely in the form of expreſſion, and which has a natural and proper meaning of its own as a covenant, but cannot amount or come up to a leaſe, without violence and force done to the words, as well as the intent of the parties. And this the rather ſeems probable, becauſe *Moor* holds clearly, that if it had been provided that if the leſſor die within ſixty years, that then he demiſed the land to another (who was alſo a party to the deed) for ſo many of the ſixty years as ſhould be then to come; this would be a good leaſe; for here he comes into the very ſame form of expreſſion made uſe of in the firſt part of the deed, which was an actual demiſe, and therefore muſt be ſuppoſed to mean the ſame thing in the latter part too, and conſequently, ſuch words would make it an actual demiſe.

Cro. Jac. 172. Roll. Abr. 847. 2 Mod. 80.

A. ſeiſed of lands in fee, by indenture, covenants with *B.* before *Eaſter* then next, to convey thoſe lands by fine, or other aſſurance to *B.* and his heirs, to the uſe of him and his heirs, with a proviſo, that if *A.* paid to *B.* 100 *l.* at the end of thirteen years that then he might re-enter, and all aſſurances ſhould be to the conuſor; and he covenanted and granted for him and his heirs that *B.* and his heirs ſhould enjoy thoſe lands till the end of the ſaid thirteen years, and for ever after, if the 100 *l.* were not paid; and *B.* covenanted to pay annually, during the thirteen years, two capons, and that during the thirteen years he would

not commit waſte; no aſſurance was made within the time: and if this, upon the whole deed, amounted to a leaſe for thirteen years, was the queſtion? And it was adjudged that it was no leaſe, but only a bare covenant, and this judgment affirmed in error: for the intent of the parties was to make aſſurance of the inheritance by way of mortgage, and the covenant was only that he ſhould enjoy the lands during the time of the mortgage, whether it continued thirteen years only, or for ever; and if a fine had been levied, or a feoffment made, it is plain this deed had been no leaſe, but only a covenant to lead or declare the uſes of ſuch fine or feoffment; and though none was levied or made, yet the deed ſtill continues of the ſame nature as it did at firſt, or as if ſuch fine or feoffment had been actually executed; and the covenant on *B.*'s part, that he would do no waſte, does not expound it otherwiſe, for that was only that he, being a mortgagee in fee, ſhould do no waſte, for which otherwiſe there would be no remedy.

So, where one, by indenture enrolled, for money, bargained and ſold lands to one and his heirs, provided, that if the bargainor for five years paid annually 10 *l.* to the bargainee at the days limited in the deed, and at the end of the ſaid five years ſhall pay 240 *l.* then the bargain and ſale to be void: provided alſo, and it is further covenanted and agreed between the ſaid parties, that the bargainee, his heirs or aſſigns, ſhall not intermeddle with the actual poſſeſſion of the premiſes, or the perception of the rents and profits, till default be made in the payment of the ſaid ſums: this was held to be no leaſe to the bargainor for five years, but only in the nature of a leaſe at will, by reaſon of the negative words, that the bargainee ſhould not intermeddle with the rents and profits for that time, and, conſequently, ſo long was to leave the bargainor in poſſeſſion as he was before. Cro. Jac. 659. Palm. 201. 2 Roll. Rep. 241. Roll. Abr. 859. Pauſeley and Blackman.

So, where *A.* acknowledged a recognizance to *B.* of 200 *l.* and *B.* by indenture of defeaſance, did covenant, promiſe, and agree with the ſaid *A.* that if *A.* his heirs or aſſigns, ſhould, after ſuch a time, convey ſuch an advowſon to him and his heirs; and if the ſaid *B.* his heirs, executors, *&c.* ſhould and might at all times thereafter, peaceably and quietly have, hold, uſe, occupy, poſſeſs, and enjoy the ſaid advowſon, without the let, ſuit, trouble, *&c.* of the ſaid *A.* or any other perſon or perſons, *&c.* then the recognizance to be void; and the queſtion was, if this laſt clauſe amounted to a leaſe of the advowſon? The court was of opinion that it did not, for the intent of the parties was not to make a leaſe of it, but only a condition to defeat the recognizance; and this laſt clauſe ſhould have relation to the eſtate in fee precedent, being, if the ſaid *A.* his heirs, *&c.* which cannot be intended of a leaſe; and further, the clauſe is indefinite, at all times hereafter, and does not limit any certain time, for life or years, wherein the advowſon ſhall be peaceably enjoyed, and therefore ſhall be intended during the eſtate in fee before mentioned: but no judgment was then given. Co. Ent. 85. a. Bradſton v. Buck.

Dyer, 124. pl. 40. 125. pl. 44. Plowd. 148. 150. Bro. tit. Leaſes, 71. Yelv. 85. Brownl. 136.

If one makes a leaſe for life, and after grants that the lands or the reverſion ſhall remain to another for twenty-one years after the death of the tenant for life, theſe words are ſufficient to paſs a reverſionary intereſt by way of future leaſe without attornment, though there is not the word *demiſe*, or any other word uſual or proper to deſcribe a leaſe for years by; for here, being words ſufficient to prove a preſent contract for the reverſionary intereſt of theſe lands, after the eſtate for life determined, theſe, in caſe of a leaſe for years, which is but a contract, are in themſelves ſufficient, and adequate to any other form.

(L) What Certainty is requiſite to Leaſes for Years as to their Beginning, Continuance, and Ending: And herein,

1. With regard to the Date of the Leaſe.

Mod. 180.

AS to the date, they may be conſidered either as it is an impoſſible date, or an uncertain date; between which the general difference taken in the books, is, that if a leaſe be made to begin from an impoſſible date, there, the leaſe ſhall take effect from the delivery; becauſe it could not be any part of the agreement between the parties, as from the 30th day of *February*, or the 32d day of *April* next: but where the limitation is uncertain, as a leaſe in *October*, *habendum* from the 20th of *November*, without ſaying from *November* next following or preceding, or what other *November*; this uncertainty vitiates the leaſe itſelf, becauſe it was part of the agreement, that the leaſe ſhould begin from the 20th day of ſome *November* or other; but it not appearing to the court what *November* was intended, they cannot determine it for the parties, and therefore for ſuch uncertainty the leaſe itſelf becomes void.

Sid. 461. Vent. 84. 2 Keb. 656. [In two of the caſes put, the period of time at which it is the intent of the parties that the leaſe ſhould begin is manifeſt, and therefore in reaſon the leaſes ought to commence from ſuch time. To ſuppoſe that they referred to an event which happened about two thouſand years ago, or had in view an event which never will happen, is to ſuppoſe them not in a capacity to contract.]

So, where a leaſe is made to begin from the nativity of our Lord God laſt paſt, without ſaying from the feaſt of the nativity, this leaſe ſhall begin preſently; becauſe it could be no part of the agreement between the parties that the leaſe ſhould begin from the nativity itſelf, which is paſt ſo many hundred years ago; and therefore, for this impoſſibility of relation, the leaſe ſhall begin preſently. But if it were to begin from the nativity of our Lord God generally, or from the nativity of our Lord God next enſuing omitting the word *feaſt*, *Twiſden* was of opinion ſuch leaſe ſhould be void for the uncertainty of its commencement. But *Sid.* in reporting the caſe, ſeems to be of a contrary opinion, and makes a *quære*, if it ſhall not begin preſently? and, in truth, this ſeems the more reaſonable opinion, for as to impoſſibility of relation, there is the ſame in this as there is in the other; and therefore, by the ſame reaſon, it ſhall begin preſently.

In ejectment, if plaintiff declares on a leaſe by *J. S.*, 20 *Auguſt* for twenty years *a feſto annunciationis beatæ* Mariæ *Virginis ultimo præterito ante datum hujus indenturæ* or *indenturæ prædictæ*, where no mention is made of any date or indenture before in the declaration, this leaſe ſhall be taken to commence from the feaſt of the annunciation next before the 20th of *Auguſt* in that year wherein the declaration is; becauſe it muſt have been ſo conſtructed if the word *ante datem hujus indenturæ* had been omitted, and the addition of thoſe words can be to no purpoſe, nor of any uſe, when no indenture at all is mentioned before, and therefore ſhall be void, or as if they had been totally omitted. Roll. Abr. 849. Darcett's Caſe, 850. Elme v. Leaves.

If a leaſe be made for thirty-one years, *anno* 1531, and after, *anno* 1535, the leſſor, reciting the ſaid leaſe, by indenture makes a new leaſe in theſe words, *noveritis me dictis* 31 *annis finitis & completis dediſſe & conceſſiſſe omnia præmiſſa* to *J. S. habend. & tenend. a die confectionis præſentium (termino prædict. finito) uſque ad finem termini* 31 *annorum tunc immediate ſequentium plenarie complendorum;* this leaſe ſhall begin in computation from the expiration of the firſt leaſe for thirty-one years after ſuch expiration of the firſt leaſe; for if it ſhould begin from the day of the making of the deed, then there would be four years thereof to come after the expiration of the firſt leaſe, which would be plainly againſt the intent of the parties; and therefore it ſhall be interpreted that the leſſee ſhall have it for thirty-one years after the day of the date, and the expiration of the firſt term of thirty-one years, *viz.* after both. Roll. Abr. 849. Dyer, 261. Leon. 199.

So, where leſſee for an hundred years made a leaſe for forty years to *B.*, if he ſhould ſo long live, and after leaſed the ſame lands to *C.*, *habend.* for twenty-one years from the end of the term of *B.*, to begin and be accounted from the date of theſe preſents; and the queſtion was, if the leaſe to *C.* ſhould be ſaid to begin preſently, or after the term of *B.*? The judges were clear of opinion, that the leaſe to *C.* ſhould not be accounted from the time of the date, but from the end of the term of *B.*, becauſe by the firſt words it is a good leaſe in reverſion in that manner; and then it ſhall not be made void by any ſubſequent words; or, as *Coke* ſaid, the laſt words ought to be conſtrued to give an intereſt as a future intereſt preſently, and the actual poſſeſſion after the expiration of the firſt forty years term is well granted by the firſt words. Godb. 166. Dyer, 261. b. in margin.

A man made a leaſe for years, to begin at the feaſt of our *Lady* Mary for twenty-one years, without ſhewing in certainty at which of the feaſt of our *Lady*, *viz.* the *Annunciation* or the *Purification;* but *Anderſon* held it a good leaſe, and that the leſſee might determine the certainty of the beginning of the leaſe, by his entry, at which of the feaſts he thought fit; but *Periam* doubted; and in truth this caſe ſeems within the rule before laid down to be void, for the uncertainty of the time of its commencement. Leon. 227. pl. 308.

In ejectment the plaintiff declares upon a leaſe for years, *habend.* from the ſealing and delivery, and declares that the ſealing and delivery was 1° *Maii*, and the ejectment was the ſame day: it was moved in arreſt of judgment, that the ejectment could not be ſuppoſed 4 Leon. 144. Highman v. Cook.

poſed the ſame day, for the leaſe did not begin till the next day enſuing the ſealing and delivery. But the court diſallowed the exception; for where the leaſe is to begin from the time of the ſealing and delivery, or generally to hold for twenty-one years next following, the ejectment may well be ſuppoſed to be the ſame day for the beginning of the leaſe is preſently upon the ſealing and delivery; and therefore ſuch a leaſe ſhall end the ſame time and hour.

Roll. Abr. 850. Hob. 18. Moore v. Huſſey.

If an indenture of demiſe bears teſte 4 *May*, 10 *Jac.* and is delivered 5 *May*, 10 *Jac. habend. a feſto annunciationis beatæ Mariæ Virginis tum ult. præterit., pro termino viginti unius annorum proximè ſequent. datum dictæ indenturæ;* this leaſe commences in computation from *Lady-day* before the date, and in intereſt the 5th day which is the day next after the date; and ſo all the words of the indenture ſhall take effect the 5th day, being the day of the delivery of the deed, and then the leaſe will determine on the feaſt of the *annunciation* twenty-one years after; and therefore the court which was of ſuch a leaſe, omitting *datum indenturæ*, was held to be well enough warranted by this leaſe found *in hæc verba*, the ejectment not being laid till the 5th of *May*.

[That a leaſe may commence at one day in point of computation, and at another in point of intereſt is manifeſt from the caſe of Enys v. Donnithorne, 2 Burr. 1192. where it is holden, that a leaſe, *to hold from a day paſt for fifty years thence next enſuing, the ſaid term to commence and begin from and immediately after the ſurrender, forfeiture, or other determination of an exiſting leaſe of the ſame premiſes*, was not uncertain in its commencement.]

4 Leon. 14. pl. 52. Frice v. Potter.

In ejectment the plaintiff declared upon a leaſe made 14 *Jan.* 30 *Eliz.* from *Chriſtmas* before for three years, and upon evidence the plaintiff ſhewed a leaſe bearing date 13th *Jan.* the ſame year and proved to have been then executed; and it was moved, for this variance between the declaration and the evidence, that the jury might be diſcharged: but *Anderſon* Ch. Juſt. ſaid, that the evidence was ſufficient to ſupport the declaration; for if the leaſe was ſealed and delivered 13 *Jan.* it was then a leaſe 14 *Jan. quod. cæteri juſticiarii conceſſerunt.*

Roll. Abr. 850. Corniſh v. Cawſey.

If an indenture of demiſe bears teſte 25th *March*, 15 *Car.* and is delivered the day of the date, and the *habend.* is from and after the day of the date of theſe preſents, for and during the time and term of ſeven years from henceforth next and immediately following fully to be complete and ended; this leaſe begins in computation from the delivery of the deed, which was the day of the date, and in intereſt the next day after the date, and ſo all the words will have an operation; for it appears that the leſſor was not to have the poſſeſſion till the next day after the date, by the words *habend.* from and after the day of the date, which exclude the day of the date, but that the ſeven years ſhould commence in computation from the delivery, *viz.* from henceforth, which refers to the limitation of the ſeven years; and therefore where the plaintiff declared on this leaſe by indenture dated 25th of *March habend. a die datus* for ſeven years, it was adjudged againſt him for by computation it began *a datu indenturæ.*

Plow. 198. Dyer, 177. pl. 35.

If one makes a leaſe to *A.* for twenty-one years, and after makes another leaſe to *B.* for years, to begin *a fine & expirat[ion]*

tra[nſ]

prædict. termini 21 *annor. dimiſſor.* to *A.*, and then the leaſe to *A.* is determined, either by an expreſs ſurrender, or by an implied ſurrender in law, as by *A.*'s acceptance of a new leaſe for life from the leſſor, the leaſe to *B.* ſhall begin preſently: but if the leaſe to *B.* had been to begin *poſt finem & expirationem prædict.* 21 *annor.*, there the leaſe to *B.* ſhould not begin upon the ſurrender, forfeiture, or other determination of the firſt term to *A.*, till the twenty-one years actually run out by effluxion of time: the reaſon of which difference is, that in the firſt caſe the word *term* comprehends as well the eſtate or intereſt in the land as the time for which it is demiſed; and therefore the ſecond leaſe being limited to begin *a fine & expiratione predict. termini* 21 *annor.*, whenever the term which includes alſo the eſtate and intereſt is determined, the leaſe to *B.* ſhall begin; but in the other caſe the leaſe to *B.* is not to begin till after the end and expiration of the twenty-one years, which cannot be ended but by effluxion of time. Co. Lit. 45. b. Co. 154. Roll. Abr. 849. Leon. 106.

The biſhop of *Bath* and *Wells*, 18 *H.* 8. made a leaſe in writing to *A.* and *B.* for ſixty years; proviſo, that if the ſaid *A.* and *B.* die within the ſaid term of ſixty years, that then, after the death of the ſaid *A.* and *B.*, and of the longer liver of them, it ſhall be lawful for the ſaid biſhop and his ſucceſſors, to enter into the ſaid lands: *A.* dies; the biſhop dies: and his ſucceſſor, 22 *H.* 8. demiſes the ſaid lands to *C.*, *habend. cum poſt ſive per mortem, ſurſum redditionem, vel forisfact. præd. B. vacare contigerit*, for ſixty years, with confirmation of the dean and chapter; and then *B.* dies within the ſixty years, and the grantee of the biſhop would avoid this leaſe to *C.* 1. Becauſe being limited to begin upon one of three events, *viz.* death, ſurrender, or forfeiture, none of which happened, it could not begin at all; for it was not determined by the death of *A.* and *B.*, within the ſixty years, as all the court agreed, but continued till the leſſor or his ſucceſſors entered; for ſo it was expreſsly provided by the leaſe, and that was a mere condition, and not a limitation; and then the ſecond leaſe, as was argued, cannot begin at all, or at leaſt the time thereof ſhall run on from the death of *B.* the ſurvivor. But it was adjudged the ſecond leaſe was good; for it was not only limited *cum per mortem, ſurſum redditionem, &c.* the firſt leaſe ſhould determine, but alſo *cum poſt mortem vacare contigerit*; ſo that this ſecond leaſe may well begin when the firſt term by effluxion of time is run out *poſt mortem* of the parties. And this differs from a remainder limited to one after the death of another: there, it ought to begin immediately after the death, without any *interim*; but here, it ſhall not begin till after the firſt term run out *poſt mortem*, whenever in ſuch manner *vacare contigerit*, and is a good leaſe preſently in point of intereſt, to take effect in poſſeſſion whenever the firſt leaſe, by any of theſe accidents, happens to be at an end, and is a good *intereſſe termini* in the mean time. And this conſtruction ought to be made, to ſupport the leaſe, becauſe it ſhall be taken moſt ſtrongly againſt the leſſor, and for the benefit of the leſſee. 6 Co. 34. Cro. Jac. 71. Biſhop of Bath and Wells's caſe. Dyer, 312. pl. 89.

If *A.*, reciting that *B.* hath a leaſe for years of ſuch lands, demiſes the ſame lands to *C.* for years, to begin after the end or determination Bendl. pl. 72. And. 3.

Dyer, 116. pl. 70. Bro. tit. Leaſes, 62. Plow. 148. Roll. Abr. 849. Cro. Car. 399. Jon. 355. Miller and Manwaring. Co. Lit. 46. b. Lev. 77. Keb. 360. Baſſet v. Lewis. 2 Leon. 11. pl. 17. Vaugh. 73. 2 Lev. 242.

determination of the ſaid leaſe to *B.*, where in truth *B.* hath no any leaſe at all of thoſe lands, the leaſe to *C.* ſhall begin preſently for in judgment of law, a void limitation and no limitation is all one. So, if he recites a leaſe which in conſtruction of law appears after to be void, or miſrecites a good leaſe in a point material *habend.* from the end of the ſaid leaſe, this new leaſe ſhall begin preſently; though where the firſt leaſe is good in law, and only miſrecited in a point material, the new leaſe can begin preſently only in enumeration of years, not in intereſt, till the end of the firſt leaſe; for in theſe caſes the commencement of this new leaſe being referred to a thing which is not, cannot be any ways aſcertained or governed thereby, and then it is as if no ſuch recital had been, which would have left the leaſe to begin preſently, as the ſtrongeſt conſtruction againſt the leſſor, ſince there is nothing now to aſcertain or determine its beginning at any other time.

[See Preſton on Eſtates, ch. "Eſtates for Years."]

Lev. 234. Sid. 460. Vent. 83. 2 Keb. 322. Foot v. Berkeley.

So, where the queen-mother, having the inheritance of certain lands ſettled on her for her jointure, 14 *Car.* 1. reciting, that whereas Queen *Eliz.* 22 *April* in the 42d year of her reign, had demiſed thoſe lands to ſuch a one, *&c.*, (whereas the leaſe intended was in truth 32 *Eliz.*) the ſaid queen-mother did thereby demiſe the ſaid lands, to begin after the end or determination of the eſtate granted to the other *per literas patentes prædictas*, for twenty-one years; and the queſtion upon this miſrecital was, when the ſecond leaſe for twenty-one years ſhould begin? whether after the expiration of the firſt leaſe made 32 *Eliz.* though falſely recited to be made 42 *Eliz.*? or whether it ſhould begin preſently? It was adjudged, that for this miſrecital the ſecond leaſe ſhould commence preſently; and ſo the leſſee was obliged to pay the rent of 60*l. per annum* for the whole twenty-one years, though he had nothing in the lands all that time. And this judgment given in *C. B.* was afterwards affirmed upon error in *B. R.* And in this caſe the court agreed, that if the date of the recited leaſe only had been miſtaken, and the ſecond leaſe had been of the lands, *habend.* after the expiration or determination of the eſtate or leaſe of the firſt leſſee generally, in ſuch caſe the ſecond leaſe had been good, and ſhould not have begun before; for then there had been ſufficient certainty for the time of its commencement, and then *utile per inutile non vitiatur*; but here being limited to begin after the determination of the eſtate granted *per literas patentes prædictas*, where there were no ſuch letters patent, and ſo the relation idle and null, the ſecond leaſe begins preſently, as if no ſuch recital or relation had been, and there is no *utile* at all; for it is tied up to begin after a leaſe which is not. And as to *Periam*'s opinion, that if I let lands to *B.* to begin after the expiration of a leaſe thereof, which I have made to *J. S.*, where in truth I have made no leaſe to *J. S.*, that the leaſe to *B.* ſhall never begin; this was denied to be law, againſt the current of all authorities. The court further ſaid, that principal caſe here differs from *Withers* and *Caſſon*'s caſe, which

Hob. 128. Withers v. Caſſon.

one made a leaſe for years, *habend. a feſto purificationis*, and after by deed, reciting that he had made a leaſe to commence *a feſto annunciationis*, granted the reverſion to another, and that grant held good: for in the grant in the reverſion the miſrecital of the particular eſtate is not material in the caſe of a common perſon, ſo long as he hath a reverſion in him; but here in the principal caſe one term is recited to give certainty to the commencement of another, and is tied up by ſuch preciſe words to begin after the determination of the leaſe granted by the ſaid recited letters patent, that this cannot be referred to a leaſe that varies in the date, though agreeing in other circumſtances (which yet is not here, for the certainty of the term to *B.* is not recited): and though a leaſe is good without a date, yet when a leaſe is recited to be of ſuch a date, a leaſe which bears another date cannot be ſaid to be ſuch recited leaſe; ſo that the leaſe here muſt begin preſently; which, by the way, makes the grant good, either to paſs the reverſion with attornment, or being by indenture, to take effect upon the ſurrender, forfeiture, or other determination of the firſt term; and ſuch recital makes no eſtoppel either againſt the leſſor or leſſee, or any claiming under them; or if it ſhould, yet the jury are not eſtopped to find the truth; and then the court ſhall judge accordingly. Vaugh. 82. Vent. 84.

And this rule, that if the former leaſe be miſrecited in the date, *&c.* and a new leaſe made, to begin after the expiration of the ſaid recited leaſe, that ſuch new leaſe ſhall begin preſently, holds as well in the leaſe itſelf as where the jury find an indenture of leaſe, whereby it is recited, that the leſſor made ſuch former leaſe of ſuch date, and under ſuch rent, without finding it ſo in fact, but only by way of recital in the deed: ſuch ſecond leaſe ſhall in conſtruction of law be adjudged to begin preſently, though in the deed it is limited to begin after the expiration of the firſt leaſe ſo recited; becauſe the jury do not actually find the firſt leaſe, but only a recital of it in another deed, which recital may be falſe, for ought appears to the court; and then the ſecond leaſe ſhall begin preſently, as if no ſuch firſt leaſe were at all, ſince the not finding it effectually is, as if there were none ſuch made. Vaugh. 73. 80. Row and Huntington. Dyer, 93. pl. 28. 4 Co. 74. Palmer's caſe. Cro. Eliz. 603.

King *Hen.* 8. in the 31ſt year of his reign, leaſed lands to one for twenty-one years, and after granted the reverſion to a biſhop, who, reciting all the lands contained in the letters patent, and the land itſelf before leaſed, by name, and reciting the letters patent thus, that whereas *H.* 8. by his letters patent, dated 20 *H.* 8., where in truth they were dated 31 *H.* 8., and alſo miſreciting the day of the date, grants all the lands, tenements, *&c.* to the firſt leſſee for a certain number of years, *poſt expirationem hujuſmodi literarum patentium:* in this caſe it ſeems, that the date being miſtaken, and the commencement of the new leaſe referred to the expiration of the ſaid letters patent, when in truth there were no ſuch letters patent as were recited, the ſecond leaſe ſhall begin preſently, and ſo by acceptance thereof will amount to a ſurren- 2 Roll. Abr. 55. Halſwell and Ayleworth.

der of the firſt: it would have been different, if the ſecond leaſe had been limited to begin after the end of the firſt term generally.

2. With regard to other Circumſtances taken Notice of in the Deed of Leaſe, whereby to aſcertain the Commencement thereof.

As to other collateral circumſtances taken notice of in the deed of leaſe in order to aſcertain the commencement thereof, theſe are various, according to the agreement of the parties.

2 Leon. 86. Godb. 25. Co. Lit. 45. b. Co. 155. 6 Co. 35. Plow. 6. 373. 524. Roll. Abr. 848.

Therefore, if one makes a leaſe for years to another for ſo many years as *J. S.* ſhall name, this at the beginning is uncertain; but when *J. S.* hath named the years, this aſcertains the commencement and continuance of the leaſe accordingly, and in the mean time, if the leſſee enters, he ſeems to be tenant at will. (But *quære* if by ſuch entry before the commencement of the leaſe he is not a diſſeiſor, as other leſſees are who enter before their time?) But if the leaſe had been made for ſo many years as the executors of the leſſor ſhould name, this could not be made good by any nomination, becauſe to every leaſe there ought to be a leſſor and leſſee; and here the nomination which aſcertains the commencement not being appointed till after the death of the leſſor, makes the leaſe defective in one of the main parts of it, *viz.* a leſſor, and therefore, of conſequence, muſt be void; which is alſo the reaſon that in the firſt caſe the nomination ought to be made in the lifetime of the leſſor, and not by *J. S.* after his death, for then it will be void.

Co. Lit. 45. b. Roll. Abr. 848.

If a perſon makes a leaſe for ſo many years as he ſhall live, or the parſon of *D.* makes a leaſe of his glebe for ſo many years as he ſhall be parſon there, theſe leaſes are ſaid to be abſolutely void for the uncertainty of their continuance; becauſe none can ſay how long the leſſor will live, or be parſon; and then it cannot be a leaſe for years, when by no poſſibility the number of years can be aſcertained. But if the leaſe were for twenty-one years, or any other certain number of years, if the leſſor ſhould ſo long live, or continue parſon, or if *J. S.* ſhould ſo long live, theſe are good, becauſe the leaſe at firſt is certain for the determinate number of twenty-one years, though the death of *J. S.* may determine it ſooner; and that is a common and uſual limitation, and ſeems to have been introduced to obviate the objection of uncertainty in the other manner of leaſing. But even in that caſe it ſhould ſeem that the leſſee will be tenant at will, or if livery were made, will be tenant during the life or incumbency of the leſſor, and ſo have the freehold in him, though for want of certainty as the number of years, he cannot be ſaid leſſee for years.

5 Co. 7. Moor, pl. 340. Cro. Eliz. 199. 2 Leon. 105.

One made a leaſe of *Blackacre* to *A.* for ten years, and of *Whiteacre* to *B.* for twenty years, and after by indenture reciting both leaſes makes a leaſe to *C.* of *Blackacre* and *Whiteacre* for forty years, *habend.* after the end or determination of the ſaid ſeveral demiſes made to *A.* and *B.*, and then the leaſe to *A.* of *Blackacre* determines

determines; and if the leaſe to *C.* therein ſhould begin preſently, or if *C.* muſt wait the determination of the other leaſe to *B.* likewiſe before his leaſe ſhould commence, was the queſtion? And, it was urged, that this leaſe ſhould begin all at one time, and not have ſeveral commencements. But it was adjudged, that this leaſe to *C.* in *Blackacre* ſhould begin preſently; for the *habend.* ſhall be taken *reſpectivè reddendo ſingula ſingulis, viz.* that the firſt leaſe of *Blackacre* to *C.* for forty years ſhall begin preſently after the determination of the firſt leaſe thereof made, and ſo for *Whiteacre*, when the firſt leaſe thereof determines: becauſe every deed ſhall be taken ſtrongeſt againſt the leſſor or grantor, and moſt beneficially for the leſſee or grantee, the reverſe whereof would happen in this caſe without ſuch conſtruction, and it would be againſt the plain intent of the parties, to let in the leſſor to the poſſeſſion and enjoyment of the lands compriſed in the firſt leaſe, till the ſecond leaſe, which had no relation thereto, were determined.

In ejectment the plaintiff declared, that *J. S.* demiſed to him *per quadd. ſcriptum obligatorium* ſuch lands, *habend. a die datûs indenturæ prædict.*; on not guilty pleaded, it was found and adjudged for the plaintiff in *Ireland:* and it being aſſigned for error here, that there was no time ſpecified when this leaſe ſhould begin; for it was *habend. a die datûs indenturæ prædict.*, and no indenture was mentioned before, but only *ſcriptum obligatorium;* it was reſolved, that the writing ſhould be intended an indenture, though improperly called *ſcriptum obligatorium;* for every deed obligeth; or if it ſhould not be intended an indenture, then it begins preſently, as if it had been from an impoſſible limitation, as the 40th of *Sept.* or ſuch like. Vent. 137. 2 Keb. 796. Taylor v. Fitzgerald.

Copyhold land was granted to *A., B.*, and *C.* for their lives *ſucceſſive;* and then the lord grants and demiſes the ſaid land to *D.* for forty years, after the death, ſurrender, forfeiture, or other determination of the eſtate to *A., B.*, and *C.;* then *A.* and *B.* die, *C.* marries, and dies; and his wife holds herſelf in for life by the cuſtom, as her free-bench, and dies; and if the leaſe for forty years ſhould commence from the death of the huſband or the wife, was the queſtion? for if it ſhould begin from the death of the huſband, it would be now ended, and ſo the ejectment not maintainable; if from the death of the wife, there would be yet twenty years of the leaſe to come: And *per curiam*, though the law will in general ſupply theſe words, *which ſhould firſt happen*, that the leaſe ſhould begin upon the death, forfeiture, ſurrender, or other determination, which ſhould firſt happen, yet in this caſe it ſhall not begin till after the death of the wife, for that is the firſt effectual determination thereof: for it does not determine to any purpoſe by any of the other ways, ſince the wife is but in continuance of her huſband's eſtate, for life; and it cannot reaſonably be intended that this leaſe ſhould begin during the continuance of the precedent eſtate, which by poſſibility may continue longer than the forty years; for the wife may outlive the forty Lev. 20. Chantrell v. Randal. 2 Sid. 165. S. C. by the name of Clerk v. Candle. [Adjourn. according to both reporters.]

forty years, and then the leaſe for forty years from the death o the huſband would be void.

Mich. 6 Geo. 2. *in Canc.* Iriſh v. Hook.

So, in a late caſe, where *B.* had a leaſe of twenty-one years o copyhold lands, to commence after the determination of th eſtate which *A.* at that time had therein, and the widow of *A* being entitled to her free-bench, and happening to outlive he huſband twenty-one years, it was held by my Lord Chancellor that the eſtate of the wife was only an excreſcence of her huſ band's eſtate, which did not determine till the wife's death, a which time the leaſe made to *B.* ſhould commence, and continu for twenty-one years.

3. The Certainty of Leaſes for Years as to their Continuance.

Plow. 271. Say v. Smith and Fuller.

As to the certainty of leaſes for years, as to their continuanc this ought to be aſcertained either by the expreſs limitation of th parties at the time of the leaſe made, or by a reference to ſom collateral act, which may with equal certainty meaſure the cont nuance thereof, otherwiſe they will be void.

Plow. 271.

Therefore, where a man made a leaſe for ten years, and grant that if the leſſee, his heirs or aſſigns, ſhould pay to the leſſor his aſſigns, ſuch a parcel of tiles at the end of every ten yea next enſuing, that then he, his heirs or aſſigns, ſhould have perpetual demiſe of the premiſes from ten years to ten years co tinually following, and out of the memory of man; this was he to be a good leaſe but for ten years certain; becauſe for all t years to come it was uncertain (beſides the repugnancy and no ſenſe of the words *extra hominum memoriam*); for the payment the tiles was to precede all the ten years that ever ſhould be, and muſt laſt to the end of the world, before any ſecond ten yea by virtue of the leaſe, was to begin; and then to be ſure th could be no ten years at all; and ſo all the other ten years, be to begin upon an impoſſible condition precedent, can never t place at all, but are abſolutely void and idle.

Co. Lit. 45. b. 6 Co. 35. Plow. 273. Roll. Abr. 849. 3 Co. 19. Plow. 522.

If *A.* lets lands to *B.* for ſo many years as *B.* hath in the n nor of *D.*, and *B.* hath then a term for ten years in that man this makes *A.*'s leaſe to him good, and fixes the meaſure and q tinuance thereof, ſo that *B.* ſhall have the lands demiſed for years. So, a leaſe to one during the minority of *J. S.*, who then ten years of age, is a good leaſe for eleven years, if *J* ſo long live; for if he die ſooner, that determines the leaſe, ſi nothing appears to extend it beyond his life, and his mino ceaſes by his death.

6 Co. 35. b. Plow. 273. Co. Lit. 42. a.

If I have a rent of 20*s.* *per annum* in fee iſſuing out of *Bl acre*, payable annually at the feaſt of *Eaſter*, and I grant that to another till he ſhall have received of the ſame rent 21*l.*, grantee ſhall have the rent for twenty-one years certain, bec the land is a certain ſecurity for 20*s.* *per annum*, which will up twenty-one years certain to anſwer 21*l.*, and therefore ſo the grant of the rent ſhall have continuance.

But if a man lets lands of the value of 20 *s.* *per annum* till 21 *l.* be levied of the iſſues and profits, this is but a leaſe at will without livery, becauſe it is uncertain whether the land will be every year of an equal value; and though livery ſhould be made, whereby he will have a leaſe for life, or a freehold eſtate, yet this will be determinable upon the 21 *l.* levied; for by the original contract he was to have it no longer than till the money levied. 6 Co. 35. 3 Leon. 157. Bro. tit. Leaſes, 67. Co. Lit. 42. a. 3 Bulſ. 100. Plow. 273.

If a woman be *enſient* with a ſon, and a leaſe be made till ſuch iſſue *in ventre ſa mere* ſhall come to full age, this is a leaſe only at will, and cannot be any leaſe for years; becauſe it is uncertain when or whether ever the ſon will be born, and conſequently the beginning, continuance, and ending of this leaſe is uncertain; and therefore it cannot be ſaid any leaſe for years, ſince it is to begin preſently as a leaſe: and yet nothing appears in the deed itſelf, nor is there ſuch a reference to any collateral circumſtance as may then meaſure the continuance thereof. 6 Co. 35.

If *A.* ſeiſed of lands grants to *B.* that when *B.* pays to *A.* 20 *s.* that thenceforth he ſhall have and occupy the lands for twenty-one years, and after *B.* pays the 20 *s.*; this is become a good leaſe for twenty-one years from the time of ſuch payment made; for though the commencement of it was contingent and uncertain, and depended upon *B.*'s election to pay the 20 *s.*, yet after he had paid them, this takes off all uncertainty, and fixes the commencement and continuance of the leaſe. Co. Lit. 45. b. 6 Co. 35. a. Roll. Abr. 849.

If one makes a leaſe to *J. S.* for twenty years, if the coverture between *A.* and *B.* ſhall ſo long continue, this is a good leaſe for that time *primâ facie*, though the diſſolution of the coverture may determine it ſooner. And there alſo it ſeems, that a leaſe to one generally during the coverture between *A.* and *B.* is a good leaſe: but this ſurely can be no other than a leaſe at will, for the uncertainty how long the coverture will continue takes off from any certainty in the number of years that can be affixed to ſuch leaſe; and conſequently, it cannot be eſteemed any leaſe for years, more than where it is for ſo many years as the leſſor ſhall live, or continue parſon, *&c.* Plow. 273.

If one lets lands for one hundred thouſand days, this by *Bro.* is a good leaſe for that time, becauſe the meaſure and continuance thereof by days is as certain as it would be if it were for ſo many years as comprehend thoſe days, ſince days are part of and go to make up the years; though it ſhould ſeem that this cannot be properly called a leaſe for years, becauſe the years are only an accidental circumſtance in the enumeration of the days, not any part of the original contract between the parties. 14 H. 8. 13. Bro. tit. Leaſes, 13.

If a man makes a leaſe for years, without ſaying how many, this ſhall be a good leaſe for two years certain, becauſe for more there is no certainty, and for leſs there can be no ſenſe in the words. 6 Co. 35. 6. Bro. tit. Leaſes, 13.

If one makes a leaſe for ten years at the will of the leſſor, and is a good leaſe for ten years certain, and the laſt words void for the repugnancy by *Bro.* But if one lets lands at will by a year, *& ſic de anno in annum*, this is a leaſe only at will by Bro. tit. Leaſes, 13. 22. 14 H. 8. 13. a.

the firſt words, and the laſt words being repugnant ſhall not controul them, or add any more certainty to its continuance.

2 Roll. Abr. 851. 6 Co. 35. b.

If a man leaſes lands for ſuch a term as both parties ſhall pleaſe, this is but a leaſe at will, becauſe what that term will be is utterly uncertain; and the pleaſure of the parties ſeems to be limited to attend the continuance as well as the commencement and firſt fixation thereof.

3 Bulſ. 158. Roll. Rep. 187. 2 Roll. Abr. 850. Dyer, 24.

A parſon made a leaſe of his rectory to one for three years, and ſo from three years to three years, and ſo from three years to three years during his life; or, as it is in *Rolle*, for three years and at the end of thoſe three years for other three years, *& ſic de tribus annis in tres annos* during the life of the leſſor. The whole court held it clearly a leaſe for twelve years; but by *Dodderidge* if the leaſe had been for three years, and ſo from three years to three years, and ſo from the ſaid three years to three years; this had been but a leaſe for nine years, becauſe the words *from the ſaid three years* tie up the relation retroſpectively to the three years laſt mentioned, which made in all but ſix years, and then there are but three years more added, which make the whole but nine years; and for the words *(during the life of the leſſor,)* they cannot enlarge it to any further certain number of three years, by reaſon of the uncertainty of the leſſor's life; and therefore, beyond the twelve years, or nine years, it amounts only to a leaſe at will, unleſs livery were made, which muſt neceſſarily paſs a freehold determinable upon the leſſor's death.

3 Keb. 760. 768. Ferringham v. Graves.

And yet in one book where a leaſe was made for three years and after the end of thoſe three years for other three years, *& de tribus annis in tres annos* during the life of the leſſor; this was held to be only a leaſe for nine years, becauſe the words *& ſic de tribus annis* ſhall be referred to the three years laſt mentioned, for otherwiſe theſe words would exclude the three years next after the ſix years, and make the three laſt years to begin after nine years, and ſo make a chaſm in the leaſe, by ſhutting out the three years next after the ſix years, ſo as for the three laſt years it ſhould be only a future intereſt; which caſe ſeems to be of new ſtamp, and to thwart the preceding caſe, as to the reſolution of its being a leaſe for twelve years; and there *Jones* and *W.* held, that a leaſe *a tribus annis in tres annos* was but a leaſe for three years to commence *in futuro*.

2 Lev. 241. College of Mancheſter v. Trafford. [2 Show. 31. S. C. reports it a leaſe for 21 years to the ſame perſon, and after in the ſame leaſe a covenant that the leſſee ſhall have the lands for

Error of a judgment in ejectment at *Lancaſter*, where the caſe on a ſpecial verdict was this: The college in the time of Queen *Eliz.* reciting a leaſe made by them 1 *E.* 6. demiſed to one *Trafford* for twenty-one years rendering 20*l. per ann.* rent, *habendo* from the end of the ſaid term, made in the time of *E.* 6., and then follows a condition of re-entry for non-payment of the rent and after that a covenant and grant, that after the ſaid twenty one years ended the leſſee ſhall have the land for other twenty one years, and ſo from twenty-one years to twenty-one years, ninety-nine years are paſt thence next enſuing ſhall be compleat and ended; and it was found that there was no leaſe made in the time of *E.* 6., and that ſince the date of the leaſe made in

time of Queen *Eliz.* more than ninety-nine years are paſſed, but from the end of the term of twenty-one years ninety-nine years are not yet come; ſo that the queſtion was only, if the leſſee ſhall have ninety-nine years in all from the time of the date of the leaſe *tempore Eliz.* or ninety-nine years over and above the firſt twenty-one years? for it was agreed, that though no number of twenty-one years will center in ninety-nine, yet the term ſhall laſt for ninety-nine years, which is a certain term, and the odd years ſhall be rejected. And it was adjudged at *Lancaſter*, that the leſſee ſhall have ninety-nine years beſides the firſt twenty-one years, which ſhall not be accounted parcel of them, and that by reaſon of the word *thence*; for if it ſhould be from the making of the leaſe *tempore Eliz.* it would be *hence*; but *thence* is a word which denotes another time, not the preſent time, and ſo *thence* muſt refer to the making of the firſt twenty-one years, becauſe there is no other time to which it can refer, there being no leaſe at all 1 *E.* 6. to which it can refer, and ſo the term is not yet expired; and of that opinion was the whole court, and the judgment was affirmed.

21 years more after the expiration of the ſaid term, and ſo from 21 years until 99 years be complete and ended; and adjudged good, and to be two leaſes, and not one, viz. for 21 years, and alſo for 99 years beſides.]

If a man makes a leaſe for a year, and ſo from year to year, *quamdiu ambabus partibus placuerit*, this is a leaſe for two years certain at leaſt; and at moſt, after three years, this is but an eſtate at will: ſo, if a parſon makes a leaſe for a year, and ſo from year to year as long as he ſhall continue parſon, or as long as he ſhall live; this is a leaſe for two years at leaſt, if he lives and continues parſon ſo long; and after the two years, or at moſt after three years, but an eſtate at will for the uncertainty, unleſs livery be made.

Plow. 273. Co. Lit. 45. b. 6 Co. 35. Cro. Jac. 308. Bulſ. 215. Roll. Abr. 851. Lev. 46. 2 Jon. 5. Lutw. 214.

One made a leaſe for three years, and after for three years, and ſo from three years to three years until ten years be expired: this was reſolved to be a leaſe but for nine years; and that the odd year ſhould be rejected, becauſe that cannot come to fall within any three entire years according to the limitation, which in this caſe is to be taken all together as one year, elſe ſo much of the limitation, as cannot come within that deſcription, muſt be rejected. And this ſeems to agree with *Brook* and *Plowden*, who in general hold a limitation in that manner from year to year for forty, fifty, or one hundred years to be a good leaſe for the whole term, becauſe this is no ſuch break of an odd year, at the latter end of the leaſe, as there is in the other caſe.

Noy, 143. Roll. Abr. 850. Bro. tit. Leaſes, 49. Plow. 273. 522. a. 2 Co. 23. 2 Lev. 242.

One made a leaſe *de anno in annum, quamdiu ambabus partibus placuerit*: this was agreed by all to be a leaſe certain for two years: but there the leſſee entered and occupied for two years, and alſo for part of the third year, and then died; and for rent in arrear for part of the third year debt was brought againſt his executors; and upon *nihil debet* pleaded, and verdict for the plaintiff, it was moved in arreſt, *&c.* that after the two years, this being a leaſe at will determined by his death, and then no action lies for the rent of the third year; and of this opinion was *Popham*. But it was held by *Gawdy* and *Fenner*, that though at firſt this was a leaſe certain but for two years, yet when he occupied part of the third year, this was then become a leaſe certain for that year alſo,

Cro. Eliz. 775. Agard v King. Mod. 3. Sid. 423. 2 Keb. 543. Goſtwick v. Maſon. Keilw. 63.

ſo that neither of them could avoid it; for otherwiſe, after the leſſee hath been at great charges in manurance, the leſſor, by a determination of his will, might ſtrip him of all his profit.

Hill. 7 Ann. in B. R. Legg v. Hackett. 2 Salk. 414. pl. 6. S.C. by the name of Legg v. Strudwick.

A parol leaſe was made *de anno in annum, quamdiu ambabus partibus placuerit*; it was adjudged that this was but a leaſe for a year certain, and that every year after it was a ſpringing intereſt, ariſing upon the firſt contract and parcel of it; ſo that if the leſſee had occupied eight or ten years, or more, theſe years, by computation from the time paſt, made an entire leaſe for ſo many years; and if rent was in arrear for part of one of thoſe years, and part of another, the leſſor might diſtrain and avow as for ſo much rent arrear upon one entire leaſe, and need not avow as for ſeveral rents due upon ſeveral leaſes, accounting each year a new leaſe. It was alſo adjudged, that after the commencement of each new year, this was become an entire leaſe certain for the year paſt, and alſo for the year ſo entered upon; ſo that neither party could determine their wills till that year was run out, according to the opinion of the two judges in the laſt caſe. And this ſeems no way impeached by the ſtatute of frauds and perjuries, which enacts, that no parol leaſe for above three years ſhall be accounted to have any other force or effect than of a leaſe only at will: for at firſt, this being a leaſe certain only for one year, and each accruing year after being a ſpringing intereſt for that year, it is not a leaſe for any three years to come, though by a computation backwards, when five or ſix or more years are paſt, this may be ſaid a parol leaſe for ſo many years; but with this the ſtatute has nothing to do, but only looks forward to parol leaſes for above

2 Keb. 16.

three years to come. And this opinion, in the principal caſe, ſeems to be confirmed by a like reſolution of the court, where the plaintiff declared, that he retained the defendant *anno* 1657 for one year then next enſuing, and ſo from year to year, *quamdiu ambabus partibus placuerit*; and laid it, that *anno* 1661, the defendant withdrew himſelf from his ſervice for a month, *per quod*, &c. And the court held, that though the retainer at firſt was for a year certain, yet after every other year begun, the retainer held for that year alſo, and gave judgment for the plaintiff.

2 Salk. 413. [A leaſe was granted "to hold "from Michaelmas-"day for "one whole "year, and "ſo for two "or three "years, or "any ſuch "further "term of

And yet there are other caſes in which it ſeems to have been held, that a leaſe made *de anno in annum, quamdiu ambabus partibus placuerit*, is a leaſe for two years certain at firſt, and after a leaſe for every ſeveral year that the leſſee holds on; and that if upon ſuch leaſe three years rent be in arrear, the declaration muſt be of ſeveral leaſes for ſo many years as were paſt. And it is held that to ouſt the leſſee there muſt be half a year's warning given (*a*) ending at the expiration of the year; and that unleſs ſuch warning be given, it will be evidence of an agreement to hold for another year (*b*). However, it appears from all the caſes, that there is yet no uniform, unanimous opinion ſettled as to this matter.

"years as the parties ſhould think fit and agree, on yielding and paying for the ſaid one year, and ſo "thence yearly and every year during ſuch term or terms as ſhould be thereafter granted, &c. "*annum*." According to Wilſon's report, this was adjudged to be a leaſe for *two* years. Harris v. Evans, 1 Wilſ. 262. But according to Ambler, who was of counſel in the cauſe, it was holden to be a leaſe for *one* year only without a ſubſequent agreement; for if it had been doubtful under the words *habendum*, thoſe under the reſervation fully explained them. Ambl. 329. If we ſuppoſe the cases to be alluding to different periods of time in theſe reports; in the former, to the time paſt, to the

the tenant had actually occupied; in the latter, to his eſtate at the commencement of the leaſe; both reports may be correct, and there will be no contradiction between them. For it is now clear that a leaſe *for a year, and ſo for ſuch further term as the parties ſhall agree upon*, or, *from year to year, as long as both parties ſhall pleaſe*, is, with a view to its preſent extent, a leaſe for a year certain, and no more; though with a view to the time which has elapſed, to the number of years the tenant has occupied, it is conſidered as an eſtate for all that time including the current year. In the caſe of Agard v. King, *ſupra*, where the court are made to ſay, that ſuch a leaſe was a leaſe certain *at firſt* for *two* years, it is to be remembered, that they were not conſidering the preſent, but the paſt eſtate which the tenant had: what they ſay therefore muſt be taken to be with reference to that, and to import nothing more than that it was at firſt, that is, upon the expiration of the two years, a leaſe for thoſe two years, whatever it might be as to the third year which the tenant had entered upon, and upon which only the queſtion in the caſe aroſe. And ſo in the caſe of Bellaſis v. Burbridge, referred to in Salk. 413. and fully reported in Lutw. 213. the leſſee under a demiſe for a year, and ſo from year to year, &c. had occupied one year, and part of another; and the court ſay, that this was a good leaſe for two years at leaſt; that is, that the tenant having continued the occupation part of another year, the leaſe was thereby become a good leaſe for that year; not that the leaſe by the terms of it was originally and in its creation a leaſe for two years certain.—And notwithſtanding the puzzle and contrariety of opinion in the books with reſpect to theſe running leaſes, the law is now conſidered as ſettled agreeably to the caſe of Legg v. Strudwick or Strudwick, above reported. They are leaſes for one, two, or more years, according to the form of the leaſe, dependent for their further continuance upon the will of the parties. If it be the will of the parties that they ſhould have a further continuance (and that ſuch is their will, the law will preſume, unleſs the contrary be evidenced by a regular half year's notice to quit given by the one to the other), the tenant ſo continuing in poſſeſſion is not a mere tenant at will, but a tenant for years: it is the will of the parties that he ſhould continue the tenancy another year: his precarious intereſt is for ſuch further term become certain; but he has ſtill the ſame kind of eſtate which he formerly had. Birch v. Wright, 1 Term Rep. 380. Preſt. on Eſtates, ch. Eſtates for Years. (*a*) 1 Term Rep. 162. (*b*) But this notice may vary according to the cuſtom of the country, and the nature of the hereditaments in leaſe. Roe v. Wilkinſon, Co. Lit. 278. b. note 1. 14th edit. 2 Salk. 414. 3 Burr. 1609.]

One let a ſtable for a week for 8*s.* and ſo from week to week at 8*s.* a week, *quamdiu ambabus partibus placuerit*; this was held, at moſt, but a leaſe for three weeks certain, and for the reſidue at will; ſo that the leſſee, at the end of the three weeks, was not puniſhable for negligent keeping of his fire, that being only an involuntary waſte, wherewith leſſee at will is not chargeable. 3 Lev. 359. Panton v. Iſham.

[A leaſe was granted for ſeven, fourteen, or twenty-one years, as the leſſee ſhould think proper. And by Lord *Mansfield*, this was at leaſt a leaſe for ſeven years; then if the leſſee continues, it is for fourteen years; if at the end of that time he ſtill continues, it is for twenty-one years. And agreeably to this deciſion, it hath been lately determined (*c*), that a leaſe for three, ſix, or nine years, determinable in 1788, 1791, 1794, is a leaſe for nine years, determinable by either of the parties at the end of the firſt three or ſix years, on giving reaſonable notice to quit.] Ferguſon v. Corniſh, 2 Burr. 1032. more accurately in 2 Term Rep. 463. (*c*) Goodright v. Richardſon, 2 Term Rep. 462.

3. The Certainty of Leaſes for Years as to their Duration and Ending.

As to this, though the preceding point may ſeem to have taken in all that can come in properly here, ſince the continuance of leaſes for years muſt ſhew their determination likewiſe; yet there are ſome caſes remaining which ſeem more proper to be inſerted under this head.

Therefore, where a leaſe was made for forty years to two perſons, if they lived ſo long, or to *A.* for forty years, if he and *B.* ſhould ſo long live, or the leſſor and leſſee, or the leſſor and *J. S.* ſhould ſo long live; in all theſe caſes the death of either of them determines the leaſe, becauſe their lives are the collateral meaſure 2 Bendl. 2. pl. 2. 13 Co. 66. 2 Brownl. 292. 5 Co. 9. Cro. Jac. 78.

3 Bulſ. 131. Roll. Rep. 309, 310. 3 Leon. 10. pl. 150.

and limitation of the continuance of the term, or rather the condition whereon the eſtate depends: and by the death of one of them, the condition is as much broken as if both were dead; ſince, with regard to the condition, both made but one perſon; and they cannot now both ſo long live, one being dead already; and the condition being entire, cannot be ſevered or divided, ſo as when part of it is broken and gone, the eſtate ſhould ſtill ſubſiſt and hang upon the other part thereof: and therefore, this differs from a leaſe to two perſons for their lives, for this gives an eſtate to both for their lives, and both have an eſtate of freehold therein in their own right, and conſequently, this cannot determine by the death of one of them, for then the other could not be ſaid to have an eſtate for his life, as the leſſor at firſt gave it. But *Rolle* ſeems to think, that where it is to two for forty years, if they ſo long live, that this does not determine by the death of one of them, becauſe it is an intereſt in both, which ſhall ſurvive; but the other books are againſt it, becauſe their life is but a collateral condition and limitation of the eſtate, which is broken when one dies.

Vent. 74. Bailes v. Wenman, & *vide* 1 Brownl. 30. Mod. 187.

Upon articles of intermarriage between *A.* and *B.* it was agreed that the defendant, father of *A.* ſhould ſettle the lands in queſtion upon *C.* for his life, and after his death upon *B.* for her jointure, with a proviſo, that *C.* ſhould make a leaſe thereof to the defendant for ninety-nine years, if he and *D.* his wife ſhould ſo long live, which leaſe was made accordingly; then *D.* dies, and if by her death the leaſe was determined, was the queſtion between the defendant and the plaintiff, leſſee of *C.*? And the court, upon the firſt opening of the caſe, without argument, were all of opinion that it was, and gave judgment accordingly on the reaſons of the foregoing caſe.

Moor, pl. 375. 3 Bulſ. 131. 133. Roll. Rep. 310. 2 Brownl. 292. Cro. Eliz. 269. Leon. 74. 244. Co. Lit. 225. a.

One made a leaſe for forty years, if *A.* his wife, or any of their iſſue, ſhould ſo long live; and it was adjudged that the leaſe was not determined by the death of one of them, but ſhould continue till all were dead, by reaſon of the disjunctive *or*, which goeth and governs the whole limitation. But if the words had been, *A. and his wife and iſſue ſhould ſo long live*, there, clearly, by the death of any of them within the forty years, the term had been at an end, by reaſon of the copulative *and*, which conjoins all together, and makes all their lives jointly the meaſure of the eſtate.

Cro. Eliz. 643. Noy, 70. Wrenford v. Gyles.

A leaſe was made for twenty-one years, if the leſſee ſo long lived and continued in the leſſor's ſervice; the leſſor dies: *per curiam*, the leaſe is not determined, becauſe it was the act of God that he could ſerve no longer.

Dyer, 67. pl. 18. Co. Lit. 219.

A leaſe is made to two for years, with a proviſo, that if the leſſees die within the term, the term ſhall ceaſe; they make partition, or one aliens his part, and dies, yet the leſſor cannot enter into his part, but the aſſignee, or executors of the leſſee (if no aſſignment) ſhall have that part during the life of the ſurvivor, and there ſhall be no occupancy. For it is not like a leaſe made to two for term of their lives; there, if they make partition and one dies, his part ſhall revert to the leſſor preſently. And if

had been to them for their lives & *eorum diutius vivent.*, yet this would not have prevented the reverter upon ſuch partition, *quia expreſſio eorum quæ tacite inſunt nihil operatur*; and the partition breaks the joint-tenancy, and defeats the right of ſurvivorſhip, and ſo lets in the reverſion *immediate* to each one's ſingle part. But in the principal caſe, the leaſe at firſt is general and abſolute to both for ſo many years, which gives them a joint-tenancy in the term, and will carry it to the ſurvivor and his executors; and then the proviſo, which comes after, though it ſtraiten it from going to the executors of the ſurvivor, yet it does not give it to the leſſor till both are dead within the term; and the partition or alienation breaks the joint-tenancy, and prevents the ſurvivorſhip, and conſequently, none but the alienee, or executors of the leſſee, can have that part during the life of the other leſſee.

3 Aſſ. pl. 8. 4 Co. 73. 3 Bulſ. 131. Roll. Rep. 310.

(M) In what Caſes, and to what Reſpects an Entry by the Leſſee is requiſite to the Perfection of his Leaſe.

AS to this it is to be obſerved, that at common law no leaſe for years, whether it were with or without any reſervation of rent, was looked upon to be complete till an actual entry by the leſſee: for though the leſſor had done all on his part to perfect the contract, ſo that he could not afterwards any way derogate from, or avoid it, ye till there was a tranſmutation of the poſſeſſion by the actual entry of the leſſee, it wanted the chief mark and indication of his conſent thereto, without which it might be unreaſonable to adjudge him in actual poſſeſſion to all intents and purpoſes; ſince it might ſo happen that ſuch leaſe was made in his abſence, and when he knew nothing of it, and perhaps might be greater than he would be willing to take; or the eſtate might be ſo incumbered as to bring a load upon him rather than any advantage. For theſe reaſons (amongſt others) the law would not caſt the immediate and actual poſſeſſion upon him *nolens volens*; and therefore it was, that till actual entry he could not maintain an action of treſpaſs or ejectment, becauſe thoſe actions, complaining of an immediate violation of the poſſeſſion, could not be proper for him who had no actual poſſeſſion. But the leſſor having done all that was requiſite on his part to deveſt himſelf of the poſſeſſion, and paſs it over to the leſſee, had thereby transferred ſuch an intereſt to the leſſee, as he might at any time reduce into poſſeſſion by an actual entry, as well after the death of the leſſor as before, and ſuch an intereſt as he might before entry grant over to another, or if he died before entry, would go to his executors; or, if the grant were made to two jointly, to the ſurvivor and his executors, any of whom might enter at their pleaſure, and ſo reduce the contract into an actual execution; for it was perfect and complete on the leſſor's part, and the perfecting of it on the leſſee's part was entirely in his own power, and left to his own diſcretion

Co. Lit. 46. b. 51. b. 270. a. Plow. 142. b. 423. a. 5 Co. 124. b. Cro. Jac. 61. 2 Mod. 249. 2 Vent. 203, 204.

to uſe when, and as he thought fit. And therefore this differed from a leaſe for life, or a feoffment in fee; for theſe being eſtates of freehold muſt neceſſarily be executed by livery of ſeiſin, which carried the immediate and actual poſſeſſion to the leſſee or feoffee, in as much as the operation of the livery could not be in ſuſpenſe for the prejudice that might thereby accrue to ſtrangers, who, after ſuch ſolemn tranſmutation of the poſſeſſion by livery, could take notice of no other tenant of the freehold, and therefore muſt neceſſarily bring their *præcipes* againſt him for recovery of their rights; which if they might after be defeated and eluded on pretence of any diſagreement, or that there was no actual conſent or agreement thereto, and ſo the actual poſſeſſion not veſted in him, would be greatly injurious to the rights of ſtrangers. Beſides that, the livery can be made to none but the leſſee or feoffee himſelf in perſon, or ſome other perſon lawfully authorized by letter of attorney to receive the ſame; and therefore he can no ways be ſuppoſed ignorant of the terms upon which he took it, and ſo no ſuch reaſon for ſuſpending the actual execution of it. And therefore if a leaſe were made to *A.* for life, the remainder to *B.* for life, and then *A.* died, a releaſe to *B.* and his heirs, before actual entry, would be good to enlarge his eſtate, becauſe he had the freehold in law in him, immediately upon *A.*'s death, to anſwer to the *præcipes* of all ſtrangers, as fully as he could ever have it by any entry. But now in the caſe of a leaſe for years it is quite different, as has been ſhewn; and therefore till actual entry, which is an agreement on his part, in caſe of ſuch leaſe for years, equivalent to the acceptance of livery in caſe of the paſſing of a freehold, the leſſee for years hath not the poſſeſſion; and as he hath not the poſſeſſion, ſo neither hath the leſſor a reverſion to grant either to the ſame leſſee or a ſtranger. But yet if a rent were reſerved on ſuch leaſe for years, and before actual entry of the leſſee, or commencement of his leaſe, the leſſor ſhould releaſe to him all his right in the land; though this would not be ſufficient to carry the reverſion * by way of enlargement of his eſtate, yet would it extinguiſh the rent, becauſe every deed muſt be taken moſt ſtrongly againſt the grantor, and to be made to ſome purpoſe or other; and ſince this cannot operate on the eſtate to enlarge that, or carry any further intereſt to the leſſee, yet it may well operate upon the rent which was iſſuing out of the land, and coming to the leſſor, in reſpect of the land he had departed with, and therefore ſhall be conſtrued to extinguiſh and determine that rather than it ſhall be totally void.

* *Vide* the next clauſe.

2 Mod. 251. And this way of executing leaſes for years, by an actual entry was always held neceſſary at the common law, and for a conſiderable time after the ſtatute of uſes likewiſe, till the way was found out of conveying a freehold by a leaſe for a year, and a releaſe thereupon, according to the common form now uſed. For it being found troubleſome and inconvenient to put the leſſee under the neceſſity of making an actual entry in all caſes before a releaſe could be effectual thereupon to enlarge his eſtate, eſpecially when the lands lay at any conſiderable diſtance from the place where

the deeds were executed; therefore, to prevent this trouble and inconvenience for the future, they began to conſtrue, that where the words and conſideration were ſufficient to raiſe a uſe, though it were but for a year, the ſtatute would carry the actual poſſeſſion after it, and conſequently, make the leſſee equally capable of enlarging his eſtate, by a releaſe thereupon, as if he had actually entered by force and virtue of the leaſe: and the conſideration, if it were valuable, though never ſo ſmall, was looked upon to be ſufficient for the raiſing of a uſe; and therefore 5 *s.* or ſuch other conſideration, came to be the ſtandard in a leaſe for one year, which in time grew to be a thing merely of courſe and form, it being ſeldom or never paid, though the leſſee, by his acceptance of the leaſe upon ſuch conſideration, was eſtopped to deny or aver againſt it. But becauſe there were ſome opinions, that where a conveyance might enure two ways, either at the common law, or upon the ſtatute, that there the common law ſhould be preferred and take place; therefore, to bring the leaſe more effectually within the ſtatute, they likewiſe inſerted the words therein *bargain and ſell*, which, together with the conſideration, were held even at common law ſufficient to raiſe a uſe; and then the ſtatute, which came after, carried the poſſeſſion accordingly, without any actual entry made by the leſſee; and ſo the conveyance, by way of leaſe and releaſe, grew in time to be the moſt common and eaſy method of transferring a freehold or fee, and has now continued for ſeveral years, almoſt to the diſparagement of conveyance by livery. And to bring the leaſe ſtill more effectually within the ſtatute, it was afterwards uſed at the end of the leaſe to ſay, *That ſuch leaſe was made to the intent, that by virtue of the ſtatute of uſes, the leſſee might be in actual poſſeſſion, and be thereby enabled to accept and take a grant and releaſe of the freehold and inheritance thereof*, &c.

(N) Leaſes for Years, when to take Effect as a Reverſion, when as a future Intereſt, and when neither the one nor the other.

IF one, having made a leaſe for life or years to *A.* of lands, after make another leaſe for years to *B.* of the ſame lands, or of the reverſion of thoſe lands, *habend.* the ſaid lands, or the reverſion of thoſe lands, to the ſaid B. *cum poſt ſive per mortem, reſignationem, ſurſum redditionem, vel aliquo alio modo vacare contigerit*; in this caſe *B.* hath election to take ſuch leaſe either as a reverſion or a reverſionary intereſt, if he can prevail for an attornment of *A.*, the tenant in poſſeſſion; or if not, yet as a future *intereſſe termini* ſuch leaſe will be good to take effect in poſſeſſion upon the determination of the firſt leaſe, be it by death, ſurrender, forfeiture, effluxion of time, or any other way. The reaſon whereof is, that when the leſſor has expreſsly departed with, and made over an intereſt to the leſſee for ſuch a time, and this intereſt cannot take effect in poſſeſſion, becauſe the leſſor himſelf had not the poſſeſſion to give, but

6 Co. 36. Cro. Jac. 72. Cro. Eliz. 152. Leon. 171. 3 Leon. 17. 4 Leon. 23. Bro. tit. Attornment, 41. 60. Lit. § 576. Dyer, 26. a. 58. 124. pl. 40. 125. pl. 44. 178. 233. pl. 10. 117. pl. 76. 350. pl. 18. 376-7.

Bendl. 286. Plow. 148. 150, 151. Bro. tit. Leaſes, 71. Yelv. 85. Brownl. 136. 4 Co. 53. Dyer, 46.

but muſt therefore be carved and derived out of the reverſion which the leſſor had, the leſſee *primâ facie* hath a reverſion, or reverſionary intereſt for the time, in the ſame manner as the leſſor or grantor himſelf had; but then the perfecting ſuch leaſe as a reverſion, or a reverſionary intereſt, to draw after it the rents and ſervices, depending on the will and pleaſure of the tenant in poſſeſſion, whether he will attorn, and become tenant to ſuch leſſee or grantee, or not; if he thinks fit not to attorn, it cannot paſs as a reverſion or reverſionary intereſt; yet this ſhall not totally invalidate and avoid ſuch leaſe or grant, if by any other means it can be made good and become effectual; and this it may as a future *intereſſe termini*, to take effect in poſſeſſion on the determination of the firſt leaſe, when or what way ſoever that happens; and therefore, as ſuch, it ſhall take effect, rather than be abſolutely void, when the leſſor or grantor hath done all in his power to diveſt himſelf of the poſſeſſion for ſo much a longer time. But then ſuch ſecond leſſee hath an election to take it as a reverſion, or reverſionary intereſt only, when the leaſe is made to him by deed poll or indenture; for if it were made by parol, then he can only take it as a future *intereſſe termini*, to take effect in poſſeſſion upon the determination of the firſt leaſe, when or which way ſoever that happens, and not as a reverſion, or reverſionary intereſt, to draw after it the rents and ſervices, becauſe a reverſion cannot be granted to paſs without deed; for a deed is of the very eſſence of the grant of a reverſion, or reverſionary intereſt, and without it no reverſion, or reverſionary intereſt can paſs out of the leſſor.

And this introduces a threefold diſtinction in the manner of making ſuch leaſes for years, where there is a prior leaſe or eſtate then in being: 1*ſt*, When they are made by parol. 2*dly*, When by deed poll. And, 3*dly*, When by indenture or fine.

Plow. 421. b. 422. b. Bendl. pl. 246. Cro Eliz. 160. Plow. 432. 521. Hutt. 105. Bro. tit. Leaſes, 48. Moor, 185. pl. 329. Dyer, 112. pl. 49.

As to the firſt, if one makes a leaſe to *A.* for ten years, and the ſame day makes a parol leaſe to *B.* for ten years of the ſame lands, this ſecond leaſe is abſolutely void, and can never take effect either as a future *intereſſe termini*, or as a reverſionary intereſt, though the firſt leſſee ſhould forfeit or otherwiſe determine his eſtate, or though the firſt leaſe were on condition, and the condition broken within the ten years; neither ſhall the leſſor have the rent reſerved upon ſuch ſecond leaſe, but ſuch ſecond leaſe is abſolutely void, as if none ſuch had been made. The reaſon whereof is, becauſe the firſt leaſe being made for ten years, the leſſor during that time had nothing to do with the poſſeſſion, or to contract with any other for it; and the ſecond leaſe being made the ſame day, and for no longer term than the firſt ten years, could not paſs any intereſt as a future *intereſſe termini* certainly; for the firſt leſſee had the whole intereſt during that time; and his forfeiture or determination of it ſooner, which was perfectly contingent and accidental, ſhall never make good the ſecond leaſe as a future *intereſſe termini*, when at the time of making thereof it was abſolutely void, for want of a power in the leſſor to contract for it; and as a reverſionary intereſt it cannot be good, for want of a deed; for a reverſion, whether it be granted for life or years, not being

being capable of executing either by livery of ſeiſin, or entry and tranſmutation of the poſſeſſion, there can be no evidence of the creation or exiſtence of ſuch a grant, without a deed to aſcertain it; and therefore a deed in ſuch a caſe is as eſſential to the making good the grant, as livery of ſeiſin or entry in the other caſes, where they deal for the poſſeſſion; and by conſequence, this ſecond leaſe not being good, either as a future *intereſſe termini*, or a reverſion, muſt be abſolutely void. But now if ſuch ſecond leaſe had been made for twenty years, then it had been good as a future *intereſſe termini* for the laſt ten years, and void for the firſt ten years, for the reaſons before given. For the laſt ten years it had been good; becauſe when the firſt ten years were elapſed, the ſecond leſſee might then execute, and reduce into poſſeſſion by entry, as well as if it had been at firſt made in poſſeſſion; for it had been good for the whole twenty years if the firſt leaſe had not ſtood in the way, and that can ſtand in the way no longer than it continues, and therefore by its determination lets in the ſecond leaſe. But as a grant of the reverſion ſuch ſecond leaſe could not be good, for want of a deed, for the reaſons before given; neither could any attornment help it, or let in the ſecond leaſe till the firſt ten years run out by effluxion of time.

But now, 2*dly*, If ſuch ſecond leaſe had been made by deed poll, then it might well enure as a grant of the reverſion, and draw after it the rents and ſervices of the firſt leſſee, if he would conſent to attorn, and by conſequence, whenever the firſt leaſe determined by ſurrender, forfeiture, or otherwiſe, ſuch ſecond leſſee having the immediate reverſion muſt come in for the reſidue of his term; but without ſuch attornment to make it operate as a grant of the reverſion, this ſecond leaſe, though by deed poll, would be abſolutely void, as if it were made only by parol, becauſe during the firſt ten years the leſſor had no power to contract for the poſſeſſion; and therefore if this grant could not take effect as a grant of the reverſion, which was all the leſſor had a power of, it muſt likewiſe be abſolutely void. But if ſuch ſecond leaſe by deed poll had been for twenty years, then with attornment this would be a good grant of the reverſion preſently, to take effect in poſſeſſion whenever the firſt leaſe determined; or if no attornment could be had, yet it would enure as a future *intereſſe termini* for the laſt ten years, and would be abſolutely void for the firſt ten years, as much as if it had been made by parol.

Vide the authorities cited above.

But now, 3*dly*, and laſtly, If ſuch ſecond leaſe for ten years had been made by indenture or fine, then this would have been good as a preſent leaſe, by reaſon of the eſtoppel to both parties by the indenture or fine, and therefore whenſoever the firſt leaſe determined, the ſecond leaſe ſhould commence in poſſeſſion; and in the mean time the ſecond leſſee, by reaſon of the eſtoppel would be obliged to pay the rent reſerved in an action of debt. And if ſuch ſecond leſſee could prevail for an attornment, then this leaſe would enure as a grant of the reverſion, and draw after it the rents and ſervices of the firſt leſſee, and would take effect in poſſeſſion whenever

Vide the authorities to the firſt diſtinction.

ever that determined; but without ſuch attornment, though the ſecond leaſe would be good between the parties, by reaſon of the eſtoppel, yet not as a reverſion; and therefore ſuch ſecond leſſee could have no remedy for the rents and ſervices of the firſt leſſee.

Co. 155. a. Cro. Eliz. 322. Plow. 422. a. 433. a.

So, if one had made a leaſe for life, or for eighty years, if the leſſee ſhould ſo long live, and after, by indenture, let the ſame lands to another for years, to begin preſently, and then the firſt leaſe determined by death, ſurrender, or forfeiture, the ſecond leſſee ſhould have the lands in poſſeſſion preſently, for the reſidue of the years; becauſe ſuch ſecond leaſe, by reaſon of the eſtoppel, took effect between the parties preſently, and therefore ſhall come in poſſeſſion whenever the firſt leaſe is out of the way. But if ſuch ſecond leaſe were only by deed poll, then there muſt be an attornment to make it good as a grant of the reverſion, as there muſt likewiſe in the other caſe, where it was made by indenture; and without ſuch attornment the ſecond leaſe could only take effect in poſſeſſion upon the determination of the firſt leaſe by the death of the leſſee, according to the expreſs limitation, and not upon any ſooner or other determination by ſurrender, forfeiture, or otherwiſe; much leſs, if ſuch ſecond leaſe were by parol, could it take effect upon any other determination of the firſt leaſe: for though in theſe caſes the firſt leaſe, depending upon the life of the leſſee, was uncertain how long it would continue, yet ſo long as it did continue, the firſt leſſee had the ſole and abſolute poſſeſſion, and the leſſor no power to contract for any thing but his own reverſion during that time; and therefore if his ſecond leſſee cannot attain the reverſion, the contract can take no effect for the poſſeſſion till the death of the firſt leſſee, becauſe that being the leſſor's own limitation affixed to ſuch leaſe, he cannot deal for the poſſeſſion before that time comes; and therefore, no accidental determination of the leaſe ſooner ſhall let in the ſecond leſſee, unleſs he can prevail for the reverſion by attornment of the firſt leſſee, in caſe of the leaſe by deed poll, or unleſs in caſe of the indenture, he ſhall, by reaſon of the eſtoppel, be let in whenever the firſt leaſe is out of the way, whether he obtained an attornment or not.

3 Leon. 17. 4 Leon. 23. 5 Co. 113. Mallorie's caſe.

But in all the caſes before-mentioned, if ſuch leaſe by indenture or deed poll were by way of bargain and ſale for years, then, it ſhould ſeem, it would paſs as a reverſionary intereſt preſently, without any attornment, by force of the ſtatute of uſes, and it being only for years, there would need no enrolment of the indenture or deed poll.—And *note*; By the ſtatute of frauds and perjuries, 29 *Car.* 2. *c.* 3. no parol leaſe for above three years is to have any other effect than only as a leaſe at will; ſo that ſuch parol leaſes now for ten or twenty years are out of doors.

(O) Leaſes for Years by Eſtoppel, how far and againſt whom ſuch Leaſes are good.

IF one makes a leaſe for years, by indenture, of lands, wherein he hath nothing at the time of ſuch leaſe made, and after purchaſes thoſe very lands, this ſhall make good and unavoidable his leaſe, as well as if he had been in the actual poſſeſſion and ſeiſin thereof at the time of ſuch leaſe made; becauſe he having, by indenture, expreſsly demiſed thoſe lands, is by his own act eſtopped, and concluded to ſay he did not demiſe them; and if he cannot aver that he did not demiſe them, then there is nothing to take off or impeach the validity of the indenture, which expreſsly affirms that he did demiſe them, and conſequently, the leſſee may take advantage thereof, whenever the leſſor comes to ſuch an eſtate in thoſe lands as is capable to ſuſtain and ſupport that leaſe. And this eſtoppel by indenture is ſo mutual and reciprocal, that if a man takes a leaſe for years by indenture of his own lands, whereof he himſelf is in actual ſeiſin and poſſeſſion, this eſtops him during the term to ſay the leſſor has nothing in the lands at the time of the leaſe made, but that he himſelf, or ſuch other perſon, was then in actual ſeiſin and poſſeſſion thereof; for by acceptance thereof by indenture, he is, for the time, as perfect a leſſee for years, as if the leſſor had at the time of making thereof the abſolute fee and inheritance in him. But if ſuch leſſee of his own lands, being ejected by the leſſor, ſhould bring an ejectment, and the leſſor ſhould plead not guilty, and give the leaſe and ſome matter of forfeiture thereof, in evidence, to ſupport his plea without pleading, and rely on the eſtoppel, and the jury ſhould find the ſpecial matter, *viz.* that the defendant had nothing in the lands at the time of ſuch leaſe made, but that the plaintiff himſelf was then in actual ſeiſin and poſſeſſion thereof, whether the court, upon this verdict, are bound to adjudge according to the truth of the caſe, *viz.* that ſuch leaſe by one who had then nothing in the lands was void; or if they are to adjudge according to the law, working by way of eſtoppel upon ſuch leaſe by indenture, ſeems a doubt upon all the books. But my Lord *Coke* lays it down for a rule, that the jury do well to find the truth, *viz.* that the leſſor had then nothing in the lands; but then, upon ſuch finding, the court is to adjudge, according to the operation of law upon the eſtoppel wrought to both parties by the indenture, that they are bound. But if the jury, underſtanding that the leſſor had nothing in the lands at the time of the leaſe made, and that therefore his leaſe could not be good in fact, but only by way of eſtoppel, and inferring from thence that they, who are ſworn to ſay the truth, were not bound by ſuch an eſtoppel, which was plainly againſt the truth, ſhould therefore give a general verdict againſt the leaſe, that the defendant was guilty of the ejectment; in this caſe, ſays my Lord *Coke*, ſuch jury are liable to an attaint. And this ſeems the better opinion; for though it be true that the jury are not bound by the eſtoppel,

Co. Lit. 47. 227. a. Plow. 434. 4 Co. 53. Cro. Eliz. 140. Sav. 98. Owen, 96. Leon. 206. Cro. Eliz. 362. Moor, pl. 323. 2 Brownl. 150. Cro. Car. 110. 2 Roll. Abr. 871. Cro. Jac. 73.

4 Co. 53. Rawlins's caſe. Co. Lit. 47. b.

eſtoppel, and therefore may find that the leſſor had nothing in the lands at the time of the leaſe made, which is a truth of fact, the leſſee is eſtopped to affirm, and is the only ſubject matter of the eſtoppel; yet the conſequence of ſuch eſtoppel, and how far the leaſe is made good thereby againſt the parties, is matter of law, and not of fact; and therefore if they take upon them, firſt, to find that the leſſor had nothing in the lands at the time of the leaſe made, and then to find that ſuch leaſe is void; or, which is all one, to find that ſuch leaſe was void, becauſe the leſſor had then nothing in the lands, as the eſſential cauſe which induced them to find ſuch leaſe to be void, or that there was no ſuch leaſe; in this they take upon them to judge the matter of law, and in ſo doing exceed their duty, and, conſequently, if they are miſtaken, lay themſelves open to an attaint; for, in truth of fact, there was ſuch leaſe made, and, in truth of fact, the leſſor had nothing in the lands at the time of making thereof; and all this is their duty, and belongs to them to find; but whether ſuch leaſe, ſo circumſtanced, be good, or void, is matter of law, for the court to adjudge, upon theſe circumſtances; and therefore, if they will take upon them to anticipate the judgment of the court, by giving their own judgment thereon, they muſt do it at their own peril, and if they miſtake, be liable to an attaint.

Co. Lit. 47. b. Roll. Abr. 871.

But if ſuch leaſe for years were made by deed poll of lands wherein the leſſor had nothing, this would not eſtop the leſſee to aver that the leſſor had nothing in thoſe lands at the time of the leaſe made; becauſe the deed poll is only the deed of the leſſor, and made in the firſt or third perſon; whereas the indenture is the deed of both parties, and both are, as it were, put in and ſhut up by the indenture, that is, where both ſeal and execute it as they may and ought; for otherwiſe, if the leſſor only ſeals and executes the indenture, the leſſee ſeems to be no more concluded than if the leaſe were by deed poll; for it is only the ſealing and delivery of the indenture as his deed that binds the leſſee, and not his being barely named therein, for ſo he is in the deed poll; but that being only ſealed and delivered by the leſſor, can only bind him, and not the leſſee, who is not to ſeal and execute it. And it ſhould ſeem, that ſuch leaſe by deed poll binds the leſſor himſelf as much as if it were by indenture, becauſe it is executed on his part with the very ſame ſolemnity, and therefore it ſhould ſeem, he is bound by ſuch leaſe by way of eſtoppel.

Cro. Eliz. 37. 700. Co. Lit. 352. a.

And yet it is generally ſaid, that theſe eſtoppels ought to be mutual, otherwiſe neither party is bound by them: therefore if a man takes a leaſe for years of his own lands from an infant or feme covert by indenture, this works no eſtoppel on either part, becauſe the infant or feme, by reaſon of their diſability to contract, are not eſtopped; therefore, neither ſhall the leſſee be eſtopped, becauſe all eſtoppels ought to be mutual.

Roll. Abr. 871.

So, if a man takes a leaſe for years of his own lands by patent from the king, rendering rent, this ſhall not eſtop the leſſee, as an indenture between common perſons in ſuch caſe would do; becauſe the king cannot be eſtopped, for it cannot be preſumed the king

king would do wrong to any perſon, and therefore being deceived in his grant makes it abſolutely void. And if he be not eſtopped, neither ſhall the leſſee; becauſe all eſtoppels ought to be mutual. But perhaps there may be ſome difference between theſe caſes of a bare acceptance of a leaſe from ſuch perſons, as by reaſon of their imbecility, incapacity, or other impediment ariſing from their own perſons, could not make ſuch leaſe, but that the ſame was either abſolutely void, or at leaſt voidable, on their part; and therefore the leſſee may ſhew ſuch incapacity, to avoid them, as made by perſons who wanted power or ability to contract; and ſo the whole contract muſt fail, not for want of a ſufficient eſtate in the leſſors, (for if they were of full age, and ſole, *&c.* that would not be material,) but for want of a ſufficient power or ability to contract. But when ſuch leaſe is made by a man of full age, though by deed poll, why this ſhould not bind and eſtop him as well as if it were made by indenture, ſeems hard to underſtand; for he hath executed it on his part with the ſame ſolemnity; and though it cannot bind or eſtop the leſſee, becauſe he never executed it, yet why that ſhould invalidate it on the leſſor's part, whoſe deed it was, and who did all he could to bind himſelf, does not ſeem very intelligible. Beſides that, the books, which put the caſe of the leaſe by deed poll, ſaying only that the leſſee is not eſtopped thereby, ſeem to allow that the leſſor is notwithſtanding eſtopped; for otherwiſe they would take notice of their being both at large, as they do in other caſes.

If leſſee for years accepts a leaſe for years of a ſtranger by indenture, who hath nothing in the reverſion, this is a good leaſe by way of eſtoppel between them, and not a confirmation; for nothing appears that the leſſor knew the leſſee then had any thing in the lands, and then it is the ſame with the other caſes, and works by way of a bare eſtoppel; but *Fenner* thought it a confirmation, againſt all the other judges. Roll. Abr. 871. Style and Herring.

If one lets lands to me, by deed enrolled, unknown to me, and brings debt upon the leaſe, I may ſay *ne leſſa pas*, as *Littleton* held; but by all the juſtices, he who made ſuch leaſe is concluded to ſay the contrary. This caſe ſeems to be an authority in point to eſtabliſh what has been laid down, that in caſe of a deed poll, (as this which is called a deed enrolled muſt be intended to be,) the leſſor himſelf is eſtopped, though the leſſee be at large; and this cannot be intended an indenture, becauſe then the leſſee would have been eſtopped likewiſe, if he had ſealed it, which in this caſe it appears he did not, becauſe it was unknown to him, and therefore was not eſtopped, whether it were by indenture or deed poll. Bro. tit. Leaſes, 36. 7 E. 4. 29.

Theſe eſtoppels continue no longer on either part than during the leaſe, for as they began at firſt by the making of the leaſe, ſo by determination of the leaſe they are at an end likewiſe; for then both parts of the indenture belong to the leſſor. Co. Lit. 47. b. 4 Co. 54. a. 8 Co. 44. Cro. Eliz. 36. Roll. Abr. 877.

When an intereſt actually paſſes by the leaſe, there ſhall be no eſtoppel, though the intereſt, purported to be granted, be really greater than the leſſor at that time had power to grant; as if *A.*, Co. Lit. 47. b. Vent. 358. *& vide*

Skin. 3. Carth. 247, 248. Salk. 275. pl. 1.

leſſee for the life of *B.*, makes a leaſe for years by indenture, and after purchaſes the reverſion in fee, and then *B.* dieth; *A.* ſhall avoid his own leaſe, though ſeveral of the years expreſſed in the leaſe are ſtill to come; for he may confeſs and avoid the leaſe which took effect in point of intereſt, and determined by the death of *B.* So, if leſſee for ten years makes a leaſe for twenty years, and afterwards purchaſeth the reverſion, yet it ſhall bind him for no more than ten years, for the ſame reaſon; becauſe when he made a leaſe for twenty years, this was certainly a good leaſe for ten years, and ſo far an intereſt paſſed, which he may confeſs, and avoid it for the reſidue, by ſaying that he had no more than for ten years in it himſelf; *ſed quære* of this? for the reaſon ſeems not ſatisfactory.

2 Lev. 140. 3 Keb. 490. Roe and Williamſon.

In ejectment, plaintiff declared of a leaſe for five years, and upon not guilty pleaded, the jury found that the leſſor of the plaintiff had only a term for three years in the lands leaſed, &c. *ſi, &c.* *Hale* held this verdict againſt the plaintiff; for the judgment ſhould be, that the plaintiff *recuperet terminum ſuum prædictum*, which is five years; and here the leſſor's intereſt does not continue ſo long, and perhaps the defendant may be the reverſioner after the five years ended, and then by this means the plaintiff's leſſor will recover the land for two years more than he hath right to do; and he ſaid, that for this reaſon, he had before cauſed another plaintiff to be nonſuit; *Wild* was of the ſame opinion; but *Twiſden* inclined *cont. & adjornatur.*

Co. Lit. 47. b. Roll. Abr. 871.

If a man takes a leaſe for years of the herbage of his own land by indenture, this is no concluſion to ſay that the leſſor had no thing in the lands at the time of the leaſe made, becauſe it was not made of the lands themſelves.

Roll. Abr. 877. Cro. Eliz. 701. Brerton v. Evans.

If baron and feme join in a leaſe for years by indenture, rendering rent, where the baron hath all the eſtate, and the wife no thing; in this caſe, after the death of the baron, the leſſee, in an action of debt brought by the feme, ſhall not be concluded to ſay, that at the time of the leaſe made the feme had nothing in the lands; for this ſhall not enure by way of eſtoppel, becauſe an intereſt actually paſſed, though not from the feme. But another reaſon given is, becauſe the feme being covert was not eſtopped, and, by conſequence, neither ſhall the leſſee, becauſe all eſtoppels ought to be mutual.

Co. Lit. 45. a. Roll. Abr. 877. Cro. Eliz. 701.

If tenant of the land, and a ſtranger, join in a leaſe for years by indenture, this is the leaſe only of the tenant, and the confirmation of the ſtranger; and yet the leaſe operates, as to the ſtranger, by way of concluſion, and ſo it does to the leſſee with reſpect to the ſtranger, becauſe he having nothing in the lands, the indenture could no otherwiſe take effect as to him.

Co. Lit. 45. a. Roll. Abr. 877.

If *A.* ſeiſed of ten acres, and *B.* of other ten acres, join in a leaſe for years by indenture, theſe are ſeveral leaſes, according to their ſeveral eſtates, and no eſtoppel is wrought by the indenture to either party, becauſe each have an eſtate whereout ſuch leaſe for years or intereſt may be derived; and the reaſon why eſtoppels at any time are allowed, is, becauſe otherwiſe, when the par-

hath nothing in the lands, the indenture muſt be abſolutely void, which would be hard to ſay, when he hath, under hand and ſeal, done all in his power to make it good; and ſince it can be good no otherwiſe, it ſhall be good by eſtoppel, rather than be abſolutely void. But when an intereſt paſſes from each leſſor, the indenture works upon ſuch intereſt to carry that, and therefore leaves no room for its operating by way of eſtoppel. But ſince both equally joined in the leaſe, without diſtinguiſhing the ſeveral intereſts they had therein, the indenture works by way of confirmation, with reſpect to each from whom the whole intereſt did not paſs; that is, as *A.*'s confirmation for *B.*'s part, and as *B.*'s confirmation for *A.*'s part; for ſince the leaſe of the whole was undiſtinguiſhed, and by reaſon of the ſeveral intereſts that paſſed from each, excludes any eſtoppel, therefore, rather than the indenture ſhall be void, with reſpect to the part of each other, it ſhall be conſtrued a ſeveral confirmation by one of the other's part, and by the other of the other's part, which is the leaſt operation the indenture can have with reſpect to each, from whom no intereſt paſſes, without being abſolutely void.

So, if two tenants in common of lands join in a leaſe for years, by indenture, of their ſeveral lands; this ſhall be the leaſe of each for their reſpective parts, and the croſs confirmation of each for the part of the other, and no eſtoppel on either part; becauſe an actual intereſt paſſes from each reſpectively, and that excludes the neceſſity of an eſtoppel, which is never admitted, if by any conſtruction it can be avoided, as being one of thoſe things which the law looks upon as odious, becauſe it chokes and diſguiſes the truth. Roll. Abr. 877.

But if two joint-tenants for life, or in fee, join in a leaſe for years by indenture, reſerving rent to the one of them only, this ſhall give him the rent excluſive of the other; and here the eſtoppel turns not then upon the intereſt paſſed by the leaſe, for that is ſeveral, according to their ſeveral rights, as in the other caſes, which excludes any eſtoppel; but it turns upon the reſervation of the rent, which being made in this manner, to one excluſive of the other, by indenture, works an eſtoppel againſt all the parties to ſay the contrary; and though the rent iſſues out of one part as well as the other, yet it not being part of the thing demiſed, but moving, as it were, rather by way of grant from the leſſee after the leaſe made, the leſſors are conſidered as accepting it in this manner by indenture, which concludes them as well as it doth the leſſee. But if the leaſe had been by parol, or deed poll, reſerving rent to the one joint-tenant only, this would not have excluded the other joint-tenant from an equal ſhare therein, becauſe this reſervation coming, as it were, by way of grant from the leſſee, and being only by parol, or deed poll, could not eſtop or conclude the leſſors, who, with reſpect to the rent, were as it were grantees, and only paſſive therein; and the rent ſhall follow the reverſion in proportion to their ſeveral eſtates in that, as the cauſe for which the rent was reſerved or granted in that manner, and ſo let in both to an equal participation thereof. Co. Lit. 47. a. Roll. Abr. 878.

Roll. Abr., 878. Moor, pl. 939. Milliner v. Robinſon.

If two coparceners join in a leaſe for years, by indenture, of their ſeveral parts, this is ſaid in one book to be but as one leaſe, becauſe they have not ſeveral freeholds therein, but only one, as both making but one heir, and therefore ſhall join in an aſſiſe. But *Moor* is *cont.* where in ejectment the plaintiff declared of a leaſe by two coparceners *quod dimiſerunt;* and exception being taken to it, the exception was allowed, becauſe the leaſe was ſeveral as to each coparcener, for her reſpective moiety. And this ſeems the better law, becauſe though they have but one freehold with regard to their anceſtor, and therefore if they are diſſeiſed ſhall join in an aſſiſe, yet as to their diſpoſing power thereof they have ſeveral rights and intereſts, ſo that neither of them can leaſe or give away the whole.

Roll. Abr. 874. 876. Omelaughland v. Hood.

If *A.* mortgages lands to *B.* upon condition to re-enter on payment of 10*l.* and after *A.* before the day of payment is come, being in poſſeſſion, makes a leaſe for years, by indenture, to *C.*, and then after performs the condition, this ſhall make the leaſe to *C.* good againſt himſelf by eſtoppel; and it was farther adjudged, that even the feoffee of *A.* ſhould be bound by this leaſe, which took its effect only at firſt by eſtoppel; becauſe he coming in under one who was eſtopped, ſhould be himſelf eſtopped likewiſe, which was ſtill a ſtronger caſe than the firſt. And this was adjudged in *Ireland*, and afterwards affirmed on a writ of error here, and ſeems a very reaſonable judgment; for if a ſubſequent purchaſe ſhall make good a leaſe of lands by indenture, though the leſſor had nothing in thoſe lands at the time of the leaſe, and therefore his leaſe at firſt could only take effect by eſtoppel; much more in this caſe, where the leſſor had a poſſibility of coming into the lands again, ſhall his performance of the condition after make good the intermediate leaſe. And ſo it ſhould ſeem to if the condition were broken at the time of the leaſe, ſo as he had then nothing but an equity of redemption; yet if he ſhould after be admitted to redeem in Chancery, this would make good the intermediate leaſe which took effect at firſt only by eſtoppel.

Co. Lit. 45. a. Dyer, 234. Moor, pl. 196. Poph. 57. Moor, pl. 939. & Co. 14, 15.

B. tenant for life of *C.*, and he in the remainder or reverſion in fee join in a leaſe for years by indenture; this, during the life of *C.*, is the leaſe of *B.*, who then only had the preſent intereſt in the lands, and the confirmation of him in the remainder or reverſion; but after the death of *C.* then this becomes the leaſe of him in the reverſion or remainder, and the confirmation of *B.*, for the leſſors having ſeveral eſtates in them in ſeveral degrees, the leaſe ſhall be conſtrued to move out of each one's reſpective eſtate or intereſt as they become capable of ſupporting thereof; which is the moſt natural and uſeful conſtruction of the leaſe, eſpecially as there can be no eſtoppel in this caſe, by reaſon of the ſeveral intereſts which paſſed from each; and therefore during the life of the tenant for life, if the leſſee, being evicted, ſhould declare of a leaſe by both, this would be againſt him, as was adjudged, becauſe for that time it was only the leaſe of the tenant for life.

(P) Leaſes for Years and future Intereſts, how far they may be barred or deſtroyed, and how far not, and where an Entry before the Term begun is a Diſſeiſin.

IT has already appeared, that all leaſes for years at the common law, when they come *in eſſe*, are to be executed by the entry of the leſſee. We ſhall therefore now conſider what care the law has taken for the preſervation and ſecurity of ſuch leaſes as are limited to begin at a future time, and ſo cannot be executed by entry preſently; what power the leſſee hath over ſuch an intereſt, and whether by any, and by what acts, either of the leſſor, or ſtrangers, the ſame may be barred and prevented from ever taking effect.

As to future intereſts, if one make a leaſe for years, to commence after the death of a tenant for life, or after the end of a leaſe for years then in being; and after the death of the tenant for life, or expiration of the term for years, a ſtranger enter by wrong, yet may the leſſee of the future intereſt grant over his term for years, before or without any entry made, and thereby transfer over his power of entering and reducing it into poſſeſſion to the grantee: for till entry of the leſſee of ſuch future intereſt, the leaſe is not executed, but remains in the ſame plight as it was upon the firſt making thereof, and then no intermediate acts, either of the leſſor, or of ſtrangers, can diſturb or hurt it; becauſe whoever comes to the poſſeſſion, whether by right or wrong, takes it ſubject to ſuch future charge, which the leſſee may execute by his entry whenever he thinks fit, as by a title prior and paramount to all ſuch intermediate violations of the poſſeſſion. But if the leſſee of ſuch future intereſt had once entered after the death of the tenant for life, or end of the leaſe for years, and had after been put out, then he could not grant over his term and intereſt to a ſtranger, becauſe by his entry the leaſe was actually executed, and being after defeated by the entry of another, he had only a right of entry left in him; which right of entry the law will not ſuffer him to transfer over to a ſtranger any more than a right of action; and for the ſame reaſon, becauſe in both caſes it may encourage champerty and maintenance: but in the other caſe, where he hath not entered, he only transfers over ſuch intereſt as he himſelf had, which the tortious entry of the ſtranger had not diſturbed or altered from what it was at the firſt taking thereof.

Cro. Eliz. 15. 5 Co. 124. 3 Leon. 156. 158. 3 Mod. 198.

So, if one makes a leaſe for years, to begin two years hence; after the two years expired, before any entry, and whilſt the leſſee continues ſtill in poſſeſſion, the leſſee may grant over his term and intereſt to another; becauſe his *intereſſe termini* was not defeated or turned to a right, but continued in him in the ſame manner as it was at firſt granted; and in the ſame manner he

Cro. Eliz. 127. Leon. 118. Wheeler v. Thoroughgood.

transfers it over to another, who by his entry may reduce it into poſſeſſion whenever he thinks fit.

5 Co. 123. Cro. Jac. 60. Saffin's caſe. Leon. 99. 3 Mod. 198. Ld. Raym. 179.

One made a leaſe for years, to begin after the end or determination of a former leaſe for years then in being; the firſt leaſe determined; and before entry of the ſecond leſſee, he in reverſion entered, and made a feoffment in fee, and levied a fine with proclamations, and five years paſſed without entry or claim of the ſecond leſſee; and if his term was barred, was the queſtion? And it was adjudged, that by this fine and non-claim his term was barred, becauſe after the firſt leaſe expired, the ſecond leaſe was actually then come *in eſſe*, and reducible into poſſeſſion by an entry preſently; and then his not entering, which was his own fault, and laches, could not ſtop the operation of the fine from running againſt him. But if ſuch fine had been levied during the continuance of the firſt leaſe, there, it was agreed, that the operation thereof ſhould not begin to run out againſt the ſecond leſſee till the firſt leaſe were determined; becauſe till then the ſecond leaſe was only an *intereſſe termini*, which the ſecond leſſee could not reduce into poſſeſſion by any entry till the firſt leaſe determined, and ſo was not obliged to take notice of the acts of ſtrangers, or of the ter-tenant in poſſeſſion; for if ſuch future intereſt might be diveſted before it came *in eſſe*, the leſſee or grantee thereof having never entered, would have no means to re-veſt it, and therefore till it comes *in eſſe*, the law takes care and ſecures it to the leſſee or grantee in the ſame manner as it was at firſt granted; but when the firſt leaſe is at an end, then the ſecond leſſee is to take care of it himſelf; and if he ſuffers five years to elapſe after that time without entry or claim, this will bar ſuch intereſt, becauſe his right then commences in poſſeſſion, and thenceforth the operation of the fine begins to run on againſt him. And where

Noy, 123. Archbold v. Cook. Vent. 81. Sid. 459.

in *Noy* it is held, that if *A.* leaſes to *B.* for years, but yet *A.* ſtill continues in poſſeſſion, and after levies a fine with proclamations, and five years paſs, that this does not bar the term of *B.*, but only carries the reverſion of *A.*, this caſe was denied by *Twiſden* to be law, for till the entry of *B.* the leſſor had no reverſion; and therefore the fine can only operate on the poſſeſſion.

2 Leon. 99. Cro. Eliz. 169. Roll. Abr. 605. Dyer, 89. 96. 2 Roll. Abr. 120.

As the leſſee muſt enter when his leaſe continues in poſſeſſion ſo if he enters before, this is a diſſeiſin: therefore, where one brought debt for rent, and declared upon a leaſe 29 *Septemb.* to *bendum* from the feaſt of *St. Mich.* next enſuing for twenty-one years, rendering 10*l. per ann.* rent, *virtute cujus* defendant 29 *Septemb.* entered, *&c.* on *nil debet* pleaded, and found for the plaintiff, it was moved in arreſt of judgment, that here, by the plaintiff's own ſhewing, there is no rent in arrear, for he ſays *virtute cujus* defendant 29 *Septemb.* entered, which is a day before the commencement of the term; and then ſuch entry is a diſſeiſin, becauſe he hath then no right to enter: and this the court clearly agreed, and that no continuance of poſſeſſion, though after the term actually begun, would purge the diſſeiſin or alter the eſtate of the leſſee: but yet they agreed that debt lay for the rent reſpe-

reſpect of the privity of contract upon the leaſe made, but that the diſſeiſin having gained a tortious fee, that ſhould not give way to the term for years, though it were legal, being but a chattel.

So, where *A.* made a leaſe to *B.* 23 *Septem. habendum* to him for eighty-one years from *Mich.* next enſuing, if *C.* ſhould ſo long live, and from and after the day of the death of *C.* for thirty-one years more; the leſſee enters the 23 *Septemb.*, and ſo, before the commencement of the term, continues in poſſeſſion for ſome years; then the leſſor re-enters, and the leſſee being out of poſſeſſion after the death of *C.* and during the continuance of thirty-one years, aſſigns over that term to the plaintiff's leſſor, who being kept out of poſſeſſion, brings ejectment, and recovered. 1. It was held, that the term not being to begin till *Mich.*, this was till then a future intereſt, and the leſſee's entry before was a diſſeiſin, and not a poſſeſſion, by virtue of the leaſe. 2. That whether this leaſe for thirty one years were only a continuance of the firſt term, and that both together made but one term, as *Bridgeman* held, becauſe the laſt day of the life of *C.* ſhall be conjoined to the firſt day of the thirty-one years, and ſo no fraction be allowed, eſpecially being for eighty-one years, which *B.* cannot be ſuppoſed to outlive; or whether they were two diſtinct terms, as others held; yet either way it was not turned to a right by the entry of the leſſor, becauſe *B.* was not poſſeſſed by virtue of the term, but by diſſeiſin, and to purge that was the entry of the leſſor; for if a ſtranger had entered after *Mich.*, and diſſeiſed the leſſor, this would not have turned the term to right, becauſe as to that the time for entry of the leſſee was not come, nor was his entry in reſpect of that; no more will the entry of the leſſor turn it to a right, and then it was well aſſignable to the plaintiff's leſſor, eſpecially if it ſhould be taken as a future intereſt, as ſome held it ſhould; for then the leſſee was never in poſſeſſion by virtue thereof, and conſequently the leſſor's entry could not turn it to a right. Lev. 45. Keb. 54. Hennings v. Brabaſon.

But where one declared of a leaſe 16 *April*, *habendum* from the *Annunciation* laſt paſt for ten years, *virtute cujus intravit, & habuit tenementa prædict.* from the ſaid *Annunciation;* this was held good, and that the leſſee was no diſſeiſor; for it ſhall be intended that he entered and occupied before by agreement, and a diverſity was taken between this caſe, where the commencement of the leaſe is limited from a time paſt, and where it is limited to begin at a time to come; there, the entry of the leſſee before that time, is a diſſeiſin. Cro. Eliz. 905. Waller v. Campian.

(Q.) How far, and by what Means, Leaſes for Years in Truſt to attend an Inheritance may be barred or deſtroyed.

Cro. Car. 310. Iſham v. Morris.

IF leſſee for years aſſigns over his leaſe in truſt for himſelf, and after purchaſes the inheritance, and occupies the land, and then levies a fine with proclamations, and the leſſee does not claim this leaſe within five years after the fine levied, this fine and non-claim will bar the intereſt of the leſſee, though he who levied the fine had himſelf the poſſeſſion by reaſon of the truſt; for this truſt paſſed included in the fine, and the truſtee not making claim within the five years, his intereſt is barred thereby, and, conſequently, ſo is the intereſt therein of the *ceſtui que truſt*. But note; it appears in other books (*a*), where this reſolution is cited, that the conuſee was a purchaſer of the eſtate, and then having no notice of the term, nor having made any agreement for it, to have it aſſigned in truſt for himſelf, if the fine had not barred it, and it might have been ſet up againſt his purchaſe, he would have been ſo far cheated. But it is ſaid, it would have been otherwiſe, if by agreement, this term had been to be aſſigned in truſt for the conuſee; and that, upon very good reaſon: for he who hath the inheritance in truſt, for whom a term or eſtate by extent is aſſigned, muſt be taken as tenant at will to his truſtee, and then his poſſeſſion is the poſſeſſion of the truſtee; the conſequence of which is, that the fine levied by him who hath the inheritance will work only upon that, when it appears that it was ſo intended, and that the term ſhould be kept on foot, and not barred; whereas in the caſe of *Iſham* and *Morris* there does not appear to have been any ſuch intention, nor does it appear that the conuſee knew any thing of the term.

(*a*) 2 Ventr. 329. 1 Sid. 459. 1 Lev. 272.

Hanmer v. Eyton, Comb. 67. See alſo 1 Ch. Rep. 27. 33.

[So, where *A.* had a term of years veſted in him for ſecuring children's portions, and *B.* being in poſſeſſion levied a fine, and five years paſſed without any claim being made; it was reſolved by the Court of King's Bench, that, admitting the term was in truſt, it was barred by the fine.]

Hard. 400. Focus v. Saliſbury.

A. ſeiſed of lands, for continuance thereof in his name and blood, *&c.* makes a leaſe to *B.* for five hundred years, in truſt for himſelf during life, and after in truſt for his brother, and ſo to others; and after, *A.* being in poſſeſſion according to the truſt, covenants with *D.* to ſtand ſeiſed of thoſe lands, upon the ſame conſiderations as in the leaſe, to the uſe of himſelf for life, with remainders over, as in the leaſe, and upon the ſame truſts; and that the ſaid leaſe, and all eſtates made or to be made by him ſhould be to the ſame uſes and truſts; and then *A.* levies a fine and five years paſs, *A.* ſtill continuing in poſſeſſion according to the truſt, and after *A.*'s death the leſſee enters; and if this leaſe was barred by the fine and non-claim for five years, was the queſtion? No judgment appears to have been given: but *Hale* ſeemed

to be of opinion that it was not, becauſe here appeared no intent to bar it; for *A.* was but tenant at will, and the fine did not diſplace the leaſe; as, if leſſee for years levies a fine, and five years paſs, the leſſor is not barred, becauſe *nihil operatur* by the fine, and *partes finis nihil habuerunt* may be pleaded to it: otherwiſe it would be, if ſuch fine had been levied by the tenant for life: therefore, where leſſee for years intends to levy a fine, it is uſual for him firſt to make a feoffment, whereby he transfers the whole and preſent poſſeſſion and fee to the feoffee, and then the fine operates upon the whole eſtate ſo united in the feoffee; but here *the leaſe for years was antecedent to the eſtate of the leſſor* upon which the fine operates, and was ſubſiſting in another perſon, *viz.* in the leſſee, at the time of the fine levied. And he cited the Ducheſs of *Richmond*'s caſe (*a*) in *C. B.*, which is ſaid to be the ſame *in terminis*, and to be ſo adjudged, 1. Becauſe the leſſor was only a tenant at will, and there was a mutual confidence between them: 2. By reaſon of the privity that was between them. And he alſo cited one *Heal*'s caſe, where *A.* conveyed lands in fee to *B.*, with a covenant to make further aſſurance, then *B.* let to *A.* for forty years, and then, on requeſt, *A.* makes further aſſurances; the leaſe is barred without precedent agreement to the contrary, for that would have ſaved the leaſe, and then the further aſſurance would have been taken only to operate by way of corroboration and further confirmation of the leaſe. But the principal caſe in *Hard.* ſeems to be very darkly put in the book; for it does not appear to whom the fine was levied; and the notion of the term being antecedent to the fine, and therefore not barred for that reaſon, ſeems ſtrange; for if it were ſubſequent, it could not moſt certainly be touched by the fine; and there in another book this caſe is cited as a caſe in point, that the term is barred by the fine; and this ſeems agreeable to ſome of the following reſolutions.

2 Vez. 481.

(*a*) Corbet v. Stone, Sir Thomas Raym. 140.

Lev. 272.

It was held *per curiam*, that a fine levied in purſuance of a truſt cannot deſtroy any leaſe made by *ceſtui que truſt*. But though a fine levied by *ceſtui que truſt* does not deſtroy or extinguiſh the truſt, yet it is not ſafe to do it, for the danger of not being able to prove an agreement to the contrary.

Keb. 24-5.

A. ſeiſed in fee makes a leaſe to *B.* for an hundred years, in truſt to attend the inheritance, *B.* enters, then *A.* enters, and receives the profits, and after makes a leaſe for fifty-four years, and covenants to levy a fine *ſur conuſance de droit*, to confirm that leaſe, and a fine is afterwards levied accordingly, and five years paſſed without any claim made by *B.* And it was adjudged in *C. B.* and affirmed afterwards upon error in *B. R* 1. That when *A.* entered upon *B.* he was but tenant at will to him, to which eſtate it is not always requiſite that there be the expreſs conſent of both parties; but if there be any thing tantamount, it is ſufficient; as here the truſt implies, that the leſſor ſhall take the profits, being *ceſtui que truſt*, which includes at leaſt an eſtate at will. 2. That when *A.* made the leaſe for fifty-four years, though this would not be a diſſeiſin, becauſe the reverſion was in the

Vent. 55. 80. Sid. 349. 458. Lev. 270. 2 Keb. 521. 597. 650. Freeman v. Barnes. 3 Mod. 196. S. C. cited.

leſſor himſelf, who made that leaſe, yet by this the leaſe for an hundred years was diveſted, diſplaced, and turned to a right. And, 3. that being ſo diveſted, this was barred by the fine and non-claim. And it was held, that *A.* only ſhould have the term of an hundred years, diveſted or not, and not *B.*, who was but his truſtee; and in this caſe *A.* hath made his election by levying the fine to corroborate the term of fifty-four years, and there is no reaſon that *A.* ſhould have the land againſt his own fine: beſides, if the term of an hundred years ſhould not be barred by the fine and non-claim, then *B.* muſt have it, which was never intended; and it is but reaſonable ſuch term ſhould be ſubject to be barred or extinguiſhed by *ceſtui que truſt* of that and the inheritance. And a general rule was taken in this caſe, that when the leſſee at will, or he who enjoys the land by expreſs or implied aſſent of his grantee or feoffee, makes a leaſe for years, or levies a fine, this ſhall be conſtrued an ouſter, diſſeiſin, or bar, when ſuch conſtruction tends to the eſtabliſhing of a lawful eſtate, as in the principal caſe; but when ſuch conſtruction tends to the deſtruction of an honeſt eſtate or intereſt, then ſuch leaſe or fine ſhall be no ouſter, diſſeiſin, or bar; and therefore *Keeling*, Chief Juſtice, put theſe two caſes: If one makes a leaſe for years, for ſecurity of money by way of mortgage, and as the courſe is, continues in poſſeſſion, and takes the profits, and then levies a fine to *J. S.*, and pays the intereſt duly, and the five years without notice or claim paſs, this ſhall be no bar to the leaſe of the mortgage: So, if one purchaſes lands, and for the better ſecurity hath a long leaſe aſſigned to *J. S.* in truſt to attend the inheritance, and then take the inheritance to himſelf by fine, and five years paſs, and there are mortgages made in time after the firſt leaſe made, and before the fine levied; yet ſuch fine does not deſtroy the firſt leaſe to *J. S.*, but the purchaſer may uſe it to defend himſelf againſt the incumbrances; and he thought this difference would reconcile all the books.

[See *acc.* 2 Vez. 482]

3 Mod. 195. Smith v. Pierce.

One by will deviſes lands to truſtees for ninety-nine years, in truſt for the payment of his debts and legacies, remainder to *A.* his brother in tail; but if *A.* gave ſecurity to pay the ſaid debts and legacies, or ſhould pay the ſame within ſuch a time, then the truſtees ſhould aſſign the term to him, *&c.* *A.* entered after the death of his brother, with the aſſent of the truſtees, and received the profits, and paid all the legacies, and alſo all the debts but 18 *l.* and afterwards *A.* levies a fine to the uſe of himſelf for life, remainder to his wife for life, with divers remainders over, and dies, leaving his wife, and one only daughter, his heir at law; the wife entered, and five years were paſt without any claim; and now the daughter, in the name of the truſtees brought an ejectment; and the queſtions were, 1. Whether this term for ninety-nine years was bound by the fine and non-claim? 2. Whether it was diveſted and turned to a right at the time of the fine levied? for if it were not, then the fine would not operate upon it. No judgment appears to have been given in it; but upon the difference taken in *Freeman* and *Barnes*'s caſe, it ſhould ſeem not

not to be barred; for then it muſt turn to the prejudice of honeſt creditors, who were ſtrangers and third perſons; and *A.* by his entry on the truſtees could be only tenant at will, becauſe his entry was with their conſent, and no manner of intent appears in him to diveſt their eſtate or intereſt, and then his fine ſhall operate only on his own eſtate-tail, like a fine levied by a mortgagor, who is but tenant at will to the mortgagee, and whoſe acts being by permiſſion of the mortgagee, ſhall not turn to his prejudice; though ſome ſaid, the five years and non-claim paſſing in the life-time of the wife, who was the ſurvivor, made a great difference in the caſe; *ideo quære.*

If one takes an aſſignment of an eſtate extended upon a ſtatute in the name of *J. S.* in truſt to attend the inheritance which he hath in himſelf, and after he by leaſe and releaſe, and fine levied in purſuance thereof, conveys that reverſion and inheritance to another, and five years paſs without any claim made by *J. S.* the truſtee; yet this will not bar the eſtate or intereſt upon the extent, if it appears that the conuſee of the fine was a purchaſer of the whole eſtate, and ſo after his purchaſe *J. S.* to be truſtee for him of the ſtatute intereſt; for in ſuch caſe the fine ſhall operate only upon the inheritance, and not to the barring of the ſtatute intereſt, which is to attend and go along with the inheritance by way of truſt for the purchaſer. But if the purchaſer had no notice of ſuch ſtatute intereſt ſtanding out, nor was by agreement to have the truſt thereof upon his purchaſe, then, rather than he ſhould be cheated thereby, the fine of *ceſtui que truſt* ſhould operate to the barring of his own truſtee. 2 Vent. 329, 330. Dighton v. Greenvil.

Upon evidence to a jury at the bar, on trial of an iſſue out of Chancery, it was agreed, that if one makes a leaſe for an hundred years in truſt for himſelf and his wife, and afterwards they both join in levying a fine to a purchaſer, for a valuable conſideration, who had no notice of this leaſe in truſt, though the fine does not convey the term itſelf to the conuſee, the eſtate in law being in the truſtee, yet this deſtroys the truſt, ſo that the leaſe ſhall not hurt the purchaſer. 3 Keb. 564.

Theſe reaſons and reſolutions ſeem to make it manifeſt, that in the caſe of *Focus* and *Saliſbury*, if the conuſee of the fine were a purchaſer for a valuable conſideration without notice of the term, then the fine would ſo deſtroy the truſt of that term, that it ſhould not hurt him: but if the fine were only in purſuance and corroboration of the former eſtates, then there would be no reaſon in the world that it ſhould operate ſo as to deſtroy the term. Hard. 400.

(R) Leaſes for Years, when merged by Union with the Freehold or Fee.

ANOTHER way, whereby a term for years may be defeated, is by way of merger, where there is an union of the freehold or fee and term for years in one perſon at the ſame time: in this caſe

caſe the greater eſtate merges and drowns the leſs; becauſe they are inconſiſtent and incompatible. And yet there are ſeveral exceptions out of this rule, not only where ſuch union is tranſitory, but even where it is permanent and continuing.

Co. Lit. 52. a. Moor, 11. 280. 605. Cro. Jac. 177. 2 Roll. Abr. 495.

Firſt then, if a man makes a leaſe for years to *A.* and afterwards makes a feoffment in fee to *B.* with a letter of attorney to *A.* to make livery, and he makes livery accordingly, yet this ſhall not drown or extinguiſh his term, becauſe he did it only as ſervant to the leſſor, and in his ſtead and right, and the feoffee after livery made is in by the leſſor, and claims nothing from the leſſee: neither ſhall his term paſs, merged, or be confounded in the fee, which by the livery he gave to the feoffee, becauſe he gave it only in right of the leſſor, and not in his own right; though perhaps, to ſecure his term, and ſettle the reverſion (which was all that was intended to paſs) in the feoffee, it may be proper for him after ſuch livery to make an entry for his term, becauſe the livery gave the actual poſſeſſion, though the agreement and intent of the parties will direct it ſo as to transfer only the reverſion expectant upon that term after the leſſee hath re-entered.

7 Co. 48. a. 66. a. Moor, pl. 345. Cheney's caſe.

If the leſſor enfeoffs his leſſee for years to ſeveral uſes, the intereſt of the leſſee is ſaved by 27 *H.* 8. *c.* 10. of uſes which ſaves to all perſons, and their heirs, which be or ſhall be ſeiſed to any uſe, all ſuch former right, title, entry, intereſt, *&c.* as they might have had to their own proper uſe, in or to any manors, lands, *&c.* whereof they be or ſhall be ſeiſed to any uſe, as if that act had not been made; and therefore in ſuch caſe his term being ſaved expreſsly by this act, he may enter and enjoy it, as if the feoffment to uſes had been to any ſtranger.

Cro. Jac. 643. 2 Roll. Rep. 245. Ferrers and Curſon. 2 Mod. 234. decreed.

A. leaſes to *B.* for years, and after the leſſor by indenture enrolled and fine conveys thoſe very lands to the leſſee, and others and their heirs, to the uſe of them and their heirs, to the intent that a common recovery ſhould be had and ſuffered againſt them with voucher of the leſſor, and that he ſhould vouch over the common vouchee, to the uſe of *D.* and *E.* and their heirs; all which was done accordingly; and the queſtion was, if by all or any of theſe acts the term were extinct and gone? for the reverſioners, who were in under the recovery, brought debt againſt *B.* the leſſee for rent. And on *nihil debet* pleaded, and all the ſpecial matter found, it was adjudged, that the term ſtill had continuance, and was not merged; for although it was merged and extinct by the union of eſtates till the recovery came, yet when that was ſuffered, the uſes thereof were guided by the bargain and ſale enrolled, and then it is all one as if it had been no conveyance or aſſurance to ſuch uſes *ab initio*, and is within the equity and intent of the ſaving of the 27 *H.* 8. *c.* 10. and is like a feoffment to uſes, and the term and rent are revived; for the intent of the ſtatute was not to hurt thoſe who had eſtates, but to preſerve them. And it was agreed *per totam cur.* that if a fine or feoffment had been made or levied to the leſſee for years, that the term would not have been extinguiſhed, but ſhould be preſerved by 27 *H.* 8. *c.* 10. The objection againſt all this was, that the bargain and ſale

ſale and fine were to his own uſe, otherwiſe he could not have been tenant to the *præcipe* for ſuffering the common recovery, and therefore, being to his own uſe, there was nothing to be ſaved within that ſtatute. But it was anſwered and reſolved, for the former reaſons, that his own term was ſaved within the equity and intent of the ſtatute.

One ſeiſed of lands in fee makes a leaſe to *B.* of ninety-nine years, to ſuch uſes as he ſhould by his laſt will direct: afterwards he makes his will in writing, (having then no iſſue by his wife, but who however was *privement enſeint*,) and thereby deviſes theſe lands to the heirs of his body on the body of his wife begotten, and for want of ſuch iſſue, to *B.* and his heirs, and dies; and about a month after a ſon was born, who by virtue of this deviſe enjoys the land, and after his full age ſuffers a common recovery, and then deviſes the lands to the plaintiff, and dies: the plaintiff brought this bill againſt *B.* to have this leaſe of ninety-nine years aſſigned to him. For the defendant it was objected, 1. That an eſtate in fee being by the will limited to *B.*, who was alſo leſſee for ninety-nine years, the term was thereby drowned. 2. That this was in nature of a deviſe to an infant *in ventre ſa mere*, which, as was objected, is not good, if there be none born at the time when the deviſe ſhould take place. Notwithſtanding theſe objections, it was decreed, that the defendant ſhould aſſign the term to the plaintiff; for that ſuch deviſe to an infant *in ventre ſa mere* is good as an executory deviſe, and though the lands deſcend to the heir at law in the mean time, or go to the deviſee in this caſe, yet it is ſubject to be defeated by the coming *in eſſe* of the infant, and the term for years in the mean time was only ſuſpended, and, by conſequence, muſt revive in the leſſee when the acceſſion of the inheritance, which occaſioned that ſuſpenſion, is defeated: and the term being created ſubject to the uſes of the will, muſt follow the deviſe of the inheritance, as a truſt to be diſpoſed of as the *ceſtui que truſt* ſhall direct. 2 Mod. 8, 9. Nurſe and Yearworth.

If one make a feoffment in fee to the uſe of himſelf for years, without limiting any other eſtate, the uſe ſhall not reſult to him in fee, becauſe that would merge the term, againſt the expreſs declaration and manifeſt intent of the parties; and therefore, in ſuch caſe, the reverſion in fee muſt continue and ſettle in the feoffee. Dy. 111. b. in margin. *per* Popham and Aderſon.

In ejectment the caſe was thus: *Cook* let to *Fountain* for ninety-nine years, and two years after by leaſe and releaſe *Cook* conveyed the inheritance to *Fountain* and another, to the uſe of *Cook* and the heirs of his body, with divers remainders over; and if by this conveyance the leaſe for ninety-nine years was merged and deſtroyed in all, or in part, was the queſtion? Firſt, it was agreed, that if ſuch conveyance to uſes had been by fine or feoffment, it would not have been deſtroyed, but would have been preſerved by the ſaving in 27 *H.* 8. *c.* 10. So likewiſe they agreed, that if there had been no leaſe for a year, but the releaſe had been immediate to the leaſe for ninety-nine years to ſuch uſes, in this caſe alſo the leaſe for ninety-nine years had been preſerved by force of that ſtatute; 2 Lev. 126. Mod. 107. 3 Keb. 283. 309. Cook v. Fountain. Freem. 384. 392. S. C. Wigſton v. Garrett, Freem. 411.

ſtatute: but here being a leaſe for a year precedent, it was argued, that this was to the uſe of the leſſee, and then, by acceptance thereof, he admitted the leſſor's power to make ſuch leaſe, and by conſequence, this was a ſurrender of the leaſe for ninety-nine years, before the releaſe to the other uſes came to take place, and then the releaſe after cannot revive it. And it was ſaid, though this be all one conveyance, yet it differs from a feoffment; for it will not purge a diſſeiſin, nor make a diſcontinuance; and if before the releaſe the leſſee grants a rent-charge, acknowledges a ſtatute, confeſſes a judgment, or makes a leaſe for half a year, and then a releaſe is made to him and his heirs to ſuch uſes; yet it was ſaid, that he who hath the inheritance would have no remedy to avoid theſe charges, but in Chancery. On the other ſide it was argued, that this was no merger of the ninety-nine years leaſe; or if it were, yet for no more than a moiety; for the reaſon of merger and extinguiſhment is not, as hath been argued, the party's admittance of the leſſor's power to make a leaſe, but the merger is effected by the acceſſion of the immediate reverſion to the particular eſtate; and therefore a new leaſe by the leſſor to his leſſee is not a merger or ſurrender of the firſt term, if there be any interpoſing or intermediate term; and yet, in that caſe, the leſſee admits the leſſor's power to make the leaſe preſently, as much as in the other: then, if the union and acceſſion of the two eſtates be the cauſe of the merger, the *quantum* of the thing granted will be the meaſure of that merger, and by conſequence, the firſt leaſe here ſhall be extinguiſhed but for a moiety of the lands. But 2*dly*, it was argued, That it was not extinguiſhed for any part; for the term is ſaved within the letter, or at leaſt within the equity of 27 *H.* 8. *c.* 10. for the intent of the ſaving therein was to preſerve the balance between the *ceſtui que uſe* and his feoffees, according to the rule of equity by which they were governed before. Now ſuppoſe that *Fountain* had a leaſe for ninety-nine years before this ſtatute, and that *Cock* had deſired him to accept a feoffment to his uſe, without doubt, the Chancery would not have compelled him to aſſign till the ninety-nine years expired; and the ſame right ſeems now to be preſerved by the ſaving, and the words are general, *all that ſhall be ſeiſed to any uſe*, not all that ſhall be ſeiſed by feoffment or fine; ſo that *the ſeiſin to uſe* is the only thing the ſtatute regarded, and *not by what ſort of conveyance*; and leaſe and releaſe are now a common conveyance; and the leaſe being expreſsly ſaid to be to enable him to accept a releaſe to other uſes, ſhall not be conſtrued to any other intent, or to be to his own uſe, otherwiſe than to enable him to accept ſuch releaſe; and then if it ſhould be admitted that the leaſe for ninety-nine years were extinguiſhed by the leaſe for a year, yet by the releaſe it is revived; for being but one conveyance, it is within the equity of the ſtatute: and *Cro. Jac.* 643. is a ſtronger caſe and yet reſolved there, that though the bargain and ſale had deſtroyed the term for a time, yet by the recovery it was revived, becauſe then but one conveyance *ab initio*; ſo here. To all this it was replied, That the very reaſon of merger was the admittance

of

of the leſſor's power to demiſe, and then the whole is ſurrendered, becauſe he admits the leſſor to have power to demiſe the whole, though he had but a moiety, to himſelf; and that where there is an intermediate eſtate, no merger ſhall be, does not make againſt it, for the intermediate eſtate diſproves his admittance, that the leſſor hath ſuch power; but here is no ſuch intermediate eſtate or impediment, and being joint-tenants *per my & per tout*, by the leaſe, the whole is merged by admittance of the leſſor's power to demiſe the whole, though they agreed that a merger may be of one's part of an eſtate or term, and not for another's part. *Hale* cited a caſe, 6 *Car.* 1. *Hele Sevam*, where *A.* mortgaged lands to *B.* for years, *B.* re-demiſes to *A.* upon condition, if he does not pay ſuch a ſum, that he ſhall re-enter; and in the firſt conveyance were covenants for farther aſſurance by *A.* Then *B.* deſires him to levy a fine, which *A.* does accordingly; and there it was agreed, that the term re-demiſed was extinguiſhed: but if it had been expreſſed to what intent the fine was, it was agreed, there would have been no extinguiſhment of the term: and in this caſe, the leaſe is found to be *eâ intentione* to enable him to take a releaſe. However, no judgment appears to be given; but it ſeems reaſonable that the leaſe for ninety-nine years, in this caſe, ſhould not be merged; or at leaſt but for a moiety; and even in that caſe, equity would ſet up the moiety or the whole term again.

If tenant *pur auter vie* makes a leaſe for years, and dies, living *ceſtui que vie*, by this the leſſee for years is become occupant, and then this acceſſion of the freehold merges his eſtate for years, becauſe they cannot conſiſt together in one perſon: but if, in that caſe, the leſſee for years had made a leaſe at will, and then the tenant *pur auter vie* had died, (which was the principal caſe) it was adjudged that the tenant at will was the occupant, and by conſequence, the leaſe for years, which was in another perſon, not drowned or merged, there being no union of the term for years, and the freehold in one perſon; and then the leſſee for years may, by determination of his will, enter and enjoy his term, and the occupant cannot prevent or hinder him, becauſe he claims in *quaſi* by the firſt leſſor, who had made ſuch leaſe for years, to which the eſtate for life, during the life of the *ceſtui que vie*, was ſubject and liable. 2 Bulſ. 12. Chamberlain v. Ewer.

If tenant *pur auter vie* make a leaſe for years, to *A.*, remainder to *B.* for years, and *A.* enter, and then the tenant *pur auter vie* die, here *A.* the tenant for years, ſhall be occupant, by reaſon of the poſſeſſion he had in him when the life fell; and yet his term for years is not drowned, by reaſon of the intermediate remainder to *B.* for years; for this eſtate by occupancy is in the nature of a reverſion expectant upon both the terms for years, as it was in the tenant *pur auter vie* himſelf after theſe leaſes made. And, in ſome caſes, a term for years and a freehold may conſiſt together in one perſon; as if leſſee for twenty years makes a leaſe to his leſſor for five years, this term for five years is not drowned in the freehold or fee of the leſſor, by reaſon of the intermediate reverſion for fifteen years in the firſt leſſee. Bro. tit. Surrender, 52. 2 Bulſ. 12. Bro. tit. Leaſes, 63.

The

Cro. Jac. 619. Salmon v. Swann.

The caſe, in effect, was this; *A.* ſeiſed in fee, grants an *intereſſe termini* to *B.* for one hundred years, to begin at ſuch a time, and before that time makes a leaſe for twenty-one years to *C.* to begin in poſſeſſion preſently; then *B.* before the commencement of his term, grants it to *A.*, who after grants a rent-charge, and the grantee of the rent-charge diſtrains *C.* for it; and the only queſtion was, whether the *intereſſe termini* were drowned in the inheritance, or if it had any exiſtence in *A.* ſo that he might thereout grant the rent? for then it would avoid the ſecond leaſe for years, being before it, and, by conſequence, be liable to the payment of the rent. It was reſolved, that it was drowned in the inheritance; for, notwithſtanding the ſecond leaſe for years, the *intereſſe termini* is not ſo ſevered from the reverſion, but that by grant thereof to him who hath the inheritance, ſuch future term or intereſt is drowned, and ſhall never riſe again; and, by conſequence, this rent ſhall not charge the poſſeſſion of the termor, who had the eſtate before the rent granted, and comes paramount it; for though there was a ſeverance of poſſeſſion by the ſecond leaſe, yet the *intereſſe termini* being granted before that leaſe, and to continue for a longer time, that ſecond leaſe was ſubject to be defeated by the *intereſſe termini* when it took effect; and therefore the *intereſſe termini* was *quaſi* immediate to the freehold and inheritance, and therefore might drown in it.

Co. Lit. 339. Plowd. 418. Bracebridge v. Cook.

My Lord *Coke* lays it down for a general rule, that one cannot have a term for years in his own right, and a freehold *in auter droit*, but that his own term ſhall drown in the freehold; and puts theſe caſes: if a man, leſſee for years, intermarries with the feme leſſor, this ſhall merge and drown his own term for years; but if a feme leſſee for years intermarries with the leſſor, her term is not thereby drowned, becauſe, ſays he, one may have a term for years *in auter droit*, and a freehold in his own right, as the husband in this caſe ſhall have: ſo, if leſſee for years make the leſſor his executor, the term is not thereby drowned, becauſe the leſſor hath a term *in auter droit*. So alſo, if a maſter of an hoſpital, being a ſole corporation, by the conſent of his brethren, makes a leaſe for years of the poſſeſſion of the hoſpital, and afterwards the leſſee for years is made maſter, the term is drowned *cauſa qua ſupra*; but if it had been a corporation aggregate, the making of the leſſee maſter had not extinguiſhed the term, no more than if the leſſee had been made one of the brethren: but if a leſſee for years of the glebe be made parſon, the term is merged, by reaſon of the union of the term and freehold in him to his own right and uſe, though he has them in ſeveral capacities.

[3 Term Rep. 401.]

Plow. 419, 420. 3 Leon. 111.

Cro. Jac. 275. Bulſ. 118. Plott v. Sleep.

But this rule ſeems to admit of divers exceptions; for where the huſband, poſſeſſed of a term for years, took wife, and after the inheritance deſcends or comes to the wife, the term for years or the huſband is not thereby drowned or merged, becauſe the deſcent was an act of law, which the huſband could not prevent, and therefore ſhall not turn to his prejudice; but he ſhall have the inheritance in right of his wife, and the term for years in his own right, as he had before, and therefore may give away or diſpoſe of the

the term as he thinks fit, notwithſtanding ſuch deſcent of the inheritance to his wife; and this was the opinion of *Fenner*, *Croke*, and *Fleming*, Chief Juſtice, and ſo given in direction to a jury in a trial at bar; and upon a general verdict to that purpoſe, they gave judgment accordingly. And *Croke* ſeemed to make a queſtion, if the huſband, in this caſe, had iſſue by his wife after the inheritance deſcended to her, ſo as thereby he was entitled to be tenant by the curteſy, and to have a freehold in his own right, if this ſhould merge the term till the wife's death; and yet he ſaid this was a much ſtronger caſe. But *Williams totis viribus* againſt the judgment, and held the term clearly extinct: but, notwithſtanding judgment was given *ut ſupra*; and in this caſe all the court agreed, that if the leaſe had been made upon truſt, for the advancement of ſuch a woman, and the leſſee had after intermarried with that woman, and then the inheritance had deſcended to her, that this would not merge the term, but that he might clearly diſpoſe thereof to the purpoſe intended; becauſe he had it *in auter droit*, and to another uſe. So, in another book it ſeems to be agreed, that if a man, being poſſeſſed of a term for years in right of his wife, purchaſes the inheritance, that by this the term for years, though in right of his wife, is merged and extinct, becauſe the purchaſe was the expreſs act of the huſband, and therefore amounts in law to a diſpoſition of the term, by reaſon of the merger conſequent thereupon; but a bare intermarriage of the feme termor with the reverſioner will not work a merger of the term, becauſe by the intermarriage the term is caſt upon the huſband by act of law, without any concurrence or immediate act done by him to obtain the ſame; and therefore, in ſuch caſe, the law will preſerve the term in the ſame plight as it gave it to the huſband, till he by ſome expreſs act deſtroys or gives it away. Godb. 2.

But where the huſband himſelf is leſſee for life, and intermarries with the leſſor, this merges his own term, becauſe he thereby draws to himſelf the immediate reverſion, in nature of a purchaſe by his own voluntary act, and ſo undermines his own term; whereas in the other caſe, the term being exiſting in the feme till the intermarriage, is not thereby ſo drawn out of her, or annexed to the freehold, as to merge therein; becauſe that attraction, which is only by act of law conſequent upon the marriage, would, by merging the term, do wrong to a feme covert, and ſo take the term out of her, though the huſband did no expreſs act to that purpoſe, which the law will not allow. But in ſuch caſe, if the feme ſhould ſurvive, and have dower of thoſe lands, this ſeems a merger of her term for a third part at leaſt, becauſe now ſhe hath the term and freehold both in her own right, and then the acceſſion of the freehold muſt *pro tanto* merge and drown the term. Co. Lit. 338. b. Plow. 418. b.

So alſo, in caſe where the leſſee for years makes the leſſor executor, the term is not merged, becauſe caſt upon him without any act or concurrence of his, as a conſequence of his being made executor; and therefore the act of law, which caſt it upon him, ſhall preſerve it in the ſame manner as if he had been a ſtranger, without any Co. Lit. 338. Plow. 418. b. 420. a. Freem. 289. S. P.

any regard to the immediate freehold he had in his own right, which was only accidental.

Moor, pl. 157. But if a feme executrix takes huſband, and the huſband after purchaſes the reverſion, and dies, yet the feme ſurviving ſhall not have the term to any other purpoſe but as aſſets to pay debts; for as to any right of her own therein, the term is extinct by ſuch purchaſe of the huſband, becauſe that was his own expreſs voluntary act, and therefore amounts to a diſpoſition of the term by the merger wrought thereupon; and ſo it was held by all the juſtices.

Bro. tit. Leaſes, 63. tit. Surrender, 52. 3 Leon. 111, 112. Plow. 419. b. 420. a. Freem. 289. S. P. So, if one who hath a leaſe for years as executor purchaſe the inheritance, this merges the term, becauſe the purchaſe was his own expreſs act; nay, Baron *Clerk* held, that though the inheritance in ſuch caſe had deſcended on the executor, that this likewiſe would merge the term, which how far it is law, may be a queſtion; but as well in the caſe of the purchaſe, as of the deſcent, all agree that the term would not be extinct as to creditors, much leſs in caſe where the leſſor is only made executor of the leſſee for years; though *Plowden* ſeems to inſinuate, that even in that caſe, the term is ſuſpended during the life of the leſſor; for he ſays, that after his death the term ſhall be revived.

3 Leon. 157, 158. Bro. tit. Leaſes, 58. Land was given to the huſband and wife, and to the heirs of the huſband; the huſband makes a leaſe for years, and dies, the wife enters and intermarries with the leſſee; and it was holden that his term was not extinct, becauſe the entry of the wife put a total interruption to the intereſt of the leſſee, and avoided the term entirely as to herſelf, becauſe ſhe was in of the freehold by ſurvivorſhip paramount the leaſe; and then the leaſe cannot take place again, till after her death, againſt the heirs of the huſband and whether ſhe will outlive the term or not is uncertain; ſo that during her life, the leſſee had no intereſt, but only a bare poſſibility, which cannot be touched or hurt by the intermarriage, but continues juſt as it was before.

Sanders v. Bournford, Fin. Rep. 424. [A leſſee for 1000 years aſſigned the term to the leſſor in truſt for his wife and children, and the leſſor accepted the truſt, and declared the purpoſes of it. The Court of Chancery ſupported the truſt, notwithſtanding the merger of the term in the inheritance, and decreed the heir of the leſſor to make a further aſſurance of the remainder of the term to a purchaſer from the ſon of the leſſee.

Doniſthrope v. Porter, Ambl. 600. (*a*) *Ibid.* Cheſter v. Willes, *id.* 246. (*b*) Though the owner were a lunatick, yet as between his mere, abſolute real and perſonal repreſenta- A court of law cannot merge eſtates unleſs it finds them in the ſame perſon, and acquired, ſubject to ſome exceptions, in the ſame right. But courts of equity look into the beneficial intereſts and views of parties, and do not regard whether the eſtates are ſtrictly in the ſame perſon, or in different perſons. Hence it is a general rule (*a*) with theſe courts, that where the owner of an eſtate becomes entitled to a charge upon it (*b*) ſecured by a term of years, ſuch term ſhall ſink for the benefit of the heir. But exceptions to this rule are admitted in ſeveral inſtances; as, where the perſon entitled to the charge takes only an eſtate tail (*c*) in the eſtate, and not the fee ſimple. So, where by reaſon of a limitation (*d*) to truſtees to preſerve contingent remainders, the owner does not take

the fee. So, where the owner of the fee (*e*) has manifeſted his intention, that the charge ſhould ſtill ſubſiſt. So, in favour of creditors, (*f*) and of infants. The caſes of infants turn upon a ſuppoſed intent; and the courts ſink or preſerve the term, as they find to be moſt beneficial for the intereſts of the infant.

tives, the term ſhall merge, for as between theſe no equity can exiſt. Lord

Compton v. Oxenden, 2 Vez. jun. 261. (*e*) Duke of Chandois v. Talbot, 2 P. Wms. 601. (*d*) Wyndham v. Earl of Egremont, Ambl. 753. (*e*) Powell v. Morgan, 2 Vern. 90. Thomas v. Kemiſh, 2 Vern. 354. 2 Freem. 207. (*f*) Ambl. 602. 2 Vez. jun. 264.

Analogous to the caſe of merger at law, where the term and the fee come into the ſame hands, is the doctrine of courts of equity, that, whenever a man is owner of the inheritance, and entitled to a truſt term of the ſame eſtate, the term ſhall be attendant upon the inheritance.]

Beſt v. Stamford, Pr. Ch. 252. 1 Salk. 154. 2 Freem. 288.

(S) Of Surrenders of Leaſes for Years: And herein,

1. Of Surrenders in Fact or Expreſs: And herein again,

1. By what Words ſuch Surrender may be made.

IT will not be here neceſſary to enter into a particular inquiry concerning the nature of a ſurrender, or of the ſeveral words whereby a ſurrender may be made, it being ſufficient to ſay in general, that a ſurrender is a yielding up of an eſtate for life, or years, to him who hath the immediate eſtate in reverſion or remainder, wherein the eſtate for life, or years, may drown by mutual agreement.

Co. Lit. 337. b. 2 Vent. 206. 3 Mod. 298. Perk. §584.

So that any form of words, whereby ſuch an intent and agreement of the parties may appear, will be ſufficient to work a ſurrender; and the law will direct the operation and conſtruction of the words accordingly, without the preciſe or formal mention of the word *ſurrender* in the conveyance. But then the party, who would have the benefit of ſuch conveyance to work as a ſurrender, muſt plead it by the very words *ſurſum reddidit*, becauſe theſe only can properly deſcribe the operation of the conveyance as a ſurrender; and whoever would take advantage of a thing in pleading, muſt determine it to that particular ſpecies of operation whereof he would ſo have the advantage: therefore, if leſſee for life or years, ſay to the leſſor that his will is, that the leſſor ſhall enter into his lands, and ſhall have the ſame, or is content that the leſſor ſhall have again the land, and by virtue thereof the leſſor enters into the land, this is a ſufficient ſurrender: ſo, if the leſſee ſay to him in the reverſion or remainder, that he will occupy the lands no longer, or that I ſurrender to you ſuch lands, *&c.* and he in the reverſion or remainder thereupon enter into the land, theſe were ſufficient and effectual ſurrenders at the common law: but if ſuch words had been ſpoken privately by the leſſee, or by a ſtranger, and not by way of addreſs to him in reverſion or remainder, this

Perk. §607, 608. Cro. Eliz. 156. 488. Leon. 179. 280. 2 Leon. 50. Roll. Abr. 497. 2 Vent. 206. 3 Mod. 301.

could not amount to a ſurrender, becauſe there could appear no mutual agreement of the parties for that purpoſe.

Dyer, 251. pl. 91. 93. Cro. Eliz. 2. Cro. Jac. 169. Lev. 144. Keb. 807. [But a releaſe of the leſſee for life or years to the leſſor does not amount to a ſurrender, for the words are repugnant; for the leſſee is in poſſeſſion, and the releaſe ſuppoſes the leſſor in poſſeſſion. Jenk. 195. Ca. 2.] 3 Mod. 301. 2 Vent. 206. Show. Par. Ca. 150. 3 Lev. 284. Thompſon v. Leach.

So, if leſſee for years remiſe, releaſe, diſcharge, and for ever quit-claim to his leſſor all his right, title and eſtate in or to ſuch lands; this has been held to amount to a ſurrender, becauſe a leaſe for years conſiſting only in contract, theſe words are ſufficient to diſſolve that contract, and let in the reverſioner. But ſuch words, in caſe of a leaſe for life, would not amount to a ſurrender, becauſe that being an eſtate created by livery, muſt be defeated by act of equal notoriety, or expreſs words of conveyance of the freehold, which the before-mentioned words are not, but rather applicable to a thing which lies only in grant. But of that *quære*; for it hath been adjudged, that if tenant for life grant, ſurrender and releaſe to him in the reverſion, that this was ſufficient, and ſo would have been, though there had not been the word *ſurrender*, becauſe the word *grant* would operate as a ſurrender after the conveyance executed; and that ſuch ſurrender, though without notice or expreſs agreement of the ſurrenderee, would be good till actual diſagreement thereto.

Smith v. Mapleback, 1 Term Rep. 441.

[So, where a leaſe came into the hands of the original leſſor, by an agreement entered into between him and the aſſignee of the leſſee, "that the leſſor ſhould have the premiſes as mentioned in "the leaſe, and ſhould pay a particular ſum over and above the "rent annually towards the good-will already paid by ſuch aſ "ſignee," it was adjudged, that this agreement operated as a ſurrender of the whole term.]

[(*a*) This note in writing, it hath been adjudged, need not be ſtamped: Farmer v. Rogers, 2 Wilſ. 26. Beck v. Phillips, 5 Burr. 2827. However, a ſtamp ſeems now to be rendered neceſſary by ſtat. 23 Geo. 3. c. 58.]

But now by the ſtatute of frauds and perjuries it is provided that no leaſes, eſtates or intereſts, either of freehold or terms of years, ſhall be ſurrendered, unleſs it be by deed, or note in writing (*a*), ſigned by the party who makes ſuch ſurrender, or ſome other lawfully authoriſed thereunto, or by an act and operation of law: ſo that ſurrenders in law, or implied ſurrenders, remain as they did at common law, if the leaſe, which is to draw on ſuch ſurrender, be in writing purſuant to that ſtatute.

Magennis v. Mac-Cullogh, Gilb. Eq. Rep. 236.

[Since this ſtatute, ſaith our author in another place, a leaſe for years cannot be ſurrendered by cancelling the indenture, without writing, becauſe the intent of the ſtatute was, to take away the manner they formerly had of transferring intereſts in lands by ſign ſymbols, and words only; and therefore, as a livery and ſeiſin a parol feoffment was a ſign of paſſing the freehold before the ſtatute, but is now taken away by the ſtatute, ſo, he takes it, the cancelling of a leaſe was the ſign of a ſurrender before the ſtatute but is now taken away, unleſs there be a writing under the hand of the party; and the words, viz. *by act and operation of law*, to be conſtrued a ſurrender in law, by the taking of a new lea

which, being in writing, is of equal notoriety with a ſurrender in writing.

Although the ſtatute directs that the deed or note in writing ſhall be ſigned by the ſurrenderor, yet where an agreement was entered into between the leſſor and leſſee, at the inſtance of the former, for the ſurrender of a leaſe, an aſſignment actually prepared, the key delivered up and accepted, and a long acquieſcence on the part of the leſſor, without any claim or demand upon the leſſee, it was decreed in equity that the leſſee ſhould be diſcharged of the rent from the time he had delivered up the key.] Natchbolt v. Porter, 2 Vern. 112.

2. Upon what Eſtate ſuch Surrender may operate.

It appears by the definition before given of a ſurrender, that the ſame is a yielding up of an eſtate for life, or years, to him in the immediate reverſion or remainder: but here a queſtion may ariſe, what eſtate in the reverſion or remainder will be ſuſceptible of ſuch ſurrender; for if the eſtate in reverſion or remainder be but for years, it ſeems a great doubt in the books, whether a leaſe for years in poſſeſſion may be ſurrendered, ſo as to merge and drown therein; and it is commonly ſaid, that years cannot drown in years; therefore, where leſſee for twenty years made a leaſe for ten years, and the leſſee for ten years ſurrendered to his leſſor, this has been held to be no ſurrender, ſo as to merge the ten years in poſſeſſion, but only to tranſfer them by way of aſſignment or acceſſion to the number of years then left in the leſſor; for that years could not drown in years. But the contrary to this has been held with ſome clearneſs, and it ſeems to be now ſettled, that ſuch ſurrender is good, and ſhall merge the firſt term; wherein it was agreed, 1. That if the term in reverſion were greater than the term in poſſeſſion, that the greater would merge the leſs, as ten years may be ſurrendered and merge in twelve or fourteen years. 2. It was held by *Gawdy*, *Fenner*, and *Popham*, that though the reverſion were for a leſs number of years, yet the ſurrender would be good, and the firſt term drowned; as if one were leſſee for twenty years, and the reverſion expectant thereupon were granted to one for a year, who granted it over to the leſſee for twenty years, that this would work a ſurrender of the twenty years term, as if he had taken a new leaſe for a year of his leſſor; for the reverſionary intereſt, coming to the poſſeſſion drowns it, and the number of years is not material; for as he may ſurrender to him who hath the reverſion in fee, ſo he may to him who hath the reverſion for any leſs term: and therefore *Popham* held, that where leſſee for twenty years takes a leaſe for ten years, and the leſſee for ten years ſurrenders to his leſſor, *viz.* the leſſee for twenty years, that this is good, and the leſſor ſhall have ſo many of the years as were then to come of the former term of twenty years, that is, as it ſeems, ſo many years as were to come of his reverſion ſhall now be changed into poſſeſſion: and he held further, that if ſuch leſſee for twenty years had made ſuch leaſe for ten years, and then granted over the reverſion

Cro. Eliz. 173. Leon. 303. Owen, 97. Perry v. Allen, Leon, 323.

Poph. 30. Co. Lit. 218. b. Cro. Eliz. 302. 2 Vent. 326.

for ten years only, *viz.* no longer than the leaſe for ten years was to continue, and ſuch leſſee for ten years had attorned, then the grantee of the reverſion ſhould have the rent and ſervices, and the grantor the reſidue of the twenty years; and that the leſſee for ten years might ſurrender to the grantee of the reverſion for ten years, and he thereby would have in poſſeſſion ſo many years, as were then to come of his reverſion; and if he had a leſs term in the reverſion than the leſſee himſelf had in the poſſeſſion, it ſhould go to the benefit of the firſt termor for twenty years, who was his grantor; for the term in poſſeſſion is quite gone and drowned in the reverſion, to the benefit of thoſe who have the reverſion thereupon, having regard to their eſtate in the reverſion, and not otherwiſe: to all which *Fenner* agreed; and it appears by the caſe of *Cook* and *Fountain ſupra*, to be taken for clear law, that a leaſe for ninety-nine years might be drowned by his acceptance of a leaſe from the reverſioner even for one year.

Co. Lit. 273. b. But now, whether a leaſe for years in poſſeſſion may be ſurrendered, ſo as to be merged in a leaſe in remainder, be the term in remainder greater or leſs than the term in poſſeſſion, ſeems to be no where ſettled: indeed my Lord *Coke* ſays, that if there be a leaſe to *A.* for twenty years, remainder to *B.* for ten years, and *B.* releaſe all his right to *A.*, that here *A.* hath an eſtate for thirty years, for one chattel cannot drown in another, and years cannot be conſumed in years; but whether if *A.* had granted and ſurrendered his eſtate and term to *B.*, it would have been merged does not appear; and *Perkins* holds, that if a leaſe for life be of lands, the remainder to a ſtranger for years, and the leſſee for life ſurrender his eſtate to him in the remainder for years, it cannot take effect as a ſurrender, becauſe an eſtate for life cannot drown in an eſtate for years; which reaſon ſeems to prove, that an eſtate for life cannot be ſurrendered to or merge in a reverſion, if it be only for years: *ideo quære.*

Perk. § 589.

3. Of Surrenders in Law, or implied Surrenders: And herein

1. *With regard to Leaſes in Poſſeſſion.*

Bro. tit. Leaſes, 14. Dyer, 93. pl. 28. Perk. § 617 3 Leon. 244. 5 Co. 11. Cro. Eliz. 521. 605. 2 Roll. Abr. 495. As to the ſurrender in law of leaſes in poſſeſſion, this is wrought by acceptance of a new leaſe from the reverſioner, either to begin preſently, or at any diſtance of time, during the continuance of the firſt leaſe; and the reaſon ſuch acceptance of a new leaſe amounts to a determination and ſurrender of the firſt is, becauſe otherwiſe the leſſee would not have the full advantage he had contracted for by acceptance of the ſecond leaſe, if the firſt ſhould ſtand in the way, and conſume any of thoſe years compriſed in the ſecond leaſe; for which reaſon, and to enable the leſſor to perform and make good his ſecond contract, the leſſee muſt be ſuppoſed to waive and relinquiſh all benefit of the firſt: therefore, if leſſee for thirty years takes a new leaſe, though but for three years, and to begin ten years hence, yet this is preſently a ſurrender and a termina-

termination of the whole firſt term of thirty years, becauſe thereby he admits the leſſor's power to make ſuch leaſe, which, if the firſt ſhould ſtand in the way, would be void, becauſe the leſſee had the lands already for a term of a much larger duration; and though ſuch ſecond leaſe be made to him *in futuro*, and at common law, though it were even by parol, yet it would be a preſent ſurrender of the firſt leaſe, becauſe the admittance of the leſſor's power to make ſuch a leaſe, which is the cauſe of the ſurrender, is then at the time of the contract made for ſuch ſecond leaſe, and therefore the operation of it, to cauſe a ſurrender of the firſt, muſt be then preſently too, or not at all; and it cannot be a ſurrender of the laſt twenty years, and remain good for the firſt ten years, becauſe that would make a fraction and ſeverance of the leaſe, which at firſt was entire, and paſſed by one entire contract, and therefore cannot either by any ſurrender in law, or even by any expreſs ſurrender, be curtailed and divided; the conſequence of which is, that ſuch acceptance of a new leaſe being a preſent ſurrender of the firſt, the leſſor may enter and take the profits for the whole thirty years, ſaving only the three years compriſed in the ſecond leaſe. Another reaſon perhaps of ſuch ſurrender may be, becauſe the leſſor, having already made a leaſe for thirty years, cannot, during the continuance of that term, make any other leaſe to transfer the poſſeſſion; but yet having the reverſion expectant upon that term, he may transfer that for any leſs term, or to begin at any diſtance he thinks fit; and then if the ſecond leaſe be by deed, it may as well be ſuppoſed to carry the reverſion, the union whereof, with the poſſeſſion, though for never ſo ſhort a time, will, as has already appeared, merge the poſſeſſion; and though the ſecond leaſe, which may be ſuppoſed to carry the reverſionary intereſt, is not to commence till ten years hence, yet the firſt leſſee has the intereſt and right thereof in him immediately, and then poſſeſſion and reverſion being inconſiſtent in one perſon at one and the ſame time, the one muſt merge and drown the other.

A huſband, ſeiſed of lands, made a leaſe for ninety years by indenture, and after enfeoffed certain perſons, and took an eſtate to him and his wife in tail, and after the termor took a new leaſe by parol of the huſband for eighteen years only, to begin preſently; then the huſband died, and his wife evicted the termor; and it was held ſhe lawfully might, for the firſt leaſe was ſurrendered and drowned in law by the acceptance of the ſecond, and then the wife's eſtate, by ſurvivorſhip, came in paramount the ſecond leaſe; and though the ſecond leaſe, which was the cauſe of the ſurrender of the firſt, was voidable by the wife after her huſband's death, yet the ſurrender of the firſt, wrought by the acceptance thereof, was abſolute and preſent. Dyer, 140. 2 Roll. Abr. 495.

One let lands to *A.* for life and twenty years over, and after let the ſame lands to *B.* for forty years, to commence after the death of *A.* and the end of the ſaid twenty years; then *B.* intermarries with *A.*, and *A.* dies, and *B.* the huſband hath the term for twenty years, yet his term of forty years is not ſurrendered by it, Bendl. pl. 59. And. 32.

becauſe that was not begun, but was a future *intereſſe termini*, to begin wholly after the firſt leaſe ended; ſo there was no union at all of the terms.

3 Bulſ. 203. 4. Roll. Rep. 387. 2 Roll. Abr. 497, 498. 2 Mod. 176.

If leſſee for years makes a leaſe to his leſſor for all but a day, this is clearly no ſurrender of his leaſe, becauſe the day disjoins the union and prevents the merger, which would have followed if the leaſe had been for the whole term; for then the leſſor would have had the whole eſtate entire in him, as he had before he made the leaſe, and conſequently the leaſe would be merged and drowned in the reverſion.

4 Leon. 30.

Leſſee for twenty-one years took a leaſe of the ſame lands for forty years, to begin immediately after the death of *J. S.*: it was held in this caſe, that this was not any preſent ſurrender of the firſt term, becauſe *J. S.* might wholly outlive that term, and then there would be no union to work a ſurrender; and it being *in equilibrio* in the mean time, whether he will ſurvive it or not, the firſt term ſhall not be hurt till that contingency happens, for if *J. S.* die within the firſt term, then what remains of it is ſurrendered and gone by the taking place of the ſecond.

Moor, 94. 239. Lord Treaſurer and Barton.

A man makes a leaſe for one hundred years, the leſſee makes a leaſe for twenty years, rendering rent, with clauſe of re-entry, and after grants his reverſion to the firſt leſſor: he ſhall neither have the rent nor re-entry, becauſe the reverſion, to which it was annexed, is extinct and gone by way of ſurrender: otherwiſe it would be, if one make a leaſe for years, rendering rent, and after grant the reverſion for life, or years, to which an attornment is had, and after ſuch grantee ſurrender; yet the grantor ſhall have again the rent, becauſe it was once a rent incident to the reverſion, which by the ſurrender is reſtored whole again as it was before.

Plow. 107. Co. Lit. 218. b.

If one makes a leaſe for forty years, and the leſſee takes a new leaſe for twenty years, upon condition, that if he does not do ſuch an act, that the leaſe ſhall be void; and after he breaks the condition, whereby the leaſe is avoided, yet the ſurrender of the firſt continues, for that was abſolute by acceptance of the ſecond, and the condition was only annexed to the ſecond leaſe. So, if the leſſor had granted the reverſion to the leſſee upon condition, and after the condition were broken, yet the ſurrender of the term would continue, becauſe the condition was annexed only to the grant of the reverſion, and moved from the leſſor as his terms of the leſſee's enjoyment of ſuch grant; but the ſurrender, which is wrought by acceptance of ſuch grant, and moves from the leſſee himſelf, was abſolute; and the diverſity is, when the leſſor grants the reverſion to the leſſee upon condition, and when the leſſee grants or ſurrenders his eſtate to the leſſor upon condition; for a condition annexed to a ſurrender may reveſt the particular eſtate, becauſe the ſurrender itſelf is conditional.

Dyer, 140. pl. 43. 2 Roll. Abr. 495.

So, if ſuch ſecond leaſe were by baron ſeiſed in right of his wife, and after the baron died, and the feme avoided the ſecond leaſe, yet the ſurrender of the firſt, by acceptance thereof, is abſolute.

Leſſee

Leſſee for life made a leaſe for years, rendering rent, and after ſurrenders to the leſſor upon condition, then the leſſee for years takes a new leaſe for years of the leſſor, and after the leſſee for life performs the condition, and evicts the leſſee for years, who re-enters, and the leſſee for life brings debt for the firſt rent reſerved; and it was ruled, that it was not maintainable, for the leaſe out of which it was reſerved is determined and gone; for though the ſurrender of the tenant for life, which made the leſſee for years immediate tenant to the firſt leſſor, and ſo enabled him to make ſuch ſurrender, was conditional, yet the defeating of the eſtate for [redacted]erformance of the condition, cannot defeat the eſtate of [redacted] for years, which was abſolute, and well made, and then the rent reſerved thereon is gone likewiſe. Cro. Eliz. 264. Brewſter and Sir Thomas Parrot.

If one be leſſee for life or years, and take a new leaſe of the ſame lands, though ſuch ſecond leaſe be void for any defect in the making or execution of it, as if it were for life, to begin at a future day, *&c.* yet it is a ſurrender of the firſt leaſe; for the acceptance of the indenture in the contracting and agreement to have a new leaſe, makes a ſurrender of the firſt leaſe before the livery is made; and therefore though that be void, yet it cannot ſet up the firſt leaſe again, which was before ſurrendered: and ſuch contract for a new leaſe is a good evidence to a jury of a ſurrender. Cro. Eliz. 873. Moor, 636. Keb. 285.

But if ſuch ſecond leaſe were void for want of power in the leſſor to make it, then, notwithſtanding ſuch admittance of the leſſee, the firſt leaſe would not be ſurrendered: therefore, where one made a leaſe for forty-one years by indenture 14 *Nov.* 1616, to *A.*, to commence from the *Annunciation* which ſhould be *anno* 1619, and after, the ſame year, by another indenture bearing date 3 *Dec.* made a leaſe to *B.* for ninety-nine years, to commence from the *Annunciation* then laſt paſt, by virtue whereof *B.* entered and was poſſeſſed, and then the leſſor by another indenture 16 *Nov.* 1617, made another leaſe of the ſame lands to *A.*, to commence from 17 *Nov.* 1619, for forty-one years, who accepted thereof, and after the commencement of his term *A.* entered and was poſſeſſed, and made his will, and his executors let to the plaintiff, *&c.* and the only queſtion was, if the acceptance of the ſecond leaſe by *A.* had determined, diſcharged or extinguiſhed the firſt leaſe, ſo as to let in the intermediate leaſe to *B.*? It was adjudged, that it had not, becauſe by the leaſe to *B.* for ninety-nine years, and his entry, the leſſor had but a reverſion, and could not by his contract after with *A.* give any intereſt to *A.*; and the firſt leaſe to *A.* was good as a future *intereſſe termini*, to take effect in poſſeſſion when the time came, and thereby *pro tanto* to defeat the leaſe for ninety-nine years to *B.*; and if it had not been for the leaſe to *B.*, there had been no queſtion but that the firſt leaſe to *A.* had been by ſuch acceptance of the ſecond leaſe ſurrendered and gone; but that intermediate leaſe, being for ſo great a number of years, diſables him, during that time, to contract for any [redacted] number of years, as the leaſe for forty-one years was. Hutton, 104. Watt and Maidwell. [No ſurrender, expreſs or implied, in order to, or in conſideration of, a new leaſe, will bind, if the new leaſe is abſolutely void; for the cauſe, ground, and condition of the ſurrender fails, *Per* Lord Mansfield, Zouch v. Parſons, 3 Burr. 1807. Lloyd v. Gregory, Sir W. Jon. 405-6. Wilſon v. Sewell, 4 Burr. 1980. Daviſon v. Stanley, *Id.* 2210.]

Perk. §604. If *A.* lets to *B.* for ten years, who lets to *C.* for five years, *C.* cannot ſurrender to *A.* by reaſon of the intermediate intereſt of *B.*, but in ſuch caſe *B.* may ſurrender to *A.*, and afterwards *C.* may ſurrender likewiſe, becauſe then his leaſe for five years is become immediate to the reverſion of *A.*

2. *With regard to Leaſes* in Futuro.

Co. Lit. 338. 5 Co. 11. 10 Co. 53. Cro. Eliz. 522. 605. Poph. 9. 2 Roll. Abr. 496. Surrenders in law of leaſes *in futuro*, or future intereſts—and theſe can no ways be ſurrendered, for an expreſs ſurrender of ſuch future leaſe or intereſt is not good, (except as after mentioned); therefore, if one makes a leaſe for years, to begin at *Michaelmas* next, this future intereſt cannot by any expreſs ſurrender be merged, becauſe there is no reverſion wherein it may drown; for till the entry the leſſee hath no poſſeſſion, and, by conſequence, there can be no reverſion wherein that poſſeſſion may drown: but yet if ſuch leſſee before *Michaelmas* take a new leaſe for years, either to begin preſently, or at *Michaelmas*, this is a ſurrender in law of the firſt leaſe preſently; becauſe thereby he preſently admits the leſſor's power to make ſuch leaſe, which, if the firſt leaſe ſhould ſtand, he could not do; and ſince ſuch leſſee hath contracted for a new intereſt, inconſiſtent with the firſt, his acceptance of ſuch new intereſt waives and diſſolves the firſt, becauſe the contract whereby it was made, was entire, and therefore the whole firſt leaſe is ſurrendered preſently.

2 Roll. Abr. 494. 495. a leaſe in *futuro*. Leſſee for years, to begin preſently, cannot till entry or waiver of the poſſeſſion by the leſſor merge or drown the ſame by any expreſs ſurrender, becauſe till entry there is no reverſion wherein the poſſeſſion may drown: but if the leſſee had entered, and aſſigned his eſtate to another, ſuch aſſignee before entry might have ſurrendered his eſtate to the leſſor, becauſe by the entry of the leſſee the poſſeſſion was ſevered and divided from the reverſion, which poſſeſſion, being by the aſſignment transferred to the aſſignee, may without any other entry be ſurrendered, and drown in the reverſion.

3. *With regard to the Thing itſelf ſo ſurrendered.*

Cro. Eliz. 873. Moor, 636. Cro. Jac. 84. 177. 2 Roll. Abr. 496. As to the nature of the thing ſurrendered, herein we muſt obſerve, that the acceptance of a new leaſe, which will work a ſurrender of the firſt, ought to be of ſomething of the ſame nature and kind with the firſt; otherwiſe there can be no ſurrender of the firſt, becauſe there is no inconſiſtency but that both may ſtand together; therefore if leſſee for years accepts a grant of a rent common, eſtovers, herbage, or the like, for life or years, out of the ſame lands, or if ſuch leſſee for years accepts of a leaſe of the ſame lands at will only, all theſe amount to a ſurrender and determination of the firſt leaſe, becauſe they admit the leſſor's power to deal or contract for the lands, or a certain charge out of it, which being inconſiſtent with the intereſt of the leſſee under the firſt leaſe, diſſolve and deſtroy it.

S

So, where leſſee for ſixty years of an advowſon did, after the church became void, take a preſentation to himſelf of the leſſor, and was admitted, inſtituted, and inducted, this was adjudged to be a ſurrender of his leaſe; for by the acceptation of the parſonage he thereby gains a new intereſt for life in that which was the chief fruit of his leaſe, and, conſequently, ſuch intereſt, being inconſiſtent with his intereſt under the firſt leaſe, amounts to a determination and ſurrender thereof. Hutt. 105. Cro. Jac. 84.

But if leſſee for years of a park accepts a grant of the office of park-keeper of the ſame park for life or years, this is ſaid to have been adjudged no ſurrender of the leaſe for years, becauſe ſuch office is collateral to the land, and not any ways iſſuing out of it; and yet *Coke* and *Dodderidge* thought, that whether he had the office of park-keeper firſt, or the leaſe for years of the park itſelf firſt, that the acceſſion of the other to it would merge and drown the firſt, for the inconſiſtency that a man ſhould be park-keeper to himſelf; *ideo quære.* Cro. Jac. 177. 2 Roll. Abr. 496. Roll. Rep. 83. Godb. 419. 425. 2 Roll. Rep. 357. 361.

So, where one made a leaſe for ninety-nine years of a manor, and after made the leſſee bailiff of the ſame manor for twenty-one years, this was adjudged to be no ſurrender of his firſt leaſe: 1. Becauſe the bailiff, as ſuch, had no intereſt in the lands, but an authority only. 2. Becauſe the bailiwick was no part of the thing demiſed, but of another nature; for the bailiff, as ſuch, is a mere ſervant, and all he doth is for the benefit, and in the name of his maſter. So, if ſuch leſſee of a manor were made ſurveyor or ſteward for life, this would not determine his leaſe; becauſe in theſe capacities he is only a ſervant, and acts in the name of his maſter, and therefore no inconſiſtency therein with his having a leaſe of the manor. Cro. Jac. 84. 177. Noy, 12. 2 Roll. Abr. 496.

But where leſſee for years of a houſe or caſtle accepted a grant of the cuſtody thereof for life or years, this was adjudged a ſurrender thereof; becauſe the cuſtody is of the ſame thing which was leaſed, and a man cannot be keeper to himſelf. Dyer, 200. pl. 62. Cro. Jac. 177. 2 Roll. Rep. 357.

If leſſee for years of lands accepts a new leaſe by indenture of part of the ſame lands, this is a ſurrender for that part only, and not for the whole, becauſe there is no inconſiſtency between the two leaſes for any more than that part only which is ſo doubly leaſed; and though a contract for years cannot be ſo divided or ſevered, as to be avoided for part of the years, and to ſubſiſt for the reſidue, either by act of the party, or act in law, yet the land itſelf may be divided or ſevered, and he may ſurrender one or two acres, either expreſsly or by act in law, and yet the leaſe for the reſidue ſtand good and untouched, becauſe here the contract for the reſidue remains entire, whereas, in the other caſe, the contract for the whole would be divided, which the law will not allow. 2 Roll. Abr. 498. Fiſh v. Campion.

(T) Leaſes, when determined by cancelling the Deed.

Bro. tit. Leaſes, 6. 16. Cro. Car. 399. Jon. 355. Moor, 35. pl. 116.

AS to leaſes for years, owing their exiſtence to the deed or indenture whereby they are created, ſo that the cancelling or deſtruction thereof ſhall deſtroy and avoid the leaſe, a diverſity ſeems to be taken in the books between ſuch things as lie in livery, and may be executed by actual entry, and ſuch things as lie only in grant, whereof no actual or manual occupation can be had; therefore, if one had made a leaſe for years, at common law, of lands or houſes by deed or indenture, and tear, raſe, or cancel it, yet this would not deſtroy the continuance of the leaſe itſelf, becauſe ſuch leaſe of lands or houſes lying in manurance and actual occupation might at firſt have been made by parol only, without any deed or indenture: and therefore ſuch deed or indenture being not of the eſſence of the leaſe, the deſtruction or cancelling thereof ſhall not defeat or deſtroy the leaſe or intereſt of the leſſee, becauſe his actual entry into the land, and continuance of the viſible poſſeſſion and occupation thereof, gives ſufficient ſanction and notoriety to the contract, as to the intereſt of the leſſee in the lands and houſes themſelves, though thereby the deed itſelf, and all covenants, which had their exiſtence only by the deed, are defeated and avoided. But if the king made a leaſe of ſuch lands or houſes by letters patent, which are matter of record, if the letters patent and enrolment are deſtroyed or cancelled, the leaſe itſelf falls to the ground, becauſe theſe letters patent and enrolment, which were of the eſſence of the creation and continuance of the leaſe, are deſtroyed and loſt. So, if a common perſon had made a leaſe for years, or a grant for years, of tithe, common, advowſons, or other things which lay merely in grant, in ſuch caſes the cancelling or deſtruction of the deed, whereby they were created and ſubſiſted, muſt neceſſarily deſtroy the intereſt of the grantee likewiſe, becauſe ſuch deed was of the very eſſence of the deed or grant, without which it could not have been made at firſt, nor can ſubſiſt afterwards, ſuch deed being the only evidence of the contract, which could not be executed by any actual poſſeſſion or manual occupation. But now, ſince the ſtatute of frauds and perjuries, which makes all leaſes for above three years to have only the force and effect of leaſes at will, unleſs they be in writing, and ſigned by the party, &c. the deed or writing whereby ſuch leaſe is made ſeems to be of the ſame eſſence as the leaſe itſelf; and therefore the cancelling or deſtruction of that ſeems to deſtroy and avoid the leaſe itſelf, becauſe it deſtroys all evidence allowed by law for the ſupport thereof; though in ſuch caſe, Chancery frequently ſets up the leaſe again, or decrees the party to execute a new one for the reſidue of the term, which is not againſt the prohibition of the act, becauſe there was once a good and effectual leaſe made purſuant to the ſtatute.

And though that ſtatute excepts leaſes not exceeding the term of three years, yet not abſolutely even thoſe; for it goes on, "not exceeding the term of three years from the making thereof, "whereupon the rent reſerved to the landlord during ſuch term "ſhall amount unto two third parts at leaſt of the full improved "value of the thing demiſed, and that no leaſes, eſtates, or inte-"reſts, either of freehold or terms for years, or any uncertain "intereſt, not being copyhold or cuſtomary intereſt of, in, to, or "out of any meſſuages, manors, lands, &c. ſhall be aſſigned, "granted, or ſurrendered, unleſs it be by deed or note in writing, "ſigned by the party ſo aſſigning, granting, or ſurrendering the "ſame, or their agents thereunto lawfully authorized by writing, "or by act and operation of law."

29 Car. 2. c. 3. A leaſe for three years to commence in *futuro*, by parol is void by this ſtatute. 12 Mod. 610. Lord Raym. 736. [But a leaſe by parol for leſs than three years to commence *in futuro*, is good. Ryley v. Hicks, 1 Str. 651. Bull. N. P. 177. S. C.]

[(T. 2) When forfeited.

HERE it is to be obſerved, that any act of the leſſee by which he diſaffirms or impugns the title of his leſſor, occaſions a forfeiture of his leaſe. For to every leaſe the law tacitly annexeth a condition, that if the leſſee do any thing that may affect the intereſt of his leſſor, the leaſe ſhall be void, and the leſſor may re-enter. Beſides, every ſuch act neceſſarily determines the relation of landlord and tenant; ſince to claim under another, and at the ſame time to controvert his title; to affect to hold under a leaſe, and at the ſame time to deſtroy that intereſt out of which the leaſe ariſeth, would be the moſt palpable inconſiſtency.

A leſſee may thus incur a forfeiture of his eſtate by act *in pais*, or by matter of record. By matter of record—where he ſues out a writ, or reſorts to a remedy, which claims or ſuppoſeth a right to the freehold; or where in an action by his leſſor grounded upon the leaſe he reſiſts the demand under the grant of a higher intereſt in the land; or where he acknowledges the fee to be in a ſtranger: for having thus ſolemnly proteſted againſt the right of his leſſor, he is eſtopped by the record from claiming an intereſt under him. By act in *pais*, as where he aliens the eſtate in fee (*a*). But then this alienation muſt be by ſuch mode of conveyance as diſplaces or diveſts the eſtate of the reverſioner (*b*): for if it have not this effect, the law will not adjudge it a forfeiture. It muſt be, therefore, by feoffment with livery; for this only operates upon the poſſeſſion, and effects a diſſeiſin. It cannot be by a grant, or any conveyance in the nature of a grant, ſuch as leaſe and releaſe, bargain and ſale, &c. conveyances of this kind operating only on the grantor's intereſt, and paſſing only what he may lawfully depart with. And as it cannot be by grant, of courſe no forfeiture can by this way be incurred of an eſtate of thoſe things which lie merely in grant.

Co. Lit. 251. a. Hawk. Abr. Co Lit. 339. Dixey v. Spencer, 3 Leon. 220. Moor, 211. Gouldſ. 40. S. C. Godb. 105. ſeems to be S. C. Barkhouſe's caſe, 4 Leon. 3. Dy. 209. pl. 21. *in marg.* 2 Lev. 52.

(*a*) Co. Lit. 251. b. 1 Burr. 92. Co. Lit. 251.

(*b*) But if tenant for years, the reverſion, or remainder or remainder is veſted out of the king; and the reaſon is, in reſpect of the ſolemnity of the feoffment by livery, tending to the king's diſheriſon. Co. Lit. 251. b.

And

Eaſtcourt v. Weeks, 1 Salk. 187.

And if an attempt to alienate by thoſe modes of conveyance which affect, but are not operative enough, to paſs a fee, occaſion no forfeiture, a leaſe by the tenant for a greater number of years than he has in the land muſt be ſtill more venial; becauſe it is only a contract between him and his under-leſſee, which cannot poſſibly prejudice the intereſt of the original leſſor, and does not even pretend to uſurp or touch the freehold and inheritance.

(a) 10 Co. 129. a. Plow. 70. a. b. (b) Cro. Eliz. Dy. 45. b. 4 Leon. 5. 3 Leon. 67. Styl. 483. 3 Wilſ. 234. 2 Bl. Rep. 767. S. C. Doe v. Skeggs, Tr. 21 G. 3. B. R. cited in 2 Term Rep. 428. (c) Cruſoe v. Bugby, 3 Wilſ. 234. 2 Bl. Rep. 767. S. C. But where the words of a proviſo were, that the leſſee, "his execu-" tors or ad-" miniſtra-" tors, ſhall " not ſet, let, or aſſign over the ſaid hereby demiſed meſſuage or dwelling-houſe, or any part thereof, an under-leaſe by the leſſor's adminiſtratrix was holden to be within the meaning of the proviſo. Rad v. Hatriſon, 2 Term Rep. 425.

Forfeitures are alſo incurred by the breach of *expreſs* or *conventionary* conditions. For the leſſor, having the *jus diſponendi*, may annex whatever conditions he pleaſes to his grant, provided they be not illegal, or repugnant to the grant itſelf, and upon the breach of theſe conditions may avoid the leaſe. A condition, that if the rent be behind by the ſpace of any given time after the day preſcribed for payment the leſſor ſhall re-enter, is good; and ſuch condition is not ſaved by the attendance of the leſſee with the rent merely on the firſt day of payment; for, if the leſſor be not then there to receive it, the leſſee muſt equally attend on the laſt day (a). Conditions in reſtraint of alienation are legal and uſual; but whether ſuch conditions extend to aſſignees in law, is a point which doth not yet ſeem to be ſettled (b). But the courts have always held a ſtrict hand over theſe conditions for defeating leaſes, and have countenanced very eaſy modes for putting an end to them. Where, therefore, the words of the condition were (c), that the leſſee, "his executors or adminiſtrators, ſhall not, at any time or times " during this demiſe, aſſign, transfer, or ſet over, or otherwiſe do " or put away this preſent indenture of demiſe, or the premiſes " hereby demiſed, or any part thereof," the court held, that this condition was not broken by an under-leaſe; for that *aſſign*, *transfer*, and *ſet over* are mere words of aſſignment; that *otherwiſe do or put away* ſignify any other mode of getting rid of the premiſes entirely; and cannot extend to the making of an under-leaſe.

3 Co. 65. a. b. 2 Term Rep. 431. Co. Lit. 215. a. Plowd. 131. 3 Co. 64. b. Cro. Eliz. 220. (d) In ſuch caſe, it ſhould ſeem, the forfeiture may be taken ad-

And as the courts adhere ſtrictly to the preciſe words of the condition in order to prevent a forfeiture, ſo, where a forfeiture hath manifeſtly been committed, they will not allow the leſſor to take advantage of it, if they find that he has afterwards done any act which amounts to a waiver of it. Acceptance of rent has been adjudged to be an act of this kind; but then, in order to give it this effect, it muſt appear, that at the time the leſſor received the rent he had notice of the forfeiture: for it would be abſurd and a moſt unwarrantable concluſion, to infer from the mere receipt of the rent that he meant to remit a forfeiture he had never heard of. However, when we ſay that a forfeiture may be waived we muſt be underſtood to confine ourſelves to thoſe caſes, where by the terms of the contract, the eſtate, upon the tenant's doing or failing to do what he has ſtipulated to do or abſtain from, is only determinable, not where it abſolutely determines; where the leaſe is only voidable, not where it is merely void (d). In the one caſe

the forfeiture is incomplete, ſome act of the leſſor is neceſſary to perfect it; that is, to ſpeak more correctly, no forfeiture is actually incurred in the inſtant, only a right of avoiding the leaſe accrues to the leſſor, which right he may waive as he may any other right that is merely perſonal and conventional. In the other caſe, the contract is at an end, the leaſe is determined; it is a nullity; the leſſee has no intereſt upon which the will of the leſſor can attach.

vantage of even by a wrongdoer. But ſee Kinnerſley v. Orpe, Dougl. 56. *contra.*

By ſtat 4 *G.* 2. *c.* 28. § 2. every landlord, who hath by his leaſe a right of re-entry, in caſe of non-payment of rent, when half a year's rent is due, and no ſufficient diſtreſs is to be had, may, without any previous demand of the rent, or re-entry, ſerve a declaration in ejectment for the recovery of the demiſed premiſes; and a recovery in ſuch ejectment ſhall be final and concluſive, both in law and equity, unleſs the rent and all coſts be paid or tendered within ſix calendar months afterwards. But if the tenant, at any time before the trial in ejectment, pay or tender to the landlord the whole rent in arrear, with the coſts, or pay ſuch arrears and coſts into court, the proceedings in ejectment ſhall ceaſe, and the tenant ſhall be relieved in equity, and hold the lands demiſed according to the old leaſe without any new leaſe.

In Archer v. Snapp, Andr. 341. Lord C. J. Lee obſerves, that both the courts of law and the courts of equity had, before this ſtatute, exerciſed a diſcretionary power of ſtaying the leſſor from proceeding at law, in caſes for forfeiture of non-payment of rent, by compelling him to take the money really due to him. See Bull. N. P. 97. and 2 Str. 900. *acc.*

(U) Of the Renewal of Leaſes, by whom, and for whoſe Benefit.

A Leaſe, we muſt have obſerved, is a contract, by which, in conſideration of ſome pecuniary or other recompence, the *temporary* poſſeſſion of lands or tenements is granted to another; for if the grantor parts with his whole intereſt in the eſtate, the contract is not a contract of leaſe, but of ſale; it being eſſential to a contract of leaſe, that there ſhould be a reverſion left in the grantor. But a practice has prevailed, particularly in leaſes from the crown, from the church, and from other corporations, of granting a further term to the old tenants, in preference to ſtrangers; and as this expectation of renewal is rarely diſappointed, ſuch tenants are conſidered as having an ulterior intereſt beyond their ſubſiſting term. This intereſt is generally, but improperly, called their *tenant-right of renewal.* For it has happened in this caſe, as it has happened in many others, that long indulgence has been made a ground of claim; a preference repeatedly given has, in proceſs of time, been inſiſted upon as a preſcriptive privilege; and attempts have been made to enforce that as a right, which was, in truth, a pure voluntary curteſy. But though ſuch attempts have failed of ſucceſs, there being, as between landlord and tenant, abſtractedly from any expreſs contract to that effect, no obligation upon the former to renew with the latter, yet the almoſt invariable recurrency of the grant to the ſame objects, has

See the very learned and ingenious argument for the appellant in the caſe of Lee v. Vernon, 7 Br. P. C. 438. and ſee alſo Mr. Butler's note in his edition of Co. Lit. 293. b.

begotten an idea of ſomething like property, and men have been ſo far from treating this ulterior intereſt as precarious, that they have acted upon it, as if it were fixed and certain. Hence, leaſes of this ſort are become a fund for ſettlements of every kind, for mortgages and other ſecurities; and are ſubjected to the ſame limitations, and applied to the ſame proviſions with the moſt permanent intereſts.

2 Atk. 597. 2 Br. Ch. Rep. 248.

This tenant-right, as it is called, is recognized and protected by courts of equity in many inſtances. Hence, where a truſtee, executor, or guardian, avails himſelf of his ſituation, and gets a renewal of a leaſe for his own benefit, the courts will direct it to be for the uſe of the *ceſtuy que truſts*, or perſons beneficially intereſted in the old leaſe. So, where a perſon who has only a partial intereſt, as tenant for life, mortgagee, or mortgagor, from the circumſtance of being in poſſeſſion, takes the opportunity of renewing, ſuch renewal ſhall be for the benefit of the perſon entitled to the reverſion. And according to the broad principles of equity, it ſhould ſeem, that wherever a grant of a reverſionary term is obtained, to the prejudice of the old tenant, by undue means, whether by *ſuggeſtio falſi*, or *ſuppreſſio veri*, the party ſo obtaining it, though an entire ſtranger, ſhall not be permitted to hold it to his own uſe.

Keech v. Sandford, or Rumford Marketcaſe, 2 Eq. Ca. Abr. 741. Sel. Ca. in Chan. 61. S. C.

A leaſe of the profits of a market was deviſed to a truſtee, in truſt for an infant: before the expiration of the term, the truſtee applied to the leſſor for a renewal for the infant's benefit, which he refuſed, in regard that it being only the profits of a market, there could be no diſtreſs, and it muſt reſt ſolely on covenant, which the infant could not bind himſelf in; on which the truſtee got a leaſe to himſelf. It was decreed by Lord Chancellour *King*, that the leaſe ſhould be aſſigned to the infant; that the truſtee ſhould be indemnified from the covenants of the leaſe, and ſhould account for the profits ſince the renewal. His lordſhip ſaid, he muſt conſider this as a truſt for the infant; for if a truſtee, on refuſal to renew, might have a leaſe to himſelf, few truſt-eſtates would be renewed to *ceſtuy que truſt*: that the truſtee ſhould rather have let it run out, than to have had the leaſe to himſelf: that it may ſeem hard, that the truſtee is the only perſon of all mankind who may not have the leaſe; but it is very proper that the rule ſhould be ſtrictly purſued, and not in the leaſt relaxed; for it is very obvious what would be the conſequence of letting truſtees have the leaſe, on refuſing to renew to *ceſtuy que truſt*.

Anon. 2 Chan. Caſ. 207.

A leſſee for years, ſubject to a truſt, deviſed *reſiduum bonorum*: the eſtate, if all ſold, would but pay the debts: the executor paid the debts, and renewed the leaſe for a further term, it being a church leaſe, and offered to account, if any profits ſhould ariſe out of the old term. It was inſiſted, that by paying debts to the value, the property was altered, and veſted in him in his own right. But the Lord Keeper decreed the executor to account for the new as well as the old leaſe; and aſked, if the executor acquainted the church with his caſe, and declared that he would renew and take it for the time of the old term, to the benefit of the creditors and

and executorſhip, and the reſt for himſelf? By the *French* law, his lordſhip ſaid, no churchman can make a leaſe to any but the old tenant, unleſs it firſt be refuſed by the old tenant.

An executor in truſt for an infant of a leaſe for 99 years, determinable on lives, renewed the eſtate for lives abſolutely. It was holden that the renewed leaſe, though for lives only, ſhould follow the nature of the original leaſe, and go to the perſonal repreſentatives of the infant. Whitter v. Whitter, 3 P. Wms. 99.

If a biſhop makes a leaſe for 21 years, and the leſſee creates a truſt thereupon, and the biſhop dies, and his ſucceſſor for a fine renews the leaſe; though he were not compellable to do ſo, and though there be no truſt of the ſecond leaſe, yet equity will ſubject it to the former truſt. *Per* Serjeant Powis, in Canc. 6 Mod. 57. Anon.

A. mortgaged a college leaſe to *B.* for 4000 *l.*, and ſecured the money likewiſe by ſtatute to *B.*; *A.* died, and made *C.* executor. The executor renewed in his own name ſeveral times, until the original mortgage leaſe expired by efflux of time. It was decreed, that *B.* paying the ſeveral fines, gratuities, and charges which *C.* had expended on account of the renewal, ſhould hold the premiſes until the debt were ſatisfied. Luckin v. Ruſhworth, Finch's Rep. 392. 2 Ch. Rep. 113. S. C.

One of three leſſees under a dean and chapter ſurrenders, and gets a renewal to himſelf. *Per* Lord Keeper *North*, It is a truſt for all. Palmer v. Young, 1 Vern. 277.

John Coombe, poſſeſſed of ſeveral leaſehold houſes holden of the crown; and having a daughter, *Joanna*, married to *Samuel Clarke*, deviſed unto ſuch child or children, as his ſaid daughter had, or ſhould have, by *Samuel Clarke*, two of his leaſehold houſes, and directed, that the rents and profits ſhould be applied for bringing them up, and educating them, and for placing them out, and ſetting them up, in ſuch proportions as *Samuel Clarke* and his wife ſhould think fit; and that they, and the ſurvivor, ſhould have power to divide the profits between their ſeveral children, when and in ſuch parts as they ſhould think fit. Part of the leaſe being expired, *Samuel Clarke* obtained an additional term from the crown for 25 years from the expiration of the term then in being. *Samuel Clarke* and *Joanna* his wife had two children, and on the marriage of *Coombe Clarke*, their ſon, to *Martha Dethie*, aſſigned one of the leaſehold houſes to truſtees, for the remainder of the term then in being, and of the renewed term of 25 years, upon truſt, to permit *Coombe Clarke* to receive the rents and profits for life, and then to permit *Martha* to receive the rents and profits for her life, and after her death to apply the rents and profits for the ſon of the marriage, for his education, and to convey the premiſes to him at 21. *Coombe Clarke* died, leaving *Martha* ſurviving, and ſeveral children, of whom *Samuel Clarke* was the eldeſt, who attained his age of 21, and ſurvived his mother. *Martha*, after her huſband's death, obtained an additional term of 28 years from the expiration of the exiſting leaſe, and afterwards made her will in 1748, and gave the reſidue of the eſtate in truſt for her daughter *Mary Clarke*, an infant, and died in 1751. Upon her death, *Samuel Clarke* took poſſeſſion of the houſe. Tatter v. Marriott, Ambl. 688.

houſe. He mortgaged it to the plaintiff in 1755, and died in 1756 inteſtate. *Coombe Clarke*, the next ſon, took out adminiſtration to his brother *Samuel*. *Mary*, the daughter, having married the defendant, *Marriott*, they got the tenant to attorn, and pay the rent to them. On a bill by the plaintiff to have an aſſignment of the 28 years term, and to be paid his mortgage money, or foreclose, *Marriott* and his wife ſet up title to the renewed term, as being obtained by *Martha* for her own benefit, and derived title to themſelves under her will. The queſtion therefore being, whether the additional term was to be conſidered as an intereſt acquired by *Martha* for her own benefit, or whether it ſhould follow the uſes of the ſettlement? Sir *Thomas Sewell*, maſter of the rolls, was of opinion, that the additional term was to be conſidered as an engraftment upon the old term, on the principle which prevailed in the caſe of *Rumford* Market and other caſes; and followed the uſes of the ſettlement and deed. Lord *Camden*, upon the appeal, was of the ſame opinion, and decreed accordingly.

Rawe v. Chicheſter, Ambl. 715. 1 Br. Ch. Ca. 199. n. S. C.

Richard Rawe ſeiſed of real eſtate, and poſſeſſed, among other things, of a leaſe of lands and houſes in *Suffolk*, originally granted by *Cha.* 2. in right of the duchy of *Cornwall*, for 31 years, renewable from time to time, upon petition by the tenant in poſſeſſion, for a further number of years, to fill up the term of 31 years, made his will 20th *December* 1761, and reciting his being poſſeſſed of leaſehold houſes at *Lambeth*, and of ſeveral eſtates in land in *Cornwall*, for unexpired terms of years, gave and deviſed the ſaid ſeveral leaſes to his wife, for as many years of the term as ſhe ſhould live, and after her deceaſe, (if the terms ſhould be then in being,) he deviſed them to *William Rawe* for life, and after his deceaſe, among ſuch of the children of *William Rawe* as ſhould be then living, and made his wife executrix and reſiduary legatee. The teſtator had renewed this leaſe juſt before his death, and the widow, during her life, renewed it ſeveral times, ſtating herſelf as widow and executrix of *Richard Rawe*, and continued in poſſeſſion till her death in 1761, in which year ſhe made her will, and diſpoſed of theſe leaſes, as her own property. The queſtion was, whether theſe renewed leaſes were the property of *Richard Rawe*, and to go according to the limitations of his will; or were the abſolute property of the widow? Lord *Bathurſt* thought, ſhe renewed as executrix, ſubject to the truſts, in the will of *Richard*, and that the plaintiffs had a right to the renewed leaſes, repaying to the widow's eſtate the ſum ſhe had paid for the fine, deducting the value of her chance in the renewed leaſe.

Owen v. Williams, 1 Br. Ch. Ca. 109. n. Ambl. 734. S. C.

William Williams deviſed leaſehold eſtates to Sir *William Burnaby*, in truſt to renew the ſame, then to his wife for life, remainder to his brother *John Williams* for life, remainder to *Bennet Williams*, ſon of *John*, and the heirs of his body, and made his wife executrix. Several years of the leaſe being to come, Lord *Groſvenor* petitioned for a leaſe of the reverſion. Mr. *Williams* diſcovering this, preſented her petition as executrix, giving

giving notice of it to the remainder-man, and got a report from the ſurveyor-general, that ſhe was in poſſeſſion, and that the fine ought to be about 1200 *l.* or 1400 *l.* Lord *Groſvenor* got a warrant from the Treaſury for a leaſe, but was to pay her a compenſation for her right. *John* and *Bennet Williams* then preſented petitions for renewal. Lord *Groſvenor* made ſeveral offers to Mrs. *Williams*, who communicated them to *John Williams*; but it appeared both Lord *Groſvenor* and Mrs. *Williams* conceived them to be for her own benefit. At length they ſettled the terms at 3000 *l.* Mrs. *Williams* gave notice to *John* and *Bennet* of the probability of their agreeing, and adviſed them to take care of their own intereſts.—It was contended on the part of Mrs. *Williams*, that this 3000 *l.* was abſolutely her property; and that *John* and *Bennet* had no claim upon her for any part of it. But Lord *Bathurſt* held, that in caſe ſhe had renewed, it would have been a renewal as executrix; that wherever a partial tenant renews, it is for the benefit of the whole; and therefore that the 3000 *l.* given by Lord *Groſvenor* as a recompence for her not renewing, was ſubject to the truſts in the will.

John Pickering, the plaintiff's father, previous to his marriage with *Ann*, the plaintiff's mother, gave a bond to truſtees in the penalty of 400 *l.*, conditioned to be void if he ſhould aſſign to them, or to other perſons to be nominated by *Ann*, a leaſehold eſtate for the term of 99 years, or ſuch term as he ſhould have therein, for three lives, of which *Ann*'s ſhould be one, to the uſe of himſelf for life, remainder to *Ann* for life, remainder to the iſſue of the marriage. *Ann* died under coverture, leaving the plaintiff and another child. The eſtate was conveyed to *John*, *Ann*, and another life. In 1776 *John* died, having made his will, and thereby given to *Henry*, his iſſue by a ſecond marriage, all the reſt and reſidue of his eſtate. It did not appear how many renewals of the eſtate had taken place, or for what lives, but that *John*'s being the laſt original life, they were all exhauſted in 1776. —For the executors of the huſband, and *Martha*, the ſecond wife, it was contended, that all the original lives falling in 1776, there was no obligation on the father, or his eſtate, to renew, and that the expence of renewal, having been his, it ſhould be for his benefit. On the contrary, it was argued for the plaintiff, that this bond was purely a contract for a marriage ſettlement, and that the uſual mode of executing it would be to inſert a covenant to renew to the ſame uſes, the object of the parties being to give as large an intereſt to the children as to the parents. For this was cited *Lawrence* v. *Maggs*, before Lord *Northington*, 26th *Novem.* 1759, that the uſual form of the covenant being to keep the leaſe fully eſtated, the ſettlement muſt be ſo executed. In that caſe, the party had, while ſolvent, frequently renewed the leaſe, and conveyed it to the uſes of the ſettlement; the creditors inſiſted, that the leaſe was part of his aſſets, and the conveyances fraudulent. But the court thought, that having conveyed according to the ſettlement, it was not fraudulent, but the ſettlement muſt be carried into execution. By Lord Chancellor *Thurlowe*,—The queſtion

Pickering v. Vowles, 1 Br. Ch. Rep. 197.

tion is, whether the father, having renewed, ſhall be conſidered as having ſo done for the benefit of the ſettlement, or for his own benefit? He did not, by the marriage ſettlement, or by any ſubſequent act, expreſs any intent to do it for the benefit of the ſettlement, and by his will, he has given it, by ſufficiently expreſs words, to his ſon. If a man has eſtates of his own, and alſo pure truſts, and gives the reſidue by will, only his own eſtates will paſs by the reſiduary clauſe; but if he has an intereſt, as well as a truſt, the clauſe will paſs both. But this is the caſe of a tenant-right, as it is called, which, though an improper, is become a technical term. In the Weſt many eſtates derive their value from renewals. The crown alſo has many eſtates of the ſame nature. It has long been held, that where a truſtee or an executor renews ſuch an eſtate, it ſhall be for the uſe of the *ceſtuy que truſt*. The rule has obtained with reſpect to a tenant for life, who has the opportunity of renewal from being in poſſeſſion, that he ſhall not obtain the reverſion for his own uſe. The court therefore obliged him to ſtand ſeiſed as a truſtee to the uſes of the ſettlement: that was determined in *Rawe* v. *Chicheſter*, before Lord *Bathurſt*. This is that caſe; for though *John* was author of the ſettlement, it was intended that the leaſe ſhould be fully eſtated, and that he and ſhe ſhould have life eſtates, and that ſo fully eſtated, it ſhould go to the children. The renewal therefore muſt be to that purpoſe. The ſon is entitled to the eſtate, paying the expence of the renewal.

Lee v. Vernon, 7 Br. P. C. 432.

In 1661 a leaſe was granted by *Cha.* 2. under the ſeal of the Duchy of *Lancaſter*, of the parks of *Hanbury* and *Tutbury* in the county of *Stafford*, to *Edward Vernon* for 31 years from *Michaelmas* in that year. In the following year another leaſe of the parks was granted by the king to Sir *Thomas Morgan*, to commence immediately after the expiration of the preceding leaſe. This leaſe becoming veſted in *Edward Vernon*, he in 1678 obtained another reverſionary term from the crown for 63 years from the expiration of the leaſe to Sir *T. Morgan*.

In 1687 *Edward Vernon* died, leaving iſſue two daughters, both of whom died without iſſue and unmarried. After his death the laſt-mentioned leaſe became veſted in the appellant's father, who was accordingly in poſſeſſion thereof until the time of his death, which happened in *Oct.* 1748. He left a widow, and the appellant, his only ſon, then about five years old. The widow, as executrix of her huſband, and legatee of his perſonal eſtate, entered upon the premiſes compriſed in the leaſe, and held them until her death in 1763. By her will ſhe gave the appellant, her ſon, the reſt and reſidue of her perſonal eſtate, to be delivered up to him at his age of 21 years, or marriage; and under that bequeſt he enjoyed the leaſehold premiſes. Theſe premiſes lying contiguous to the lands and caſtle of *Tutbury*, held by the reſpondent by leaſe from the crown, under the Duchy ſeal, he, in the year 175[illegible] applied to Lord *Edgecumbe*, then Chancellor of the Duchy of *Lancaſter*, and repreſented to him, that he (the reſpondent) was the heir-male of the ſaid *Edward Vernon*, and in poſſeſſion of the

family ſeat by inheritance from *Henry Vernon*, his great-grandfather, and that the ſaid leaſehold eſtates had been diſpoſed of out of the family by the ſaid *Edward Vernon*, or his repreſentatives, and were very deſirable to be enjoyed with the reſpondent's ſaid ſeat; and therefore he requeſted of Lord *Edgecumbe*, as a matter of favour, that a reverſionary leaſe of the ſaid parks might be granted to him, to commence on the expiration of the leaſe then ſubſiſting. With this requeſt Lord *Edgecumbe* complied; and accordingly a leaſe of theſe premiſes was granted on 12th of *May* 1755 to the reſpondent for nine years and a half to commence in *Mich.* 1776, when the term of 63 years, granted by the leaſe of 1678, would expire: and for this leaſe the reſpondent paid a fine of 200*l.* In the year 1765, the reſpondent preſented a petition to Lord *Strange*, then Chancellor of the Duchy of *Lancaſter*, praying a grant to him of the ſaid parks and premiſes for ſuch further term, as, together with the terms then ſubſiſting, would make up 21 years. And in the years 1766 and 1768, two petitions were preſented by the appellant to Lord *Strange*, praying, that a leaſe might be granted to him of the ſaid parks for ten years and a half, to commence from the 5th of *April* 1786, when the leaſe now in queſtion would expire, or for ſuch other term as to his lordſhip ſhould ſeem meet. In purſuance of an order made by Lord *Strange*, the matter of theſe petitions, on the part both of the appellant and reſpondent, came on to be heard before his lordſhip, in the preſence of counſel for the parties, on the 8th of *April* 1768, when his lordſhip declared, that the tenant-right or lord's favour of renewal of the leaſe was in the appellant; and diſmiſſed the reſpondent's petition, but ſuſpended for the preſent all proceedings upon the matter of the appellant's petition, ſo far as the ſame reſpected the new leaſes prayed.—In *Hilary* term 1773, the appellant filed a bill againſt the reſpondent in the Exchequer, by which he prayed, that the reſpondent might be declared a truſtee for him, as to the leaſe granted in 1755, and might be decreed to aſſign the ſame to the appellant for his own uſe and benefit; the appellant thereby offering to pay the reſpondent the fine of 200*l.* and all reaſonable expences incurred in obtaining that leaſe, together with intereſt for the ſame from the reſpective times of payment. And as a ground for ſuch relief, the bill charged, that when the ſaid leaſe was obtained, the appellant was an infant of ſeven years of age; that the reſpondent had preſented the petition, upon which that leaſe was granted, without the privity of the appellant's mother, in whom the poſſeſſion of the premiſes then was; that no mention was made in that petition, as uſual in ſuch caſes, of any term or intereſt ſubſiſting in another perſon, nor any notice given to the appellant's mother of the application for ſuch leaſe, but, on the contrary, the whole tranſaction was induſtriouſly concealed from her; and that the petition for obtaining ſuch leaſe had unduly ſtated, that the reſpondent would have been entitled to the premiſes, if *Edward Vernon* had not diſpoſed thereof; but the appellant charged, that the reſpondent was not of kindred to *Edward Vernon*. To this

bill the reſpondent filed a demurrer; on the argument of which, two of the barons were of opinion, that the demurrer ſhould be allowed, and the other two were againſt the allowance of it, thinking, that the appellant ought to have the ſatisfaction of an anſwer to the bill, eſpecially to ſuch part thereof as ſought a diſcovery of facts. Upon this the reſpondent put in an anſwer, in which he admitted, that when the leaſe was granted to him, the appellant was an infant; and that he did not give notice to the appellant's mother, when he applied to Lord *Edgecumbe* for a grant of the leaſe; but he denied that he had induſtriouſly concealed the tranſaction from her, and inſiſted, that he was not in any reſpect bound to diſcloſe it to her, or to inform Lord *Edgecumbe* that ſhe had at that time any intereſt in the premiſes; for that he had been informed, and believed, that until Lord *Strange* became Chancellor of the Duchy, no certain rules had ever obtained with reſpect to granting leaſes of Duchy lands; but that the Chancellor of the Duchy for the time being had always been uſed to grant leaſes of eſtates held thereof to ſuch perſons as he thought fit, without regard, and without giving notice to the leſſees or tenants in poſſeſſion thereof; and though the reſpondent believed, that previous to the grant of the ſaid leaſe to him, and after his perſonal application to Lord *Edgecumbe*, and his compliance with the reſpondent's deſire, a petition had been preſented to Lord *Edgecumbe*, to the effect ſtated by the appellant, yet that ſuch petition was prepared as a matter of courſe, and in compliance with the forms of the office, without the reſpondent's direction or privity, and to the beſt of his remembrance was not ſigned by him; and he declared by his anſwer, that he never did aſſert, either to Lord *Edgecumbe*, or any other perſon, that he ſhould have been entitled to the ſaid leaſehold premiſes, had they not been diſpoſed of by the ſaid *Edward Vernon*, nor did he obtain the ſaid leaſe on any ſuch or the like ſuggeſtion, but merely as being heir-male of the ſaid *Edward* and *Henry Vernon*, and of the ſenior branch of the *Vernon* family, and in poſſeſſion of the family ſeat and eſtates in the neighbourhood of the ſaid leaſehold premiſes, and as a matter of friendſhip from Lord *Edgecumbe*, and a favour from the crown to the reſpondent, whoſe relation *Edward Vernon*, originally obtained the grant of the ſaid parks from King *Charles* the Second in conſideration of many acceptable ſervices, and in particular of money, to a conſiderable amount, advanced to the king during his exile at *Breda*.—To this anſwer the appellant replied, and paſſed publication, but did not examine any witneſſes. —Upon the hearing of the cauſe, *Feb.* 24th, 1775, the court was equally divided, the Lord Chief Baron *Smythe* and Mr. Baron *Eyre* being of opinion, that the bill ſhould be diſmiſſed; Mr. Baron *Perrot* and Mr. Baron *Burland* being of opinion, that the reſpondent ſhould be declared a truſtee of the leaſe in queſtion for the benefit of the appellant. In conſequence of this equal diviſion the cauſe was to have been heard before the Chancellor and Barons of the Exchequer, but before it came on Mr. Baron *Perrot* died, and therefore it was recommended by the court to the parties

that the bill ſhould be diſmiſſed without farther argument, in order that the appellant might appeal; and the bill was thereupon ordered to be diſmiſſed, but without coſts. Upon the appeal, the Lords affirmed the order of diſmiſſal, but without prejudice to any application which the appellant had made, or might make, to the officers of the crown, as to the manner of their executing, in this caſe, the truſt repoſed in them by his Majeſty.

Where a leſſor has *expreſsly* covenanted to renew, what ſhall be the extent of ſuch covenant, whether it ſhall be ſatisfied by the leſſor's once renewing, or whether it ſhall amount to an engagement for a perpetual renewal, is a queſtion, the deciſion of which muſt depend upon the words in which the covenant may be expreſſed, and the conduct of the parties, and particular circumſtances of each caſe.

In a demiſe of corn-mills for 21 years, there was a covenant on the part of the leſſor, that "if the leſſee, his executors, *&c.* "ſhould, before the expiration of the term, be minded to renew, "then, upon application, *&c.* the leſſor, his heirs or aſſigns, "ſhould grant ſuch further leaſe, as ſhould by the leſſee, his exe- "cutors, *&c.* be deſired, without any fine to be demanded there- "fore, *and under the ſame rents and covenants only* as in the then "leaſe." The queſtion was, whether there muſt be a covenant for renewal again in the ſecond leaſe? The court of Exchequer were of opinion, that under the words *the ſame rents and covenants*, the covenant for renewal ought to be inſerted; and on appeal to the Houſe of Lords, their decree was affirmed. Bridges v. Hitchcock, 1 Br. P. C. 522.

Again, in a leaſe for three lives, the leſſor covenanted, that he, his heirs, *&c.* ſhould and would (in conſideration of a certain ſum to be paid to him, *&c.* at *Crewe Hall*, or at the place where the ſaid Hall then ſtood, in the name of a fine, for adding one life to the remaining lives therein before mentioned) execute one or more leaſes, *under the ſame rents and covenants* which were expreſſed in the then leaſe, *and ſo to continue the renewing of ſuch leaſe or leaſes* to the leſſee or his aſſigns, paying as aforeſaid to the leſſor, his heirs or aſſigns, the ſum before mentioned for every life ſo added or renewed from time to time. Lord *Hardwicke* held this to be a covenant for perpetual renewal, and decreed a new leaſe to be granted to the aſſignee of the original leſſee with a covenant inſerted in it to that effect. Furnival v. Crewe, 3 Atk. 83.

Again, in ſuch a leaſe, the leſſor had covenanted, that if the leſſee, his heirs, *&c.* ſhould be minded, upon the falling in of any of the lives, to ſurrender the demiſe and take a new leaſe; and thereby add a new life to the then two in being in lieu of the life ſo dying, that he, the leſſor, his heirs, *&c.* upon payment of ſo much for every life ſo to be added, in lieu of the life of every of them ſo dying, would grant a new leaſe for the lives of the two perſons named in the former leaſe, and of ſuch other perſon, as the leſſee, his heirs, *&c.* ſhould nominate in lieu of the perſon named in the preceding leaſe, as the ſame ſhould reſpectively die, under *the ſame rents and covenants. There had been ſucceſſive renewals from the time of the firſt leaſe; and in every leaſe the like* Cook v. Booth, Cowp. 819.

covenant for renewal had been inſerted. The court of King's Bench held, that the leſſors, *by their own acts* had conſtrued this to be a covenant for perpetual renewal.

Hyde v. Skinner, 2 P. Wms. 196.

But where a leſſor covenanted to renew the leaſe at the ſame rents and upon the ſame covenants on the requeſt of the leſſee within the term, Lord *Macclesfield* held, that though the new leaſe was to be made on the ſame covenants, yet that ſhould not take in the covenant for the renewing of the new leaſe, foraſmuch as then the leaſe would never be at an end.

Ruſſell v. Darwin, 2 Br. Ch. Rep. 639. n.

So, where in a leaſe for years determinable upon lives, the covenant was, that the leſſor would, upon the death of any of the appointees (by name), add a new third life upon payment of 200*l.* within ſix months; or upon the death of two of them (by name) within ſix months add two new lives upon payment of 500*l.*; or upon the death of all of them (by name) would, upon payment of 1150*l.* make a new leaſe or grant for any three new lives to be nominated and appointed by the leſſee, his executors, *&c.* for the like term as was thereby demiſed, *at and under the like rent, covenants, and agreements therein contained*; Lord *Camden* was of opinion, that the leſſors were not under any obligation to grant any farther leaſe than for three lives only, and that the leſſee was not entitled to have any covenants inſerted for a farther renewal; the words of the covenant not requiring the leſſor to grant a new leaſe, but upon the death of ſome one of the perſons named in that leaſe, and when they were all dead, no further renewal could be claimed.

Tritton v. Foote, 2 Br. Ch. Rep. 636.

So, under a covenant in a leaſe for 21 years, that the leſſor, his executors, *&c.* would, at the end and determination of the ſaid term of 21 years, execute a new leaſe of the demiſed premiſes, for the further term of ſeven years, to commence from the end of the ſaid term of 21 years, thereby demiſed, *ſubject to the ſame rents, and purſuant to the ſame exceptions, covenants, reſervations, conditions, and agreements in all reſpects, as were in and by the then granted indenture of leaſe mentioned and expreſſed*, in caſe the leſſee, his executors, *&c.* ſhould deſire the ſame; the leſſee, his executors, *&c.* firſt giving twelve months notice in writing to the leſſor, his heirs or aſſigns, of his or their deſiring ſuch farther term of years as aforeſaid; Lord *Thurlowe* held the leſſee entitled to a leaſe for ſeven years only, it appearing that the leſſee himſelf had put that conſtruction upon it.

Vipont Charles v. Rowley, Ca. in the Houſe of Lords, 1774.

Sir *A. Langford* Bart. being ſeiſed in fee of ſeveral farms and lands in the county of *Meath*, on the 22d of *March* 1697, demiſed the ſame to *John Charles*, his heirs, executors, adminiſtrators, and aſſigns, during the lives of *Alice Charles* his wife, *Richard Charles* their eldeſt ſon, and *John Ward*, and the longeſt liver of them, at the rent of 366*l.*, payable half-yearly, with the following clauſes of renewal, *viz.* "That if the ſaid *John Charles*, his heirs, exe-
"cutors, adminiſtrators, and aſſigns, within one full year next
"after the deceaſe of any of the ſaid perſons, for whoſe lives the
"preſent demiſe and leaſe is taken, ſhall pay 100*l.* of good and
"lawful money, within the like ſpace and time next after ſuch
"deceaſe

" deceaſe as aforeſaid, by way of fine, to the ſaid Sir *A. Lang-*
" *ford*, his heirs and aſſigns, he the ſaid Sir *A. Langford*, his heirs
" or aſſigns, to whom ſuch payment of 100*l.* ſhall be made as
" aforeſaid, having then the immediate inheritance of the ſaid
" lands and premiſes, and ſuch perſon or perſons that ſhall make
" ſuch payment of the ſum of 100*l.* by way of fine, then having
" two lives ſtill in being, and undetermined of this demiſe; and
" the ſaid perſon or perſons then paying the ſum of 100*l.* by way
" of fine as aforeſaid, then likewiſe tendering to the ſaid Sir *A.*
" *L.*, his heirs and aſſigns, having the immediate inheritance of
" the ſaid lands and premiſes, a pair of deeds of indenture of
" leaſe, fairly drawn and ingroſſed on parchment, purporting a
" deed of all and ſingular the ſaid lands and premiſes, for the ſaid
" two ſurviving lives, mentioned and contained in theſe preſents,
" and for the life of ſuch other perſon as ſhall be nominated and
" appointed by ſuch perſon and perſons, paying ſuch ſum of
" 100*l.* by way of fine, and for the natural life of the longeſt
" liver of them, and under ſuch reſervations of rent, covenants,
" conditions, agreements, and clauſes of renewal, as in the ſaid
" indented deeds are ſpecified and contained;—that then, and in
" ſuch caſe, he the ſaid Sir *A. L.*, his heirs or aſſigns, having the
" immediate inheritance of the ſaid lands and premiſes, and hav-
" ing received the ſaid fine of 100*l.*, ſhall ſeal, deliver, and per-
" fect ſuch new indenture of leaſe, ſo to be preſented as aforeſaid.
" —Provided, that the perſon or perſons paying the 100*l.* fine
" as aforeſaid ſhall, at the ſame time, deliver and perfect, as his
" act and deed, a counter-part of ſuch new indenture of leaſe,
" and make ſufficient ſurrender of the remaining intereſt hereby
" granted, and deliver up this preſent indenture to be cancelled.
" And it is further concluded and agreed by and between the ſaid
" parties to the ſaid indented deed, that the ſaid Sir *A. L.*, his
" heirs and aſſigns, having the immediate inheritance of the ſaid
" lands and premiſes, ſhall, from time to time, and at all times
" for ever hereafter, make all ſuch further and other renewals
" and leaſes of the ſaid lands and premiſes, unto the ſaid *John*
" *Charles*, his executors, adminiſtrators, and aſſigns, for three
" lives, *viz.* the two remaining lives, and one other life to be no-
" minated, at and under the reſervations of rents, covenants, con-
" ditions, agreements, and clauſes of renewal, as in the ſaid in-
" dented deed are ſpecified and contained.—Provided, that the
" parties requiring ſuch renewal pay unto the ſaid Sir *A. L.*, his
" heirs or aſſigns, having the immediate inheritance of the ſaid
" lands and premiſes, the ſum of 100*l.* by way of fine, for every
" and each renewal, within the year next after the deceaſe of
" each of the ſaid lives reſpectively. And provided, that all
" former leaſes thereof be then ſufficiently ſurrendered and can-
" celled." There was no covenant on the part of the leſſee to pay the fine on renewal, or to accept a new leaſe *toties quoties*: nor was any fine paid on the execution of this leaſe. *John Charles* entered and had poſſeſſion under the leaſe. On the 9th of *March* 1710, *Alice Charles*, one of the *ceſtuy que vies*, died, but no appli-

cation was made for a renewal within the year, or for many years afterwards, though the leſſee was frequently preſſed by Sir *A. L.* to clear his arrears of rent, and take a renewal. In 1716 Sir *A. L.* died, having deviſed the eſtate to his nephew *Hercules Rowley*, the reſpondent's late father. In 1719 the leſſee *John Charles* firſt made application for a renewal of the leaſe, and he then tendered to Mr. *Rowley* 100 *l.* as a fine for the renewal, with intereſt from the 9th of *March* 1711, being after *Alice Charles* the *ceſtuy que vie*'s death, together with a further 100 *l.* for a ſecond renewal, (upon a ſuppoſition that if the leaſe had been regularly renewed on the 9th *March* 1711, and a life then inſerted, ſuch life would have ſubſiſted no longer than ſeven years,) and intereſt alſo upon that laſt ſum. He at the ſame time tendered a pair of leaſes, purporting a renewal for the life of *Thomas Hendrick* in the room of *Alice Charles*. Theſe tenders being refuſed, and the renewal denied, *John Charles* immediately filed a bill againſt Mr. *Rowley* in the court of Exchequer in *Ireland*, *inter alia*, to compel him to renew. By a decree of that court of the 21ſt *February* 1723, this bill, ſo far as it related to a renewal of the leaſe, was diſmiſſed. No motion was made to re-hear the cauſe; nor was there any attempt to reverſe the decree. In 1746 *Richard Charles*, another of the *ceſtuy que vies* named in the leaſe, died, and within a few days of the expiration of the year after his death, a propoſal was made to the reſpondent on the behalf of the appellant, who was the grandſon of *John Charles* the original leſſee, and entitled to an eſtate-tail in this leaſehold eſtate under his will, for a renewal. This propoſal the reſpondent refuſed to accede to, but apprehending from it that the appellant intended to purſue his claim to renewal, and being deſirous that ſuch claim ſhould be brought to an early deciſion, he wrote to the appellant, offering to do every reaſonable act to contribute to bring the matter to a concluſion with all poſſible diſpatch. The appellant, however, acquieſced above ſix years longer, till 17th *September* 1754, when he filed a bill in nature of a bill of revivor of the ſuit which had been diſmiſſed in 1723. But this bill, after ſeveral amendments and demurrers, was diſmiſſed at the appellant's own requeſt in *Trinity* term 1759; and in the *Michaelmas* term following he filed another bill as a new original bill, praying, that the reſpondent might be compelled to renew the leaſe of the premiſes, by executing a new leaſe thereof for the lives of the ſaid *John Ward*, his preſent majeſty, and the duke of *York*, with ſuch reſervations, conditions, covenants, clauſes, and agreements as ſpecified in the leaſe made to *John Charles*, upon the appellant's making ſuch compenſation or ſatisfaction to him for the ſame as to the court ſhould ſeem juſt and equitable; and that the appellant might have an allowance for the coſts and expences ſuſtained by *John Charles*, and might be quieted in the poſſeſſion of the lands; and that the reſpondent might be enjoined from proceeding at law concerning the premiſes till the hearing. To ſo much of this bill as ſought a renewal of the leaſe; that the appellant might be quieted in the poſſeſſion of the premiſes; and the reſpondent be enjoined from proceeding at law

law; or a diſcovery of ſuch matters as were, or might have been in iſſue in the former cauſe, on certain particulars, which were afterwards anſwered, the reſpondent pleaded in bar the former bill and decree in the court of Exchequer in 1719 and 1723. This plea came on to be argued before the court of Exchequer on 30th *December* 1763, when the court allowed the plea, but without prejudice to ſuch other methods of proceeding as the appellant might be adviſed to take, in order to obtain the relief ſought by his bill. This order however was reverſed by the Houſe of Lords in *England*, and the plea was directed to ſtand for an anſwer, with liberty to except and to ſave the benefit thereof to the hearing. On the 20th of *May* 1765 *John Ward*, the laſt *ceſtuy que vie*, died, and the bill being amended in order to put that in iſſue, the cauſe came on to be heard on the 12th of *November* 1772, when it was decreed by the court of Exchequer that the bill ſhould be diſmiſſed, but without coſts. From this decree the appellant appealed to the Houſe of Lords, where it was affirmed. Apr. 14th, 1764.

By articles in writing of 4th *October* 1734, *James Hamilton* demiſed to *Guſtavus Hamilton* the reſpondent's father, lands and mills in the county of *Monaghan*, to hold for the lives of the ſaid *Guſtavus Hamilton* and his two eldeſt ſons, the reſpondent and *George Hamilton*, and the ſurvivor of them, at the yearly rents therein mentioned, which the ſaid *Guſtavus* covenanted to pay: and it was agreed, that leaſes ſhould be perfected at the requeſt of either party, containing a covenant of re-entry and diſtreſs, as alſo *a covenant of renewal for ever, paying half a year's rent as a fine in ſix months after the fall of every life then named, and thereafter to be named.* At the time when this demiſe was made, the fee of *James Hamilton*'s eſtate was in fact in *Nathaniel Kane*; a mortgagee of it, to whom it had been conveyed abſolutely, by under-tenant leaſe and releaſe in 1729: but Mr. *Kane* had permitted Mr. *James Hamilton* to continue in poſſeſſion of it, and verbally promiſed to re-convey it to him, upon his re-payment of the purchaſe-money and intereſt within five or ſix years. Mr. *J. H.* however, not having re-paid the money within that time, Mr. *Kane* entered into poſſeſſion, and ſhortly afterwards applied to *G. H.* to attorn tenant. In anſwer to this application *G. H.* ſaid, that the rent was too high, and that he would give up the lands unleſs Mr. *K.* let them to him at a lower rent. Mr. *K.* thereupon conſented to refer the yearly value of the lands to the conſideration of two perſons, who valued them at 30*l.* a year; in conſequence of which Mr. *K.* conſented to *G.*'s continuing tenant at will at that rent. About the year 1752, *G. H.* being in arrear for the rent of the ſaid premiſes, requeſted Mr. *K.* to take them off his hands, and to forgive him the arrears; upon which Mr. *K.* directed his agent, *John Speer*, to conclude this buſineſs with *G. H.* on his own terms. *Speer* and *Hamilton* accordingly ſettled matters between themſelves, and the latter, about *November* 1752, gave up the poſſeſſion of the lands to Mr. *K.*, either by a formal ſurrender, or by ſome writing purporting in ſubſtance to be a ſurrender, of which *Speer* ſoon after informed Mr. *K.*, who reſted ſatisfied with Kane v. Hamilton, Ca. in the Houſe of Lords, 1776.

his account of the tranſaction without making any further inquiry. Soon after this, *G. H.* came to *England*, where he reſided till *Auguſt* 1755, when he died inteſtate, leaving the reſpondent his eldeſt ſon and heir. In 1757 Mr. *Kane* died, and the appellant his ſon and heir entered, and continued in quiet poſſeſſion of the premiſes from that time till the year 1763, when the reſpondent applied to him for a renewal of the leaſe, purſuant to the articles. This being the firſt intimation the reſpondent received of the articles, or that any perſon claimed any intereſt in the eſtate under *G. H.* he communicated the ſame to his agent *Edmund Weld* in *Ireland*, he being himſelf at that time in *England*, and directed him to make ſtrict inquiry into the reſpondent's claim. *Weld* accordingly wrote to *Speer*, informing him of the claim; and received an anſwer from him, in which he ſtated, that *G. H.* had made an actual ſurrender of the leaſe, which he (*Speer*) had given to Mr. *Kane*, and that he (*Speer*) had another actual ſurrender of it to Mr. *K.* A copy of this letter was ſent by the appellant to the reſpondent, who never made any further claim during *Speer*'s life, but ſoon after his death he filed a bill againſt the reſpondent in the Exchequer, praying to be reſtored to the poſſeſſion of the premiſes, and that the appellant might be obliged to perfect leaſes thereof to him, renewable for ever, at the yearly rent of 36*l.*, and to account with him for the rents and profits ſince the death of *G. H.*, and pay him what ſhould appear to be due on ſuch account. The reſpondent having put in his anſwer, and iſſue being joined, the appellant filed a croſs bill, praying that the reſpondent in the original bill might ſearch the papers, books, and entries of the ſaid *Guſtavus Hamilton*, and if there was any copy or entry of the ſaid ſurrender, or any letter or acknowledgment from the appellant of his acceptance thereof, or relative thereto, that he might ſet forth the ſame *in hæc verba*, and might bring the ſame into court. It appeared, and was ſo admitted by the reſpondent's anſwer to the croſs bill, that upon the death of *George Hamilton*, one of the *ceſtuy que vies*, in 1747, no application was made to Mr. *K.* for a renewal, nor was any ſtep taken to enforce a ſpecifick execution of the articles, or to have a life inſerted in his ſtead. It was alſo admitted by the reſpondent in his anſwer, that the great riſe in the value of lands in *Ireland* ſince the year 1752, was the main inducement with him to attempt the recovery of the poſſeſſion of this eſtate. But the reſpondent ſaid, that he had been informed by *G. H.* that he never had made any ſurrender of the leaſe; in anſwer to which the appellant offered in evidence ſeveral letters of *Speer* to prove the fact of ſurrender; but theſe letters the court rejected, and decreed, that the reſpondent was entitled to a leaſe for three lives renewable for ever, and diſmiſſed the croſs bill with coſts. Upon appeal to the Houſe of Lords in *England*, this decree was reverſed, and the reſpondent's original bill was diſmiſſed.

Feb. 7th, 1776.

Bateman v. Murray, Caſes in the Houſe of Lords, 1779.

Edward Edwards being ſeiſed in fee of the manor of *Haſtings*, and the lands therein compriſed, ſituate in the county of *Tyrone*, by indenture bearing date the 28th *October* 1685, gave, granted, enfeoffed,

enfeoffed, and in fee-farm let unto *Thomas M'Cauſland*, his heirs and aſſigns, the two town-lands of *Claraghmore* and *Seagully*, being part of the lands compriſed in the ſaid manor, to hold the ſame to him, his heirs and aſſigns, in fee-farm for ever, *viz.* for the term of his natural life, and the natural lives of his two ſons, *Andrew* and *John M'Cauſland*, and the longeſt liver of them, at the clear yearly rent of 15 *l.* ſterling, with two year old bullocks and one fat mutton. In the indenture there was contained (*inter alia*) a power of entry and diſtreſs for the rent, when in arrear, and an agreement, *that upon payment to the grantor or his heirs or aſſigns, of the ſum of* 7 l. 10 s. *ſterling, within three months after the fall of each of the ſaid lives, he or they would add another life inſtead thereof, by a new indenture, continuing three lives for ever;* and a further agreement, that the ſaid *Thomas M'Cauſland*, his heirs and aſſigns, ſhould make appear, at every *Eaſter* court-leet, and view of frankpledge, to be holden for the ſaid manor, by two ſufficient witneſſes duly ſworn, that the ſaid three lives were then in being, in default whereof, it ſhould be lawful for the ſaid *Edward Edwards*, his heirs or aſſigns, to diſtrain for the ſaid fine, although all the ſaid lives ſhould be then in being. But there was not any power of re-entry reſerved to the grantor, in caſe of non-payment of the ſaid rent or fines, nor was there any clauſe which declared the rent void, if the grantee ſhould neglect to renew. In the year 1708, the original indenture and the lands therein compriſed having become veſted in the reſpondent's grandfather *James Murray*, and it being doubtful whether two of the lives, named in that deed, had not fallen, the eſtate was renewed by *Thomas Edwards*, the ſon and heir of the grantor, according to the terms of the original, and two new lives were inſerted in the room of thoſe ſuppoſed to be fallen. In 1724 *James Murray* conveyed his intereſt in the eſtate to his ſon *George Murray*, by virtue of which he entered into poſſeſſion, and enjoyed the lands till his death; and during all that time paid the reſerved rent. The ſaid *Thomas M'Cauſland*, one of the lives named in the deed of renewal of 1708, died in the year 1741; *James Murray*, another of the ſaid lives, died in the year 1746; and the ſaid *George Murray*, the other of the ſaid lives, died in 1763 inteſtate, leaving the reſpondent *Sophia* his widow, and the reſpondent *William* his eldeſt ſon and heir, then a minor, who thereupon became entitled to the ſaid lands, under a marriage ſettlement, ſubject to a jointure to the reſpondent *Sophia* his mother. At this time, the appellant, the Counteſs of *Roſs*, who was the grand-daughter of *Thomas Edwards*, under whom the leaſe was renewed, and who was entitled to theſe lands under her father's will, reſided in *England*, where ſhe continued till ſome time in the latter end of the year 1763, or the beginning of 1764. Soon after her return to *Ireland*, the reſpondents cauſed deeds of renewal to be prepared, purſuant to the covenants for that purpoſe in the original indenture of *October* 1685, and ſent the ſame to the counteſs, with a ſum of money, as they alleged, ſufficient to pay her all the renewal fines, with intereſt, which would be due to her on her executing ſuch deeds of renewal. Inſtead of complying

complying with this application, the counteſs brought an ejectment, in *Eaſter* term 1763, for the recovery of the premiſes in queſtion; upon which, before any judgment was obtained, the reſpondents in *June* 1765 filed their bill in the court of Chancery in *Ireland* againſt the appellants, PRAYING, That ſhe might be compelled to execute a new leaſe of the premiſes in queſtion, purſuant to the covenant for renewal in the ſaid original indenture of *October* 1685, under the rents and with the covenants in the ſaid indenture contained; and that ſhe might be reſtrained in the mean time by injunction from proceeding in the ſaid ejectment. The appellant, Lady *Roſs*, by her anſwer inſiſted, that the reſpondents were not entitled to a renewal upon two grounds; the one was, an agreement made between *James* and *George Murray* with her father *Hugh Edwards*, and in part carried into execution, for the purchaſe of their intereſt in the premiſes; the other was, that neither *George Murray* nor the plaintiffs had complied with the terms of the covenant for renewal, by not paying or tendering the fine within three months after the death of the lives. Iſſue being joined, ſeveral witneſſes were examined on each ſide. The cauſe came on to be heard before the Chancellor of *Ireland* on the 20th of *July* 1772, when the following iſſues were directed to be tried, *viz.* Whether any, and what agreement was entered into by the ſaid *James* or *George Murray* for a ſale of their intereſt in the ſaid lands, and of the ſaid leaſe thereof? And in caſe there was any agreement, whether the ſame was carried into execution, or whether the ſame was varied, or departed from, by the parties thereto, or either of them? The jury by their finding, negatived any ſuch agreement at all. The cauſe afterwards came on to be heard on the judge's certificate and merits, when the reſpondents' right of renewal was conteſted on the ground of laches in having neglected to renew; but the Chancellor was pleaſed, on the 22d *April* 1777, to order and decree, that the reſpondents were entitled to a renewal of the ſaid leaſe, according to the true purport and intent of the ſaid deeds of *October* 1685 and *November* 1708, upon payment of the ſeveral fines and intereſt; and of the rent and arrears of rent and duties become due. From this decree, and the ſaid decree or order of 20th *July* 1772, the appellants appealed to the Houſe of Lords in *England*, when their lordſhips were pleaſed to order and adjudge that the decrees be reverſed, and the reſpondents' bill diſmiſſed.

Feb. 18th 1779. This reverſal, though perfectly conſonant to Engliſh principles, gave great diſſatisfaction, and occaſioned conſiderable alarm in Ireland. It was ſaid to claſh with a *local equity*, *the old equity of that kingdom*, where theſe leaſes were conſidered on both ſides as a kind of inheritance; where they had been introduced ſoon after the country was recovering from the convulſions of the great rebellion in the laſt century, for the purpoſe of raiſing an uſeful and reſpectable tenantry, and the improvement of agriculture, and where, upon that policy, they had ever been protected and preſerved by the courts of equity, whoſe practice it had invariably been, to fill up the lives, upon the tenant's neglect to renew, provided there was one life ſtill ſubſiſting, that is, provided there was a legal eſtate for the equity to attach upon. In conſequence therefore of this alarm, an act was paſſed in the 19th and 20th of the King, c. 30. which revives the *old equity*, and provides, that in all caſes of mere neglect, where no fraud appears to have been intended, no dereliction on the part of the tenant, in neglecting or refuſing to renew after the landlord has demanded the fine, courts of equity ſhall relieve upon an adequate compenſation being made. See Vernon and Scriven's Reports of Caſes in Ireland, p. 135. and the caſe of Magrath v. Lord Muſkerry in the ſame book, p. 166.

In a leaſe granted in 1739, by the mayor and burgeſſes of *Leominſter* for 99 years, determinable on three lives, there was a covenant on the part of the leſſors, "that they and their ſucceſſors, when and as often as either of the ſaid three lives ſhould die, and there ſhould be *only two lives remaining in the premiſes*, if the leſſee, her executors, adminiſtrators, or aſſigns, ſhould, within the ſpace of ſix months next enſuing the deceaſe of ſuch life, or at the firſt or ſecond chamber which ſhall be held after the expiration of the ſaid ſix months, apply for a new leaſe of the ſaid premiſes, and pay a fine of 4 *l.* for a new leaſe of the ſaid premiſes, and pay the ſum of 4 *l.* to the bailiff, *&c.* with ſix months intereſt for the ſaid 4 *l.*, after the rate of 5 *l. per cent.* the ſaid bailiff, *&c.* ſhould add a third life in the ſaid premiſes, and grant to her or them a new leaſe of the ſaid premiſes for 99 years, to commence from the time of ſuch payment, if the two other lives, and ſuch other life as ſhould be nominated by the ſaid leſſee, her executors, *&c.* or either of them, ſhould ſo long live, under the like rents, covenants, and agreements, and to the ſeveral uſes and truſts therein before declared, and ſo *from time to time ever after*, as often as the caſe ſhould ſo happen." There were ſeveral renewals of this leaſe on account of the death of the *ceſtuy que vies*: the laſt was in the year 1763, and the lives for which the leaſe was then granted, were *Adam Ward* and *Mercy* his wife, and the plaintiff's. In 1764 *Adam Ward* aſſigned for a valuable conſideration the beneficial intereſt in the leaſe to the plaintiff, who entered under ſuch aſſignment. *Adam Ward* died in 1781 and his wife in 1789, and ſoon after her death, the plaintiff applied to the corporation for a new leaſe, offering to pay them 4 *l.* with intereſt from the death of *Adam Ward*, and alſo 4 *l.* as a fine for renewal, on the death of *Mercy Ward*, and a further ſum of 4 *l.* upon a ſuppoſition, that if plaintiff had renewed the leaſe on the death of *Adam Ward*, by putting in another life, ſuch other life might have fallen in between the death of *Adam Ward* and *Mary Ward*. This the corporation refuſed, inſiſting, that no application having been made to renew till the falling in of the ſecond life, they were not bound to renew upon the terms of the covenant, but were at liberty to impoſe ſuch terms as they pleaſed. It was contended on the part of the plaintiff, that, although the covenant was only to renew on the falling in of one life, yet the ſpirit of the covenant extended to the caſe of two lives falling in: that the caſe lay in compenſation, and that no forfeiture is to be incurred when compenſation can be made. But Lord Chancellor ſaid, the caſes upon *Iriſh* leaſes in the Houſe of Lords went the whole length of this caſe; that the plaintiff was not bound to renew upon the falling in of one life; he had his election whether to renew or not, and has made that election; the corporation therefore are not bound now to renew. It has been determined over and over in the *Iriſh* caſes.

Bayley v. the Corporation of Leominſter, 3 Br. Ch. Rep. 329.

However, where a compenſation can be made, where the tenant's neglect can be reaſonably accounted for, it is the general diſpoſition

diſpoſition of courts of equity to relieve in a lapſe of this kind. The meaſure of compenſation introduced in *Ireland* by the Lord Chief Baron *Gilbert* was, by allowing the leſſor ſeptennial fines; that is, by giving him a fine for every ſeven years which had lapſed ſince the fall of a life, and intereſt upon each fine from the time of its being ſuppoſed to have accrued due, calculating from the probabilities of human life, that if another life had been added at the regular period of renewal, the duration of ſuch life would not have exceeded the term of ſeven years. This was firſt done in one of the Duke of *Ormond*'s leaſes: the Duke had granted a leaſe in 1697 for the lives of the leſſee, and his nephew *John Anderſon*, and *V. B.*, and of the ſurvivor, and had covenanted "that as often as any of the lives ſhould happen to fail, he would "at the requeſt of the leſſee, his heirs or aſſigns, and upon "payment of all rents of the ſaid premiſes, that ſhould be then "in arrear; and advancing and paying, by way of fine, within "twelve calendar months next after the death of each life, 16*l.* "13*s.* 4*d.*, renew, and make a new leaſe of the ſaid ſeveral "lands, &c. to the leſſee, his heirs and aſſigns, at and under the "yearly rent and reſervations, and with the covenants, conditions "and proviſos contained in the ſaid leaſe; with the like clauſe "for being diſpuniſhable of waſte, and the like covenant for re- "newal of ſuch two lives, as ſhould be then in being, and alſo for "one other life, to be added in the place and room of ſuch of the "three lives as ſhould, from time to time, happen to fail. Pro- "vided, that, if when ſuch new leaſe or renewal was to be made "more than one of the *ceſtuy que vies* beforementioned ſhould be "dead, there ſhould be named in ſuch leaſe ſo many other lives "in their ſtead; and there ſhould be paid to the perſon renewing "a fine, of the value aforeſaid, for each of the ſaid *ceſtuy que vies* "who ſhould be dead at the time of ſuch renewal." The leſſee himſelf died in 1714, and upon his death the reſpondent, who was the deviſee of this eſtate, applied to the appellant, who had purchaſed the Duke of *Ormond*'s reverſionary intereſt, for a renewal of the leaſe, and that another life might be inſerted in the room of that which had dropped; and at the ſame time tendered the fine of 16*l.* 13*s.* 4*d.*, all rent and arrears being diſcharged; but the appellant refuſed to renew, inſiſting that *John Anderſon*, one of the *ceſtuy que vies*, had been abſent from *Ireland* ever ſince the year 1697, and therefore muſt be preſumed to be dead, and that no tender of a fine for renewal having been made within twelve calendar months after his abſence, the reſpondent had loſt his right of renewal. The reſpondent thereupon filed his bill in the court of Exchequer to oblige the appellant to renew the leaſe by inſerting a new life in the room of the leſſee's: but it appearing that *John Anderſon*, the other *ceſtuy que vie*, had been a long time abſent from *Ireland*, and there being no poſitive proof of his being alive, the court ordered the bill to be amended by inſerting a tender of the fine for the ſecond life; and the reſpondent having made ſuch tender, and amended his bill ac-

Sweet v. Anderſon, 2 Br. P. C. 430.

cordingly

cordingly, they decreed the appellant to renew, and make a new leaſe to the reſpondent for the lives named in the bill, and according to the covenant in the leaſe, on the reſpondent's paying the appellant 16*l.* 13*s.* 4*d.*, with intereſt from the 19th *July* 1704; another ſum of 16*l.* 13*s.* 4*d.*, with intereſt from the 19th of *July* 1711; another ſum of 16*l.* 13*s.* 4*d.*, and intereſt from the 19th *July* 1718; and on the reſpondent's alſo paying to the appellant the ſum of 16*l.* 13*s.* 4*d.*, being the fine due on the death of the leſſee; and all rents in arrear, duties, &c. purſuant to the leaſe. And this decree, upon appeal to the Houſe of Lords, was affirmed.

A leaſe was granted for 21 years, under the yearly rent of 1*l.* with a covenant on the part of the leſſor to renew before the end of the term for 21 years, and to renew from the end of ſuch term for 21, 21, and 15 years more, making in the whole a term of 99 years. It was in effect, and ſo underſtood by the parties to be, a leaſe for 99 years, but the eſtate being copyhold holden of a manor in which no leaſe could be granted for more than 21 years, this mode was neceſſarily adopted in order to avoid a forfeiture. At the expiration of the firſt term, there being an arrear of rent due, and no application made for a renewal, the executor of the deviſee of the leſſor brought an ejectment, and obtained judgment and poſſeſſion. But as when this ejectment was brought, the leſſee was under difficulties, he being then a bankrupt; as it did not appear that there was not a ſufficient diſtreſs upon the premiſes; as on the contrary it appeared, that the leſſee had laid out a large ſum of money upon them; as it was alſo in evidence, that the perſon to whom the leſſee had mortgaged them, had endeavoured to ſtop the ſuit, by a treaty for a new leaſe, which had been refuſed; as the covenant did not expreſsly require any requeſt from the leſſee for further terms;—under all theſe circumſtances, the Maſter of the Rolls held the leſſee entitled to renewal on payment of the arrears of rent with intereſt, and the coſts both at law and in equity. Rawſtorne v. Bentley, 4 Br. Ch. Rep. 415.

That this indulgence in the courts of equity in the caſe of a tenant's neglecting to renew, is not of modern date, and that it hath been long ago carried to a conſiderable extent, will appear from the caſe immediately following, but which is cited for another purpoſe.

A court of equity in decreeing a renewal, will not always adhere to the literal import of the clauſe upon which ſuch renewal is directed to be granted, but will regulate the term according to what it conceives to be the ſpirit and ſound reaſon of the clauſe; as in the following caſes. An eſtate was deviſed for the purpoſe of founding an hoſpital: the truſtees procured letters-patent for that purpoſe, with power for them to make orders and conſtitutions for governing the hoſpital; under which they ordained, that no leaſe ſhould be made for above 21 years, the rent not to be raiſed, nor above three years rent to be taken for a fine, or *greſſom*. The eſtate was originally leaſed at 120*l.* *per ann.* On a bill by the Maſter Watſon v. Hinſworth Hoſpital, 2 Vern. 596.

Maſter and Hoſpital, Sir *Edw. Phillips* decreed the leſſee to enjoy, paying 120 *l. per ann.* and afterwards the caſe was heard again by Lord *Elleſmere*, and although the leaſe was long before expired, his lordſhip decreed the leſſee to account at 120 *l. per ann.* only, and to have a new leaſe for 21 years at that rent, notwithſtanding it appeared the eſtate was, by the tenant's improvements, then worth 250 *l. per ann.* In 1663 it was decreed again by Lord *Clarendon*, aſſiſted by *Hide*, C. J. and *Hale*, C. B. that the leaſe, having been ſome time expired, the tenant ſhould account from the expiration of the leaſe, at 120 *l. per ann.* and that he ſhould have a new leaſe on reaſonable terms, and recommended it to the Archbiſhop of *York*, to call the parties before him, and to certify what terms were thought reaſonable for a leaſe, who certified the hoſpital had agreed to accept a fine of 100 *l.* and 120 *l. per ann.* The preſent tenant having purchaſed the leaſe, and laid out a conſiderable ſum in improvements, filed a bill for renewal.—Lord Chancellor—The conſtitution that the rent ſhould not be raiſed, is juſt and charitable, for the encouragement of the tenant to improve the eſtate; and he ought to find a benefit in it; and the hoſpital will alſo find an advantage in having the rent well ſecured by an eſtate of greater value and conſtantly paid. But the rule or conſtitution is not to be followed according to the letter, that no more rent is to be taken than what was at firſt reſerved; but as times alter, and the price of proviſions, *&c.* increaſes, ſo the rent ought to be raiſed, in proportion. The tenant is entitled to a beneficial leaſe, but not at any certain rent: the conſtitution is not to be regarded in the letter, but in the reaſon of it. His lordſhip therefore referred it to the Maſter to certify the value of what had been laid out in improvements, and when that was aſcertained, he referred it to the Archbiſhop of *York*, to certify what fine and what rent he thought reaſonable.

Attorney-General v. Smith, 2 Vern. 746.

So, where a decree had been made by the Lord *Coventry*, for granting a leaſe of charity lands to *J. S.* (who had been at great expence in recovering them) for 99 years, determinable upon lives, at the rent of one third of the then improved value, to be renewable from time to time for ever without fine according to the value of the lands ſettled by a commiſſion of ſurvey directed by the court for that purpoſe; it was decreed, that the leaſe ſhould be renewed *toties quoties* without fine, but that the rent was not to be computed according to the value of the land at the time of the decree, but according to the real improved value of the eſtate at the time of every renewal.

In mortgages and ſettlements of leaſes of this kind, it is uſual to inſert proviſions for renewal. In mortgages, there is generally an agreement, that if the mortgagor neglects to renew, it ſhall be lawful for the mortgagee to renew, and that the fine and charges of renewal, ſhall be a charge upon the premiſes, and bear intereſt. In ſettlements, there ſhould be a power authorizing the truſtees, from time to time, to renew the leaſes, and for that purpoſe, to raiſe money by mortgage.

Where

Where ſuch a proviſion is not inſerted in a mortgage, the mortgagee cannot indeed compel the mortgagor to renew, but he may do it himſelf, and the money which he may ſo lay out ſhall be added to the principal of the mortgage, and carry intereſt. Manlove v. Ball, 2 Vern. 84. Lucam v. Martins, 3 Atk. 4. 1 Wilſ. 34. S. C.

Upon the omiſſion of ſuch a proviſion in a ſettlement, the expences of renewal are to be borne by the ſeveral perſons intereſted in the eſtate in proportion to their reſpective intereſts. The old rule of aſcertaining this proportion was by making the tenant for life pay one-third of the expence or keep down the intereſt, and the remainder-man the other two-thirds. This rule perhaps may be proper where the nature of the eſtate, the will of the teſtator, or the circumſtances of the caſe compel a renewal; but as a general rule, it would frequently be wrong: for ſuppoſe the deviſee or grantee for life to be one of the perſons upon whoſe life the eſtate is holden, and a renewal to be made by him; in this caſe, as there is no obligation upon him to renew, as the law will not permit him to renew but on the truſts of the ſettlement, and as he cannot poſſibly in any way enlarge his own intereſts, the fine and expence of the renewal muſt, in juſtice, be paid entirely by the remainder-man. This is evidently the caſe, where the deviſee for life has the legal eſtate, and it ſhould ſeem, that it is the ſame, where he is a *ceſtuy que truſt*. Suppoſe again, an eſtate of limited duration, as an eſtate for years, or for the lives of ſtrangers, to be limited to one for life, without any obligation upon him to renew; if ſuch a perſon renew, it is manifeſt, that the contribution of a third muſt, in moſt caſes, be very unfair and unequal. The true rule therefore in ſuch caſe muſt evidently be, that the proportion follow the benefit; that the contribution of a perſon having ſuch limited intereſt in the eſtate, and voluntarily renewing, ſhall only be in proportion to the benefit which he actually derives from ſuch renewal.] 2 Vez. 429. Ambl. 88. 2 Br. Ch. Rep. 244. 2 Vern. 666. 2 Vez. 429. 2 Vez. jun. 652. Addis v. Clement, 2 P. Wms. 459. Nightingale v. Lawſon, 1 Br. Ch. Rep. 440. Stone v. Theed, 2 Br Ch. Rep. 243. If the eſtate be charged with annuities, the annuitants are not bound to contribute to the expence of renewal. Maxwell v. Aſhe, Nov. 6, 1752. 1 Br. Ch. Rep. 444. n.

For further title Leaſes in Appendix.

Legacies and Deviſes.

A WILL and teſtament may be conſidered in two very diſtinct lights according to the different ſubjects upon which it operates, either as it diſpoſes of real, or of perſonal property. A will of lands is a conveyance or donation *mortis cauſâ*, a limitation of the teſtator's eſtate by a revocable act: it conſtitutes no heir, creates no repreſentation, but paſſes the eſtate merely of itſelf without any further act. On the contrary, the conſtitution of an heir is eſſential to a will of perſonal eſtate; for if there be no heir conſtituted, the inſtrument is not ſtrictly and properly a will; and as no teſtamentary diſpoſition of perſonal property can be adminiſtered without the interpoſition of the repreſentative, the law upon the deceaſed's omitting to appoint a repreſentative, or the appointee's refuſing to act, takes upon itſelf to nominate one. The inſtrument in the latter caſe was borrowed from, and is framed upon, the *Roman* law; the inſtrument in the former caſe has no reference to that law; and not having the form of a will properly ſo termed, it has therefore been called a *deviſe*. However, as the reſtraint which the feudal law impoſed upon teſtamentary alienations of lands, and which occaſioned the above diſtinctions, is now taken off; and as the ſtatutes of *H.* 8. have enabled mankind to diſpoſe of real eſtates by will and teſtament, the term "will" ſeems now ſufficiently comprehenſive to be uſed in a general ſenſe; and therefore the word "deviſes" may rather be applied to thoſe parts or clauſes of the will which convey a title to real eſtate, whilſt thoſe parts which relate to perſonal chattels may be diſtinguiſhed by the name of "bequeſts." Not that, though it be now allowed to convey both ſpecies of property by an inſtrument nominally the ſame, the old diſtinctions are therefore entirely obliterated; for the will is ſtill in effect a diſtinct inſtrument, as it relates to the one or to the other ſpecies. To a bequeſt or legacy the aſſent of the repreſentative is required; not ſo to a deviſe, for a deviſe creates no repreſentative. So far as reſpects the perſonalty there is a probate of the whole inſtrument; and the probate is evidence for every legatee; but as to the real eſtate there is no probate, the ſpiritual court having no cognizance of the inſtrument as a deviſe; the will may be void as to one deviſe, and

Domat, lib. 3. § 1.

*** It was the intention of the Editor of the fifth edition of this work to reduce the whole doctrine relating to wills under the head of "Wills and Teſtaments," and with that view, the learning of Deviſes was omitted in the ſecond volume. But it has ſince occurred to him, that an objection might poſſibly be made to this change in the arrangement, inaſmuch as it would be blending that part of the book which is generally attributed to the Chief Baron Gilbert, with the labours of later compilers. He therefore thought it better to abandon the ſcheme he had formed. It was proper, however, to take notice of it here, in order to account for the introduction of the Law of Deviſes under the head of Legacies.

good

ood as to the others; and every ſeveral deviſee muſt make out his itle in a diſtinct cauſe. Nay, ſo diſtinct and independent on each ther are the ſeveral parts of the will conſidered with reference o theſe different kinds of property, that a perſon may affirm the ill as to one, and diſaffirm it as to the other; he may impeach e will *quoad* the deviſes, and yet inſiſt upon taking a benefit nder it *quoad* the perſonalty. Again, the will, as to perſonals, es not ſpeak till after the teſtator's death; whilſt, as to real eſtate, refers to the date. Hence, it will paſs after-gotten property of e former ſort, but not of the latter.

We ſhall firſt treat of Deviſes, and under that head we ſhall nſider,]

A) Who may deviſe Lands, and to whom.

B) Of what Eſtate or Intereſt in the Deviſor he may diſpoſe.

C) What Words paſs a Fee in a Will.

D) What Words create an Eſtate-Tail, or for Life.

E) Of Terms for Years, and uncertain Intereſts by Deviſe.

F) Of Deviſes for Payment of Debts.

G) Of Deviſes by Implication.

H) Of the Diſpoſition of Goods and Chattels by Will, by what Deſcription, and to whom good.

I) Of Executory Deviſes of Lands of Inheritance: And herein of contingent Remainders, and croſs Remainders, as far as they relate to this Place. 192.

K) Of Executory Deviſes of Leaſes for Years: And herein of the Limitation of the Truſt of a Term, as far as it relates to, and agrees with a Deviſe thereof. 304.

L) Of void Deviſes: And herein,

1. By deviſing what the Law already gives, or what the Policy of the Law will not admit. 315.
2. By Incertainty in the Deſcription of the Thing deviſed. 322.
3. By Incertainty in the Deſcription of the Perſon to take. 328.
4. By the Deviſee's dying in the Lifetime of the Deviſor. 33A.

What Circumſtances are neceſſary by the 32 *H.* 8. *c.* 1. and 34 & 35 *H.* 8. *c.* 5. and 29 *Car.* 2. *c.* 3. What ſhall be a Revocation and a new Publication, *vid.* Tit. *Wills.*

(A) Who may deviſe Lands, and to whom.

6 Co. 16. b. Roll. Abr. 608. (a) A conveyance by will was a privilege anciently allowed by the civil law only to perſons in *extremis*, who had not time or aſſiſtance neceſſary to make a formal alienation, was chiefly intended for military men, who were always ſuppoſed to be under thoſe circumſtances, therefore the ceremonies and number of witneſſes required of others were diſpenſed with as to ſoldi though now the rules for military teſtaments are allowed in moſt caſes; but as to lands and houſes, law gave no liberty of diſpoſing thereof by will, except in certain boroughs and places where ſuch cuſt had obtained time out of mind. Show. P. Caſes, 147. Sir Edward Hungerford v. Noſworth (b) That it is not ſufficient that they be able to anſwer to familiar and uſual queſtions. Cro. Jac. 4 6 Co. 23. a.

THE (a) ſtatutes of 32 *H.* 8. *c.* 1. and 34 and 35 *H.* 8. *c.* give this power to all perſons, except infants, idiots, fem coverts, and perſons of (b) *non ſane* memory; and every perſo may be a deviſee within theſe ſtatutes, except bodies politick an corporate; and theſe were excepted becauſe they never anſwere the feudal ſervices, and were reſtrained from purchaſing any lan by the ſtatute of *mortmain*.

(c) 43 Eliz. c. 4. for which *vide* head of Charitable Uſes and Mortmain. Hob. 136.

Yet, ſince the (c) ſtatute of charitable uſes, it has been hel that a deviſe to the principal, fellows, and ſcholars of *Jeſus C lege* in *Oxford*, and their ſucceſſors, for maintenance of a ſchol is good, though ſuch deviſe had been *mortmain* by the ſtatute *wills*. Flood's caſe. Lev. 284. S. P.

2 Vern. 104. Counteſs of Portland and Progers; for this *vide* tit. Baron and Feme.

Although a wife, by reaſon of the ſubjection ſhe is under to h huſband, cannot make a will; yet a woman, whoſe huſband baniſhed for his life by act of parliament, may make a will, a act in every thing as a feme ſole.

Cro. Eliz. 27. Cro. Car. 219. 376. 597. 1 Vern. 244-5.

Alſo, a huſband may bind himſelf by covenant or bond to p mit his wife, by will, to diſpoſe of legacies, &c. and this w be ſuch an (d) appointment as the huſband will be bound perform.

2 Vern. 329. 2 Vez. 141. [Where the huſband ſtipulates, that perſonal property ſhall be enjoye the wife ſeparately, it muſt be ſo enjoyed with all its incidents, and the *jus diſponendi* is one of th Fettiplace v. Gorges, 3 Br. Ch. Rep. 8. And where ſhe has this power over the principal, ſhe neceſſarily have it alſo over its produce and accretions. Gore v. Knight, 2 Vern. 535. Pr. Ch. S. C. Herbert v. Herbert, Pr. Ch. 44. When a feme covert is empowered to make a writing in ture of a will, a writing executed during the coverture will operate as ſuch, Cotten v. Layer, 2 P. W 624. Oke v. Heath, 1 Vez. 139 Duke of Marlborough v. Lord Godolphin, 2 Vez. 75. Sou v. Stonehouſe, *id.* 612.] (d) But it does not operate as a will, neither ought it to be proved i ſpiritual court; for the property paſſeth from him to her legatee, and it is his gift. Mod. 211. although it may not operate ſtrictly as a will, but as an appointment, yet it is of a teſtamentary n and therefore muſt be proved in the ſpiritual court, elſe the legatee cannot entitle himſelf to the be in a court of law. And the regular courſe in the ſpiritual court is, not to give probate of the will adminiſtration, with the will, as a teſtamentary paper, annexed. Stone v. Forſyth, Dougl. 707. v. Ewer, 3 Atk. 156. Jenkin v. Whitehouſe, 1 Bur. 431. Cothay v. Sydenham, 2 Br. Ch. Rep. Pre. Ch. 84.—If he once aſſents, he cannot after diſſent; and where he is bound by agreement her make a will, his conſent ſhall be implied till the contrary appears; and what ſhall be ſufficient dence of an aſſent, *vide* 2 Mod. 172, 173. Eq. Caſ. Abr. 66.

Roll. Abr. 608. (e) Of things in action, or of what ſhe hath as executrix by her huſband's conſent, ſhe may make a will, and this is prope

A feme covert executrix cannot deviſe any of the goods, wh ſhe hath as (e) executrix, without the (f) aſſent of the huſba or his agreement after.

will in law, and ought to be proved in the ſpiritual court. Mod. 211, 212. (*f*) That a feme covert executrix may make an executor without his aſſent, *vide* Moor, 340. 2 And. 92. Rol. Abr. 608. 912. Mod. 211, 212.

If a feme covert makes and publiſhes her will, and deviſes land by it, and her huſband dies, and then ſhe dies, the deviſe is void, becauſe the conſummation is founded upon the making and publiſhing, which are void acts. Plow. 344. 11 Mod. 157.

[It was formerly thought, that the power of a feme covert over her ſeparate eſtate muſt be confined to ſuch part of it as was perſonal; for that of her real eſtate ſhe could make no diſpoſition during her coverture, unleſs by fine, or unleſs ſhe had, before marriage, reſerved to herſelf ſuch right by way of truſt, or of a power over a uſe; that unleſs one of theſe methods were taken, her will of real eſtate would be void, as an inſtrument or conveyance, and could not bind her heirs. But the contrary hath been ſince adjudged; for where by articles entered into prior to the marriage of a woman who was entitled to the truſt of a reverſion in fee of lands, expectant on the death of her uncle, and on failure of his firſt and other ſons, and the heirs male of their bodies, it was ſtipulated by the huſband, that all her eſtate which ſhe then had, or which at any time thereafter ſhould deſcend or devolve upon her, ſhould be conveyed to her own uſe, and ſubject to her appointment; and under theſe articles ſhe executed an appointment in favour of her huſband, and her children by him; it was holden, that this was a good and valid appointment as againſt her heir-at-law, although no conveyance of the reverſion was ever executed, nor any fine thereof levied. Peacock v. Monk, 2 Vez. 191. Wright v. Lord Cadogan, 6 Br. P. C. 156. See too Doe v. Staple, 2 Term Rep. 684.

It is ſaid by Lord C. B. *Comyns*, that, by the cuſtom of *London*, a feme covert may deviſe to her huſband, but without citing any authority.] Com. Dig. tit. Deviſe, (H. 3.)

A wife may be a deviſee, though not a grantee to the huſband, for as the grant had been void, becauſe the huſband and wife are but one perſon in law, ſo the deviſe is good, becauſe it does not take effect till after the death of the huſband, and then they are no more one perſon. Co. Lit. 112. Roll. Abr. 610. [This was allowed for ſettled law ſo early as the time of Ed. 2. 4 E. 2. Fitz. tit. Deviſe, pl. 23.]

An infant cannot deviſe his (*a*) lands; and therefore if one under the age of 21 makes his will, and thereby deviſes his lands, and after attains the age of 21 years, and dies without making any new publication thereof, this deviſe is void. Sid. 162. Herbert and Forbale, agreed *per Cur.* on a trial at bar.

1 Mod. 157. for this *vide* Dyer, 143. Raym. 84. 1 Vez. 299. 3 Atk. 695. (*a*) An infant male at the age of 15, or female at 12, if proved to be of diſcretion, may make a will, and diſpoſe of perſonal eſtate. 2 Vern. 469.——Other books mention 17 or 18, at which years an infant may make his teſtament and conſtitute his executors for his goods and chattels. Co. Lit. 89. b.—But as the common law has appointed no time, and as this is a matter properly cognizable in the ſpiritual court, which proceeds according to the civil law, by which law a will at 14 is good; it ſeems agreed, that a will made by an infant at the age of 14 of his perſonal eſtate will not be controlled in Chancery, or the temporal courts. 2 Mod. 315. 2 Jon. 210. See tit. Infancy, vol. 3. 577.

If there be two jointenants of lands, and one of them deviſe that which belongs to him, and die, this is a void deviſe, and the deviſee takes nothing, becauſe the deviſe does not take effect till after the death of the deviſor, and then the ſurviving jointenant Lit. § 287. Perk. § 500.

takes the whole by a prior title, *viz.* from the first feoffment. B in this case, if the devisor survive (*a*) the other jointenant, th the devise is good for the whole, because he being the survivi jointenant has the whole by survivorship, and then the words the will are sufficient to carry the whole estate: besides, at t time of making the will, though he was not sole tenant, yet was seised *per moy et per tout*; and it is impossible to fix upon a particular part which he meant to devise, because he could n then call one part of the land more his own than another, and t most genuine construction seems to give the whole land, since was seised *per tout* of it at the time of the devise.

[(*a*) But it is now settled, that a subsequent severance of the jointure, whether by partition or by the death of the companion, will not effectuate a devise made during the jointure;

for the statute of 34 and 35 H. 8. c. 5. § 4. requires that the devisor should *have a sole* estate in fee-simp or should be seised in fee in coparcenary or in common, at the time of making the will, in order to capable of devising. Even at common law such a will would have been bad, for before the statut man could only devise lands which he was *then* seised of: and a will cannot operate as a severance the jointure. Swift v. Roberts, 3 Burr. 1488. Butler and Baker's case, 3 Co. 30. b. Poph. 87. S. C.

That such a devise is not good seems to be supported by the following authorities: Dyer, 303. 11 H. 6. 13. Bro. Devise, 30. Salk. 231. pl. 10. Moor, 637. 12 Mod. 2

It has been much doubted, whether a devise to an infant *ventre sa mere* be good, because it is not in being to take at t time of the death of the devisor; and since by the devise the pe son is to take (*b*) immediately after the death of the devisor, t freehold cannot be put in abeyance by the act of the parties.

(*b*) It is said by Finch, Lord Keeper, that at common law, without all question, a devise to an infant *ventre sa mere* is good of lands devisable by custom; but the doubt arises upon the statute, which ena that it shall be lawful for a man by will in writing to devise to any person or persons, 2 Mod. 9— * Posthumous children, how enabled to take a contingent remainder which hath no trust-estate to p serve it, see 10 and 11 W. 3. c. 16.

(*c*) As Moor, 177. Lev. 135. Sid. 153. Raym. 163. Keb. 851.

Others, (*c*) of as good authority, hold, that such devise is goo though the infant be not *in esse* at the death of the devisor, a that the freehold shall not be in abeyance, but shall descend to t heir at law in the mean time.

2 Bulst. 273. Freem. 244.

Sid. 153. Snow and Cutler. Lev. 135. S. C. Raym. 162. Freem. 244.

But all agree in this, that a devise to an infant, *when he shall born*, or when God shall give him birth, is a (*d*) good devise, a that the freehold shall descend to the heir at law in the me time.

[The universal concurrence in this point must close the question; for a devise to an fant *in ventre sa mere* necessarily implies a future disposition to take effect at its birth, as much as if words "*when he shall be born*" were added; for surely it cannot be imagined, that the child should t the estate before it was born. Fearne's Conting. Rem. 428. And that a devise to an infant *in ve sa mere* is good, see Taylor v. Bydall, 1 Freem. 243. Anon. *Id.* 293. Gulliver v. Wicket, 1 Wilf. Chapman v. Blisset, Ca. temp. Talb. 145. And that an infant *in ventre sa mere* is within the descrip of "*children living at the time of the testator's decease*," see Doe v. Clark, 2 H. Bl. 399.] (*d*) So a devise to an infant *in ventre sa mere*, with a new publication of the will after his birth. Cro. Eliz. 42

Moor, 637. Church and Wiat. 3 Lev. 408. 4 Mod. 359. Salk. 227. Carth 309. Reeve and Long, *vide* 10 and 11 W. 3. c. 16.

So, it is out of doubt, that if land be devised for life, the r mainder to a posthumous child, that this is a good contingent mainder, because there is a person in being to take the particu estate; and if the contingent remainder vests during the conti ance of the particular estate, or *eo instanti* that it determines, it sufficient.

8 Vin. Abr. 87. pl. 12. and head of Remainder and Reversion.

A devi

A deviſe to an alien (*a*), ſo to the heir of an alien, is void, becauſe an alien, according to the policy of our law, can have no heir, either to (*b*) inherit or take by purchaſe.

[(*a*) The deviſe to an alien, it ſeems, would not be void; for there does not appear to be any rule of law to prevent an alien from taking by deviſe: the only conſideration would be for whoſe benefit he may take. Knight v. Du Pleſſis, 2 Vez. 360. Godfrey v. Dixon, Godb. 276. Noy, 137.] Lev. 59. (*b*) A baſtard may be a deviſee of land though he cannot take by deſcent. Dyer, 323. But a monk cannot be a deviſee of land. *Id. ibid.* As to religious perſons who are diſabled from making a will, or taking by deviſe, *vide* Rol. Abr. 608.

[The will of a *felo de ſe* (though void as to his perſonal eſtate, becauſe that is forfeited to the king) ſeems to be effectual as to lands.]

Plowd. 261. Swinb. 106. At Rome, ſuicide did not invalidate a will, and it was common with thoſe who were apprehenſive of being expoſed to capital puniſhment, to prevent the confiſcation of their property by a voluntary death. "*Eorum qui vi de ſe ſtatuebant, humabantur corpora, manebant teſtamenta, pretium feſtinandi.*" Tacit. Annal. lib. 6. §29. But this *pretium feſtinandi*, this temptation to ſuicide was taken away by the laws of the later emperors, and the will was allowed to be good only where the party deſtroyed himſelf from impatience of pain, or derangement of mind. *Quod ſi futuræ pœnæ metu voluntariâ morte ſupplicium antevertit, ratam voluntatem ejus conſervari leges vetant.* Cod. l. 2. *Qui teſtam. fac.*

(C) Of what Eſtate or Intereſt in the Deviſor he may diſpoſe.

BY the common law, no lands or tenements were deviſable, except by particular cuſtom; neither could they be transferred from one to another but by ſolemn livery and ſeiſin, or matter of record: the (*c*) true reaſon hereof ſeems to be owing to the nature of the feudal tenures; for by theſe, though the lord had given lands to his tenant and his heirs, which were words of limitation, and appropriated to meaſure out the length and continuance of the eſtate; yet as they were underſtood the heirs of the preſent tenant who came in by the donation of the lord, the tenant could not deviſe them even to his own heir, thereby to make him a purchaſer, and ſo deprive the lord of the profits of wardſhip, marriage, and relief, which were incident to the feudal tenure; much leſs could he deviſe them to a ſtranger, who perhaps might not have ability of mind, or ſtrength of body, though the one was requiſite to aſſiſt his lord in his courts, and the other to defend his perſon in the field.

Co. Lit. 111. Abr. Eq. 174. (*c*) Becauſe it was preſumed that the teſtator would do that in *extremis* which he would not do in his health; that it proceeded from the diſtemper of his mind by the anguiſh of his diſeaſe, or by ſiniſter perſuaſions, to which he was more liable in his illneſs than at other times. Rol. Abr. 608.

But an eſtate for years might have been deviſed at common law; for this, as now, was only conſidered as a chattel, and, formerly, was of a very ſhort duration.

50 Aſſ. 1. Roll. Abr. 609.

The ſtatute of 32 *H.* 8. *c.* 1. which firſt introduced this diſpoſition of lands by will, requires that the deviſor ſhould have a proper title and intereſt in them for that purpoſe; and therefore if a man deviſes land (*d*), in which he has nothing, and after purchaſes them, ſuch a deviſe is void, not being within the ſtatute of *wills*, for he is not a perſon *having* (*e*) as the ſtatute ſpeaks.

Plow. 343. [(*d*) The law is the ſame whether the lands be freehold or copyhold. Doe dem. Biggs v. Biles, M. 24 Geo. 3. B. R. 1 Term Rep. 435. (*e*) The rule of law in this caſe does not depend upon the word "*having*;" but upon the will's being in nature of a conveyance; an appointment of the ſpecifick eſtate. 2 Vez. jun. 427. Cowp. 90.]

Salk. 237. pl. 16. Holt, 248. pl. 14. 11 Mod. 129. Fitzgib. 231. Bunter and Cook, adjudged in C. B. and affirmed in B. R. [In this caſe of Bunter v. Cook, the court of King's Bench doubted, whether a chattel real, acquired after the making of the will, would paſs by it; but that doubt ſeems to have been ſince done away; for in Wind v. Jekyll, P. Wms. 575. Lord Parker held, that ſuch an intereſt would clearly paſs, and ſtated the difference between freehold and perſonal intereſts, acquired ſubſequent to the making of the will, to be, "that with regard to the real eſtate, "bought after the making of the will, ſuppoſing *that* not to paſs, ſtill there is one in law capable of "taking it, *viz.* the heir; but with regard to the perſonal eſtate, if the executor, though made before "the acquiring thereof, does not take it, it is uncertain who ſhall."] (*a*) That in pleading a deviſe, it muſt be ſhewn of what eſtate the deviſor was ſeiſed at the time of making the will, Cro. Eliz. 530, and that he died ſeiſed of that eſtate. Mod. 217. [3 Burr. 1496.]

So, where a man deviſed to his wife all ſuch ſums of money, lands, tenements, and eſtate whatſoever, whereof at the time of his deceaſe he ſhould be poſſeſſed, and after the making of the will he purchaſed lands in gavelkind, and died without making any new publication, it was holden that thoſe new purchaſed lands did not paſs; for they were not *ſua* at the time of making the will, and the conſtant form of (*a*) pleading is, that the teſtator was ſeiſed, and being ſo ſeiſed, *&c.* which at leaſt is an evidence of the law: and there is no difference as to lands deviſable by cuſtom, or by ſtatute. But ſuch deviſe of things perſonal is good, though the teſtator had them not at the time of making his will, becauſe they go to the executor, to whom the will is only directory.

39 H. 6. 18. b. Mod. 217. S. P. [*Qu.* Whether this point would not be differently determined ſince the reaſoning of the court in Jones v. Perry, 3 Term Rep. 93.?] (*b*) But if he re-enters, the deviſe ſhall be good, for he was ſeiſed *ab initio*. Salk. 238. (*c*) But if the father deviſes lands to his youngeſt ſon, and the eldeſt ſon knowing thereof enters into the land, and diſſeiſes the father, and ſo continues till the death of the father, by which the will is void, yet becauſe it was made void by deceit and covin, it ſhall be made good in Chancery. Roll. Abr. 378. *per* Lord Chancellor, in the caſe of Boſwell and Emery.

If *A.* makes his will, and thereby deviſes lands, and is afterwards diſſeiſed and dies (*b*) before re-entry, the deviſe is (*c*) void.

Chan. Ca. 39. Ca. Darcy and Beardſham. 2 Chan. Ca. 144. Prideux v. Gibben. [This point, that lands contracted for at the time of making the will, will paſs by the will, and under general and ſweeping words, is eſtabliſhed by ſeveral caſes. Milner v. Mills, Moſel. 123. Allen v. Allen, *Id.* 262. Potter v. Potter, 1 Vez. 437. Gibbs v. Lord Montfort, *Id.* 424. Nor will it make any difference, though the day, agreed upon for the execution of the contract, be ſubſequent to the date of the will, Greenhill v. Greenhill, Pre. Ch. 320. the articles were actually entered into before the making of the will, 2 P. Wms. 629., and they be ſuch as a court of equity would enforce in ſpecie. Potter v. Potter, 1 Vez. 437.] (*d*) That an equitable intereſt is as well deviſable as a legal eſtate. 2 Vern. 679. adjudged. [Potter v. Potter, 1 Vez. 437.]

A. agrees with *B.* for the purchaſe of copyhold lands, which were ſurrendered out of court to the uſe of *A.*, but before admittance *A.* dies: *A.* was ſeiſed of other copyhold lands, and after the ſaid contract with *B.* had made his will, and deviſed all his copyhold lands to *J. S.* It was ruled, that the copyhold lands agreed for, paſſed by the will; for after the agreement, the purchaſer might, in equity, recover the land, and oblige *B.* to execute a conveyance, and till ſuch conveyance executed, the vendor ſtood ſeiſed in truſt for the purchaſer, as he ſhould appoint; and therefore if, after articles agreed on for a purchaſe, the purchaſer deviſes the land, and dies before a conveyance executed, yet the land paſſeth in equity; for though according to the ſtrict notions of law the deviſor has not lands within the ſtatute till a conveyance be executed, and he thereby become ſeiſed of them, yet after articles of purchaſe, the purchaſer only is conſidered as maſter of the land, and therefore in (*d*) equity will be allowed to diſpoſe of them.

Abr. Eq. 175. pl. 5. Gilb. Eq.

Again, a treaty of marriage articles was entered into, whereby the ſum of 700*l.* being the wife's portion, and 700*l.* more added

to it on the part of the huſband, in all 1400*l.*, was agreed to be laid out in the purchaſe of lands, to be ſettled on the huſband for life, remainder to the wife for life, remainder to truſtees, to ſupport contingent remainders, *&c.* the marriage took effect, the huſband died without iſſue, and before any purchaſe made purſuant to the articles, having firſt deviſed all his perſonal eſtate to the defendant, who was his wife, and all his real eſtate to the plaintiffs, who were his nephews, and one of them his heir at law, and made his wife executrix, but taken no manner of notice of the 1400*l.* On a bill brought by the plaintiffs to have this 1400*l.* as they would have the land, if the purchaſe had been made purſuant to the articles, (for the wife took more by the deviſe than ſhe would be entitled to under the ſettlement, had it been made); it was argued, that if it were to be conſidered as lands, ſhe could not have both; the deviſe of the perſonal eſtate being more than an equivalent, and therefore a ſatisfaction; and it was holden by my Lord Chancellor, that, as this caſe is, if a purchaſe had been made even after making the will, though at law ſuch lands would not paſs, yet in this court there could be no queſtion but the plaintiffs would have the benefit thereof by the relation to the articles; and though no purchaſe was made, yet by the agreement the 1400*l.* is to be looked upon in a court of equity as a real eſtate, and as ſuch, muſt go to the plaintiffs.

Rep. 91. Pre. Ch. 400. Will Rep. 172. pl. 42. 2 Eq. Abr. 353. pl. 7. 10 Mod. 39. 528. Lingen and Souray, decreed by Lord Harcourt, and affirmed by Lord Cowper.

A guardian by knight's ſervice might have deviſed the ward of the body and land; ſo, of a guardian in (*a*) ſocage.

26 E. 3. 65. Fitz. Gard. 159. Roll. Abr. 609.

(*a*) But a ſpecial guardian appointed purſuant to the ſtatute 12 Car. 2. c. 24. cannot tranſfer the cuſtody of the ward, by deed or will, to any other. Vaugh. 179.

Tenant (*b*) in tail to him and the heirs of his body, with reverſion expectant in fee, (*c*) cannot deviſe the land in fee to another, though he dies without iſſue, becauſe it is but a mere (*d*) poſſibility, and not grantable or aſſignable.

(*b*) But tenant in tail may deviſe to a charity, and ſuch deviſe ſhall be good by the ſtatute of charitable uſes, by way of appointment. Duk. Charitable Uſes. 110. 2 Vern. 453. (*c*) 31 Aſſ. 3. adjudged, but a Q. *rationem* added. ——— Whether ſuch a reverſion could be deviſed by parol within the cuſtom, Styl. 409, 410, *dubitatur*. (*d*) But a remainder after an eſtate-tail may be deviſed. 2 Aſſ. 60. Bro. Deviſe, 42. Fitz. Aſſiſe, 259.

A man ſeiſed in fee deviſed his lands in truſt, to ſell part for payment of his debts, and till his debts were paid, to pay 100*l.* *per ann.* to his natural daughter *M.* and after the debts paid, 300*l.* for her life; and if ſhe have children, to convey ſucceſſively to thoſe children; but if ſhe die without iſſue, then to convey to the eldeſt ſon and heir of *J. S.* his nephew, and the heirs of his eldeſt ſon; but if he claim any thing during the life of *M.*, then both father and ſon to be excluded from having any thing out of his eſtate. The eldeſt ſon of *J. S.* was *A.*, who had two ſiſters, *B.* and *T.* *A.* died, leaving iſſue *J.*, who in the life of *M.* deviſed the lands in queſtion to *J. S.* and died without iſſue, and after the death of *M.* without iſſue, the truſtee conveyed to the ſiſters of *A.* and their heirs; and it was held, that this being but a mere

3 Lev. 427. Biſhop and Fountaine, decreed in Chancery by the aſſiſtance of Treby, C. J. and Powel, J. [This caſe of Biſhop and Fountaine is now not law: It ſeems to be finally ſettled, that a

poſſibility clothed with an intereſt, is not only deſcendible, but deviſable. Selwin v. Selwin, 2 Burr. 1131. 1 Bl. Rep. 222. 251. Roe v. Jones, 1 H. Bl. 30. 3 Term Rep. 88.]

a mere poſſibility during the life of *M.* the deviſe was void, and the lands well conveyed to the ſiſters of *B.*

Baker v. Hacking, Cro. Car. 387. 405.

[An eſtate that is turned to a right, as a reverſion diſcontinued, is not within the purview of the ſtatutes of wills. Thus *A.* being tenant in tail, the reverſion to *B.*, they joined in a leaſe for life by deed: *B.* afterwards, during the leaſe for life, deviſed the reverſion, and died, and then tenant in tail died without iſſue. The queſtion was, whether this deviſe were good or not? and this depended upon, whether, if tenant in tail join with him in reverſion in a leaſe for life, not warranted by the ſtatute, ſo that it be a greater eſtate than tenant in tail can make, it be a diſcontinuance of the tail only, or a diſcontinuance of the reverſion alſo? It was holden to work a diſcontinuance in both, and then the deviſor having nothing more than a right in the reverſion, the deviſe was void.]

Abr. Eq. 175, 176. Drew and Merry, decreed.

J. S., who was to have had a conſiderable advantage by a will, was drawn in by fraud and falſe ſuggeſtions to make a compoſition for his intereſt, and to give a releaſe; afterwards *J. S.* being ſenſible of the fraud, makes his will, and thereby (after other legacies) he deviſes all the reſt of his goods and chattels whatſoever to his wife, upon condition, that ſhe paid all his debts, and made her ſole executrix; and it was held that his right to ſet aſide the releaſe was deviſable, and the words proper for that purpoſe.

(C) What Words paſs a Fee in a Will.

Co. Lit. 6. b. Bulſt. 222. Bendl. 11. Moor, 57. *vide* tit. Eſtates in Fee-ſimple.

ALthough a ſet form of words, and the word *heirs* particularly, are neceſſary in deeds to convey an inheritance, yet may they be diſpenſed with in laſt wills, at which time it is preſumed that the teſtator is *inops concilii*. Hence great regard is paid to the intention of the teſtator, and ſuch intention is to govern in all caſes where it can ſquare with the rules of law; therefore, if a man deviſes lands to another *in perpetuum*, or in *feodo ſimplici*, or *to him and his aſſigns for ever*, or *to him and his*, or that *ſuch a one ſhall be univerſal heir;* in all theſe caſes, a fee paſſes by the will; for it is evidently the deviſor's intention that the gift ſhould continue beyond the life of the deviſee.

Roll. Abr. 834.

So, if *A.* deviſes land to *B. to give, ſell, or do what he pleaſes with it;* theſe words by the intent of the deviſor convey a fee to *B.* So, if the words were to *B.* or *ſanguini ſuo*, they would paſs a fee, becauſe the blood runs through the collateral as well as lineal line.

Cro. Jac. 416. Roll. Abr. 835.

A deviſe to a man and his ſucceſſors carries a fee; for by the word *ſucceſſors* is intended *heirs, quia hæres ſuccedit patri.*

If a deviſe be in theſe words, *viz. I releaſe all my lands to* A. *and his heirs*, *A.* has a fee-ſimple; for where the (*a*) intention of conveying appears, the law diſpenſes with a form in a will. Bendl. 30. (*a*) *I appoint that* J. S. *ſhall have my inheritance, if the law allows it*, or *that* J. S. *ſhall be heir of my lands*, theſe words are ſufficient to convey a fee. Hob. 2.

If lands are deviſed to truſtees, without any words of limitation to ſupport the truſt of eſtates of inheritance, they, by implication, muſt have an eſtate of inheritance ſufficient to ſupport the truſt, for there is no difference between a deviſe to a man for ever, and to a man upon truſts which may continue for ever. Abr. Eq. 176. adjudged in the caſe of Shaw and Wright, Paſch. 1 Geo. 2. [Str. 798. S. C. by the name of Shaw v. Weigh. Fitzg. 7. S. C. Oates v. Cooke, 3 Burr. 1685. 1 Bl. Rep. 543. S. C. Gibſon v. Lord Montfort, 1 Vez. 485. Chapman v. Bliſſett, Ca. temp. Talb. 145.]

If a man deviſes land to his wife for life, and after her death to his three daughters, equally to be divided, and if one dies before the other, then one to be heir to the other, equally to be divided; this laſt clauſe gives a fee to the daughters, for the word *heir* is *nomen operativum*, and chiefly in a will ſhall be taken in its full extent, and then it reaches the moſt remote heir. Roll. Abr. 833.

A. deviſes land to his ſon and heir, and if he dies before his age of 21 years, and without iſſue of his body then living, the remainder over; he ſurvives the 21 years, and ſells the land: the ſale was adjudged good, for he had a fee-ſimple preſently, the eſtate-tail being to commence upon a ſubſequent contingency. Sid. 148.

If *A.* deviſes land to *B.* for life, the remainder to *C.*, paying ſeveral ſums in groſs, *C.* hath a fee, though all the ſums together do not amount to the annual rent of the land; for the deviſe ſhall be intended for his benefit; and if he had only an eſtate for life, he might die before he would receive the legacies out of the land, and conſequently, be a loſer, which could never be the intention of the teſtator (*b*); and therefore, wherever there is a ſum in groſs to be paid, the deviſee hath a fee, though the ſum be not to the value of the land. 6 Co. 16. Collier's caſe. Cro. Eliz. 378. S. C. Spicer v. Spicer. Cro. Jac. 527. Anſley v. Chapman, Cro. Car. 158. Co. Lit. 9. b. [Welock v. Hammond. Cro. El. 204. (*b*) Yet even in this caſe *C.* ſhall not have the fee, if a contrary intention manifeſtly appear. Bacon v. Hill, Cro. El. 497.]

So, if *A.* deviſes to *B.*, in conſideration that *B.* will releaſe 100*l.* due to him to the executors of *A.* *B.* has a fee-ſimple upon his releaſe of the debt; for the deviſe ſhall be intended for his benefit, and an eſtate for life might be determined before he could receive 100*l.* out of the land. Bendl. 15.

If a man deviſes 100*l.* in legacies, to be paid within a year to ſeveral perſons out of land of the value of 10*l.* yearly, and then deviſes the land to another, the deviſee has a fee in the land; for though the deviſe be not to him, paying 100*l.*, yet ſince he muſt take the land ſubject to the charge of the legacies, he muſt have a fee to have any benefit by the deviſe. 2 Lev. 249. 2 Salk. 685.

But if *A.* deviſes lands to *B.*, paying ſo much, or ſuch ſums out of the profits of the lands, the deviſee takes but an eſtate for life; for although he takes the land charged, yet he is to pay no (*c*) farther than he receives, and ſo can be no loſer. 6 Co. 16. 2 Mod. 25. [(*c*) But there is a diſtinction, it ſeems, between a deviſe to truſtees to pay "out of rents and profits, and out of the *annual* rent: in the

the former caſe they have a power of ſelling the eſtate, but not in the latter. *Per* Buller, J. Doe v. Richards, 3 Term Rep. 359, 60. Eq. Ca. Abr. tit. Deviſes (J), pl. 7, 8.] Whether the word *paying* out of lands in general, and not mentioning any certain time, ſo that the loſs may appear, paſſes a fee-ſimple, *Q.* and *vide* Hawker v. Buckland, 2 Vern. 106. [from which caſe it appears that it would not paſs a fee-ſimple.]

Cro. Car. 158. Jon. 211. Bulſt. 194.

So, if the deviſe had been to *B.* paying an annual ſum to another, this had been an eſtate for life, for he may pay this out of the yearly profits without any loſs to himſelf.

[But notwithſtanding words to the effect in this and the preceding paſſage in the text, if there are circumſtances in the will from which it can be collected, that the deviſor intended that the deviſee ſhould take a larger eſtate, ſuch intention ſhall prevail. Webb v. Hearing, Cro. Jac. 415. Moore, 852. S. C. Baddely v. Leppingwell, 3 Burr. 1533. Frogmorton v. Hollyday, *Id.* 1618. Doe v. Woodhouſe, 4 Term Rep. 89. Lee v. Withers, Sir T. Jones, 107. And ſo, on the other hand, where lands are charged with a groſs ſum, yet ſuch charge will not carry an eſtate in fee without any words of limitation, if an expreſs eſtate for life, or an expreſs eſtate-tail is given in terms by the will. Doe v. Fyldes, Cowp. 840. Denn v. Slater, 5 Term Rep. 337.]

Goodright v. Stocker, 5 Term Rep. 13.

[But a deviſe of a houſe to *A.*, "paying yearly, and every "year, out of the ſaid houſe, the ſum of 15*s.* to *B.*," will paſs a fee.

Andrew v. Southouſe, 5 Term Rep. 292.

So, a deviſe of teſtator's lands to *W.*, and all his intereſt in the eſtates of *J. C.* deceaſed, to *L. A.* for life, and after *L. A.*'s deceaſe, to *E. S.*, charged with an annuity to *J. T.* for life, gives a remainder in fee to *E. S.*

Doe v. Richards, 5 Term Rep. 356.

Thereference doth not govern where Bracey

So, a deviſe of all the reſt, reſidue, and remainder of the deviſor's lands, hereditaments, goods, chattels, and perſonal eſtate, "his legacies and funeral expences being *thereout* paid," conveys the fee to the deviſee, by reaſon of the words THEREOUT *paid*.

Villiers v. Villiers, Barnard. Can. 307.

A. having a fee-ſimple in a light-houſe, and a term for 99 years in lands adjoining to it, deviſed to his ſon *H.* and his aſſigns, all his eſtate and intereſt in the light-houſe, meſſuages, lands, and tenements, and appurtenances thereunto belonging, upon truſt, that he pay out of the rents and profits of the term, during the remainder thereof, 200 *l. per annum*. *H.* takes a fee-ſimple in ſuch parts of the premiſes wherein the teſtator had a fee, and a term in the other part.

Canning v. Canning, Moſel. 240.

Where the words of a will were, "all the reſt, reſidue, and "remainder of my meſſuages, lands, or hereditaments, whatſo-"ever or whereſoever unbequeathed, after my juſt debts, legacies, "and funeral expences are fully ſatisfied and paid, I give to my "executors, in truſt for my daughters;" it was adjudged, that the executors took only an eſtate for life; the words "*all the reſt*," *&c.* comprehending the particulars only, not the eſtate; and the ſubſequent words amounting to no more than a charge in equity: that the court were not neceſſarily called upon to enlarge the eſtate to the truſtees; for the truſt being only for daughters, it may be underſtood to be only for the lives of the truſtees.

Denn v. Mellor, 5 Term Rep. 558. The parties being diſſatisfied with this deci-

So, where the words were, "all the reſt of my lands, tene-"ments, and hereditaments, either freehold or copyhold, what-"ſoever and whereſoever, and alſo all my goods, chattels, and per-"ſonal eſtate, of what nature or kind ſoever, after payment of my "juſt debts and funeral expences, I give, deviſe, and bequeath the "ſame unto my wife *S. C.*; and I hereby nominate and appoint "her

" her my said wife sole executor of this my will," it was adjudged, that the wife took an estate for life only; for though the real estate be charged with the payment of debts and funeral expences, if the personalty be insufficient for that purpose, yet there are no words charging the estate in the hands of the wife with the payment of those debts.

sion, another ejectment was brought, and a special verdict found, in order that the case might go up to the House of Lords. But the facts being the same, the court of K. B. gave judgment as here, without argument. 6 Term Rep. 175.

So, where a testator gave " all his lands, tenements, and mes- " suages whatsoever, after debts and legacies paid, and funeral " expences were discharged, to his brother-in-law," it was holden, that only an estate for life passed; for though it be true, that where a gross sum is to be paid out of lands, it gives a fee to the devisee of those lands; yet, here, the debts are not in all events charged upon the real estate, but only contingently, if the personal estate should be deficient; and therefore it does not come up to those cases where a gross sum is to be paid out of land, and consequently, gives no more than an estate for life to the devisee.]

Merson v. Blackmore, 2 Atk. 341.

If a man devises to his younger brother, all his lands, tenements, and hereditaments, and all his personal estate, and whatever else he hath in the world, and makes him executor, desiring him to pay his debts and legacies; the devisee hath a fee-simple by these words.

Ackland v. Ackland, 2 Vern. 687. Salk. 239. pl. 18. S.C. by the name of Hopsewell and Ackland. [Spicer v. Spicer, Cro. Ja. 527. S. P. In the case of Hopewell v. Ackland it was settled, that the word *hereditaments* will not pass a fee in a will, for that in the statute of wills it is evidently opposed to an estate of inheritance, the words of the statute being " any person having manors, lands, tenements, and *hereditaments* of estate of inheritance." See acc. Canning v. Canning, Mosel. 242. Denn v. Miller, 5 Term Rep. 558.]

If a man devises 50*l.* to be paid in three months, and all the rest and residue of his real and personal estate whatsoever he gives to his dearly-beloved wife, whom he makes sole executrix; by these words, the wife has a fee-simple in the lands.

2 Vern. 564. Murray and Wyse. Pre. Ch. 264.

So, where the testator, being seised of copyhold and freehold lands, devised all the rest of his estate, whether freehold or copyhold, to his wife and children, equally to be divided between them; it was holden, that the word *estate* must signify the interest he had in the land, and so pass a fee.

4 Mod. 89. Show. 348. S. C. Eq. Abr. 177. pl 16. [The words " *all my tenant-right estate*" pass a fee. Wilson v. Robinson, 2 Lev. 91. 1 Mod. 100. 3 Keb. 180. 245. So, all the rest of his estate. Cliffe v. Gibbons, 2 Ld. Raym. 1324.] If a man devises lands to *A.* for life, and after his decease, the whole remainder of these lands to *B.*, these words pass a fee in the remainder to *B.* by the manifest intention of the testator. Lutw. 762.——A devise of all a man's real and personal estate passes a fee in the real estate, adjudged between the Countess of Bridgwater and Bolton, Salk. 236. pl. 15. 6 Mod. 106. S. C. adjudged, and largely debated.—[And the opinion of the court in this case of Bridgewater v. Bolton, that the word " estate" in a will *of itself* passes a fee, has been confirmed by several subsequent cases. So far indeed from its being necessary to insert words of inheritance in order to give it this operation, words of restraint must be added in order to carry a less estate; for it is *genus generalissimum*. Barry v. Edgeworth, *infra*. Ibbetson v. Beckwith, Ca. temp. Talb. 157. Tanner v. Morse, *Id.* 283. 3 P. Wms. 295. S. C. by the name of Tanner v. Wise. Tuffnell v. Page, Barnard. 9. 2 Atk. 57. Ridout v. Pain, 3 Atk. 486. 1 Ves. 11. S. C. Baillis v. Gale, 2 Ves. 48. Scott v. Alberry, Com. Rep. 337. Macacree v. Tall, Ambl. 181. Stiles v. Walford, 2 Bl. Rep. 938. Hurst v. Earl of Winchelsea, 2 Burr. 879. Holdfast v. Marten, 1 Term Rep. 411. Fletcher v. Smiton, 2 Term Rep. 656. Doe v. Chapman, 1 H. Bl. 223. And the word " estates" is equivalent to " estate." Fletcher v. Smiton, 2 Term Rep. 656. Tilley v. Simpson, *Id.* 659. n. Under a sweeping clause of " all the remainder and residue of the testator's effects, both real and personal," a fee in lands will pass.

Hogan

Hogan v. Jackſon, Cowp. 299. So, a deviſe of "all I am worth" will carry a fee. Huxtep v. Brooman, 1 Br. Ch. Rep. 437.

Abr. Eq. 178. Barry and Edgworth. Pach. 1729, decreed at the Rolls. 2 P. Wms. 524. S. C.

A., a young lady, who was in eight days time to be married to the defendant, being taken ill, made her will, and after ſeveral ſpecifick and pecuniary legacies, deviſes in theſe words: *Item, I give and bequeath all my land and eſtate in* Upper Cateſby *in* Northamptonſhire, *with all their appurtenances, to* William Edgworth *of St. Margaret's, Eſq.* and made him and Mrs. *Rudge* executors and reſiduary legatees, and died ſeiſed of a real eſtate of the value of 200*l. per ann.* and poſſeſſed of about 3000*l.* perſonal eſtate, leaving the plaintiff's wife, who was her ſiſter and heir. The only queſtion was, whether the defendant had an eſtate in fee, or only for life? It was agreed, that a deviſe of all his eſtate would have paſſed a fee; but a difference was endeavoured between ſuch a deviſe of all his eſtate generally, and a deviſe of all his eſtate at ſuch a place, that this was only a deſcription of the place where the eſtate lay, and no deviſe of the intereſt which he had in that eſtate, farther than for life; and it was agreed clearly, that a deviſe of all his lands would paſs only an eſtate for life, and not the eſtate in fee which he had in thoſe lands. But the maſter of the *Rolls* was clearly of opinion that he had an eſtate in fee, becauſe the lands paſſed by the firſt words, and the intereſt in thoſe lands by the ſecond; and if the word *eſtate* meant nothing more than the lands, it would be uſeleſs: but if the deviſe had been of all his lands or eſtate at ſuch a place (*a*), he thought that would not have paſſed the fee, but would have been taken according to the common acceptation for his lands at ſuch a place; but as this was, it muſt be a fee, and decreed accordingly.

[(*a*) Lord C. Talbot ſaid, he remembered this caſe very well, and that no ſuch diſtinction as this was made in it. Ca. temp. Talb. 160. See 1 Vez. 226.]

Cro. Car. 447. Wilkinſon and Merryland. Roll. Abr. 834. Jones, 380.

But where a man ſeiſed of Black Acre in fee by mortgage, which was forfeited, and of White Acre, as his own inheritance, deviſed White Acre to his brother, and then deviſed all the reſidue of his goods, leaſes, mortgages, eſtates, debts, ready money, and other goods, whereof he was poſſeſſed, after debts and legacies paid, to his wife, and made her executrix, and died; it was holden, that this was no deviſe in fee to the wife, of the mortgaged land; for the word *eſtate* is coupled here with chattels, which ſhew that he meant only eſtates for years, and the rather, becauſe the words *whereof he was poſſeſſed* ſhew, that he intended only to give her chattels, and the mortgage-money, and not the inheritance of the land.

Timewell v. Perkins, 2 Atk. 102. Dally v. King, 1 H. Bl. 2. S. P. Semb. However, where a teſtator has already mentioned both real and perſonal property, a deviſe "of all the reſt and reſidue of his eſtate, of what nature or kind ſoever," will include real

[So, where a deviſe was in theſe words, "All thoſe my freehold "lands and hop-grounds, with the meſſuages or tenements, "barns, *&c.* now in the tenure or occupation of the widow *L.*, "and all other the reſt, reſidue, and remainder of my eſtate, "conſiſting in ready money, plate, jewels, leaſes, judgments, "mortgages, *&c.* or in any other thing whatſoever or whereſo-"ever, I give unto *A. H.* and her aſſigns for ever;" Lord *Hardwicke* held, that the word *eſtate* in this clauſe would not paſs the reſidue of the real eſtate, for that being coupled with things that are perſonal, it muſt be reſtrained to perſonals.

real as well as perſonal eſtate, though accompanied with limitations peculiarly applicable, and uſually applied to the latter only. Doe v. Chapman, 1 H. Bl. 223.

A teſtator wills that his lands ſhall go to his two younger brothers *R.* and *M.*, to be divided between them; and if *R.* ſhould have no iſſue mail, then his whole lands and eſtate ſhall go to *M.* in tail male, he paying 200 *l.* to the daughters of *R.* after the ſame eſtate ſhall fall to him; and if *M.* ſhall have no iſſue male, then his lands ſhall go to his nephew *T.* and his heirs, he paying 200 *l.* to the daughters of *R.* and *M.* reſpectively after the eſtate ſhall fall to him; and if *T.* have no iſſue male, then "*his ſaid eſtate*" ſhall go to the daughters of *R.* and *M.*; and if they have none, then to the daughters of *T.*; and if he have none, then to the teſtator's heirs. An eſtate for life only paſſes to the daughters of *R.* and *M.*, the word "*eſtate*" being here deſcriptive only. Rogers v. Briggs, Andr. 210.

By this deviſe, *viz.* "I give and demiſe to *A.*, her heirs and "aſſigns for ever, all my lands at *B.*, and I give and bequeath to "*A.* aforeſaid all my lands at *C.*" *A.* only takes an eſtate for life in the lands at *C.*, and the reverſion deſcends, although the will begin with theſe introductory words, "For thoſe worldly "goods and eſtates wherewith it hath pleaſed God to bleſs me," and contain a legacy of 1 *s.* to the heir at law. Right v. Sidebotham, Dougl. 759.

So, though a will begin with like introductory words, and then the teſtator gives all his freehold tenement lying in *G* to *A.*, *B.*, and *C.*, "*to them my ſiſter's ſons*," and then, among ſeveral pecuniary legacies, leaves 10 *s.* to his heir at law, *A.*, *B.*, and *C.* take only for life, and the reverſion deſcends. Denn v. Gaſken, Cowp. 657.

So, where there are ſimilar introductory words, and the teſtator gives his houſe to a younger ſon *S.*, and after the death of *S.* to *A.* and *B.*, ſons of *S.*, and a legacy of one ſhilling to the huſband of his heir at law, *A.* and *B.* take only for life, and the reverſion deſcends. Right v. Ruſſell, Scac. Hil. 1 Geo. 3. cited in Dougl. 761.

So, if, after a ſimilar introduction, the teſtator gives all his real eſtate to his wife for life, and to his ſon *P.* after his wife's death, all his land at *W.*, and, among ſeveral legacies, 5 *s.* each to all his grandchildren, among whom was his heir at law, *P.* ſhall only take the land at *W.* for life, and the reverſion ſhall deſcend. Roe v. Bolton, 2 Bl. Rep. 1045. and Dougl. 761.

So, if after the like words in the preamble, the teſtator gives to *W. W.* his nephew two houſes at *S.*, with a croft and appurtenances belonging to them, now in the occupation of *A.* and *B.*, and further directs that the ſaid houſes ſhould not be entered upon by the deviſee till after the deceaſe of his executor, *W. W.* takes only an eſtate for life. Frogmorton v. Wright, 3 Wilſ. 414.

And yet introductory words to this effect are material in the conſtruction of ſubſequent deviſes. Ibbetſon v. Beckwith, Ca. temp. Finch. 160. Maudy v. Maudy, Ca. temp. Hardw. 143. Goodright v. Stocker, 5 Term Rep. 13. Gulliver v. Poyntz, 3 Wilſ. 141. Hogan v. Jackſon, Cowp. 306.

One deviſes thus, "*As touching my worldly eſtate*, I deviſe the ſame as follows: I give to my wife *E. M.* 5 *l.* to be paid yearly out of my eſtate at *G.*, and alſo one part of the dwelling-"houſe, Loveacres v. Blight, Cowp. 352.

" houſe, with as much wood-croft home at her as ſhe ſhall have " need of, by her executors hereafter named. *Item*, to my ſon *T. M.* " and daughter *E.* 5*l.* each, to be paid twelve months after my " deceaſe. *Item*, to my ſons *T. M.* and *R. M.*, whom I make " my —— and ordain my ſole executors, all my lands and tene- " ments, freely to be enjoyed and poſſeſſed alike." *T. M.* and *R. M.* are tenants in common, and take a fee.

Grayſon v. Atkinſon, 2 Wilſ. 333.

So, where after introductory words to that effect, a teſtator gave ſeveral legacies to *A.*, and directed him to ſell all or any part of his real or perſonal eſtate for the payment of his debts and legacies, and deſired three perſons to aſſiſt him in the ſale thereof, and to be ſupervifors of his will; and after giving ſome pecuniary legacies to others, concluded with this reſiduary deviſe: " As to all " the reſt of my goods and chattels, real and perſonal, moveable " and immoveable, as houſes, gardens, tenements, my ſhare in the " copperas works, *&c.* I give to the ſaid *A.*"; It was holden that a fee paſſed to *A.*

Smith v. Coffin, 2 H. Bl. 444.

So, where a teſtator reciting, " As to ſuch worldly eſtate as " God has pleaſed to bleſs me with," made a proviſion for his heir at law, and deviſed " all the reſt and reſidue of his goods " and chattels, rights, credits, perſonal and teſtamentary eſtate " whatſoever to *B.*, for his own uſe, benefit, and diſpoſal," it was holden, that *B.* took an eſtate in fee in the lands of the teſtator, for the reſiduary clauſe is commenſurate with the introductory clauſe.]

Cro. Car. 129. Chamberlain and Turner. Jon. 195. Dyer, 357. *in margine.*

A. deviſed his houſe or tenement, wherein *J. S.* dwelt, called the *White Swan* in *Old-ſtreet*, to *J. N.* for ever; this carries the (*a*) fee-ſimple, and though *J. S.* had but a ſeparate apartment in the houſe, and the other rooms were inhabited by other perſons, yet the whole houſe paſſed, becauſe the houſe in which he dwelt was deviſed, and that houſe was called the *White Swan*, which ſign extending to the whole houſe, ſhews the intent of the deviſor.

(*a*) *A.* deviſes in theſe words: " I " give, rati- " fy, and confirm all my eſtate, right, title, and intereſt which I now have, and all the term or terms of " years which I now have, or may have in my power to diſpoſe of, after my death, in whatever I hold by " leaſe from *J. P.*, and alſo the houſe called the *Bell Tavern*, to *B.*" it was holden by three judges againſt Holt, that the deviſee took an eſtate in fee in the *Bell Tavern*. Salk. 234. 3 Wilſ. 419.

(D) What Words create an Eſtate-Tail, or for Life.

Bro. tit. Deviſe, 1. Co. Lit. 9. b. 25. a. 27. a. Hob. 33. Vent. 228, 229. *vide* head of Eſtates-tail.

AND here the former rule will hold good, that the intent of the deviſor will ſupply the want of thoſe words which are neceſſary in a conveyance at common law; and therefore (*b*), if *A.* deviſes land to *B.* and his heirs male, the law will ſupply theſe words, *of his body*, and make it an eſtate-tail.

(*b*) But a deviſe cannot direct an inheritance to deſcend againſt the rules of law; and therefore in this caſe, if *B.* hath iſſue a daughter, who hath iſſue a ſon, he ſhall never inherit; for the rule is, that whoever claims as heir in tail-male, muſt convey his deſcent wholly by heirs male. Roll. Abr. 835. Vent. 228. *vide* tit. Deſcent.

2 Vern. 766. Abr. Eq. 179.

So, a deviſe to one and *ſemini ſuo* creates an eſtate-tail: ſo, if lands are deviſed to one, and if he die before iſſue, or if he depart

not leaving (*a*) iſſue, or if he die, not having a (*b*) ſon, all theſe limitations create an eſtate-tail.

(*a*) And if it ſhall pleaſe God to take my ſon *R.* before he ſhall have iſſue of his body, ſo that the lands deſcend to his brother, this is an eſtate-tail. Owen, 29. adjudged. (*b*) For the word *ſon* is *nomen collectivum*. Vent. 231.

But if a man deviſes lands to another without more words, this is but an eſtate for life; and if the deviſe had gone farther, *viz. to him and his aſſigns*, theſe words, of themſelves, had not enlarged the eſtate; but if it had been to him and his aſſigns for ever, it had been a fee. Co. Lit. 9. b. Bro. tit. Deviſes, 33. Roll. Abr. 834.

If *A.* deviſes lands to his eldeſt ſon *J. S.* and the heirs male of his body for the term of 500 years; provided if he, or any of his iſſue male, alien the premiſes, then to remain over, this is an eſtate-tail, and the limitation for 500 years void; for though generally a deviſe to a man and the heirs of his body, for 1000 years, is a term, and not an inheritance; yet, here, the teſtator's intent was, that it ſhould be an inheritance, becauſe by the proviſo he took care to advance the iſſue of *J. S.*, but if it ſhould be a term, then by the deſcent of the inheritance on *J. S.*, the term would be merged, and the iſſues would be unprovided, for *J. S.* might alien the eſtate. 10 Co. 78. Moor, 772. S. C.

A. ſeiſed in fee of a houſe and lands belonging to it, deviſes the moiety of the houſe to his wife for life; *item*, he deviſes the other moiety of the houſe to his ſecond ſon; *item*, he deviſes the ſaid houſe, and all the lands belonging to it, to his ſecond ſon; yet the ſon took but an eſtate for life; for the ſecond deviſe to the ſon had its effect by conveying that moiety of the houſe, and the land which he had not by the firſt deviſe, and there are no words in the will to create a larger eſtate. Roll. Abr. 834.

A. having iſſue two ſons, deviſes Black Acre to the eldeſt, and White Acre to the youngeſt; and if either of them died, his acre ſhould go to the ſurvivor, and farther deviſed (having two daughters) to each of them 10*s.* it was adjudged the ſons took but an eſtate for life; for though the conſideration generally gives a fee, yet where there are expreſs words to determine the intent of the deviſor, (which is always the rule in wills) there, the deviſe ſhall be (*c*) conſtrued accordingly; and here, it is provided, that, after the death of either of them, the ſurvivor ſhould have both acres, which declares his intent, that they ſhould have it but for life, notwithſtanding the ſums appointed to be paid to the daughters. Cro. Eliz. 498. (*c*) If lands are deviſed to *A.* and *B.* equally to be divided, they have but eſtates for life, for this can mean no more than that they ſhould ſeverally occupy the land. Roll. Abr. 834.

If *A.* deviſes land to his ſon *B.*, and if he hath iſſue male of his body lawfully begotten, then that iſſue to have it, and if he hath no iſſue male, then to others in remainder; by this deviſe *B.* hath an eſtate-tail; for where the deviſor ſaith, if he have no iſſue of his body, then it ſhall remain over, that is as much as if he had ſaid, if *B.* dies without iſſue male, which had been ſufficient to create an eſtate-tail in him. 9 Co. 128. Owen, 29. Vent. 227. Pollex. 487.

A. having two ſons, *B.* and *C.*, deviſed *Black Acre* to *B.* and his heirs, and *White Acre* to *C.* and his heirs, and farther willed that Cro. Jac. 695. Chadock

and Cowley. Pollex. 487. See Sid. 148.

the ſurvivor of them ſhould be heir to the other, if either of them died without iſſue: though the firſt words are ſufficient to paſs an eſtate in fee, yet the ſubſequent words correct them, and paſs only an eſtate-tail, and the remainder in fee is not contingent, but executed, each ſon being tenant in tail of the part to him deviſed, with the remainder to the ſurvivor in fee.

Cro. Jac. 448. King and Rumball. Roll. Abr. 836. Pollex. 487.

A man deviſed all his free lands to his wife for life, and after her death to *A.*, *B.*, and *C.*, his three daughters, equally to be divided; and if any of them die before the other, then the others to be her heirs, equally to be divided; and if they die without iſſue, then to others named in the will: adjudged, that the daughters had an eſtate-tail.

Noy, 64. Dyer, 330. Roll. Abr. 835.

So, where the deviſe was to a man and his heirs, and if he die without iſſue, that then the land ſhould go to *A.* and *B.* or the ſurvivor of them; adjudged an eſtate-tail in the firſt deviſee; for in theſe caſes, the (*a*) extent of the word *heirs* is confined to the deſcendants or iſſue of the body of the deviſee, ſince otherwiſe the limitation over cannot veſt according to the intent of the deviſor, for even in wills they will not allow a limitation of a fee upon a fee.

(*a*) Where a man deviſed land to *A.* his ſon for ever, and after his deceaſe the remainder to his heir male for ever, with other remainders over, it was holden an eſtate-tail in *A.*; for though the firſt deviſe, being to him for ever, would give him a fee-ſimple, yet the ſubſequent words *his heir male*, ſhew what ſort of inheritance the deviſor intended him. Buiſt. 219 to 223. Whiting and Welkins. Roll. Abr. 836.

Roll. Abr. 837.

If a man deviſes land to his wife for her life, and after to her ſon, and if he dies without iſſue having no ſon, that then *J. S.* ſhall have it; the ſon by this deviſe takes an eſtate in tail male, for though the deviſe to the ſon, and if he dies without iſſue, had been a good tail general, yet when the deviſor went further and ſaid, having no ſon, he thereby explained what iſſue he intended ſhould inherit the land, and limited it to the iſſue male.

Cro. Car. 285. Spalding's caſe. Buiſt. 230. S. C. Vent 230. 3 Lev. 434. S. P. 1 P. Wms. 427. S. P. 2 P. Wms. 196. S. P. Ld. Raym. 524. S. P.

A., having iſſue *B.* and *C.*, deviſed ſome of his lands to *B.* his eldeſt ſon, and the heirs of his body, after the death of his wife; and if *B.* died, living his wife, then to *C.* his ſon; and deviſed other lands to *C.* his ſon and the heirs of his body, and if he died without iſſue, then to remain over; *B.* died in the life of the wife; yet adjudged that *C.* could not enter into the land, while any iſſue of *B.* remained; for the words, *if* B. *died living the wife*, did not abridge the eſtate-tail which was given by the former words, becauſe the teſtator could not be ſuppoſed to intend to prefer a younger ſon before the iſſue of his eldeſt, eſpecially, when he had in the former part of the will ſettled it on the iſſue of the eldeſt, and made the ſame proviſion of other lands the ſame way for the youngeſt ſon.

3 Lev. 425. Luxford and Cheek. Raym. 427. S. C. by the name of Brown v. Cutter.

A. ſeiſed of lands deviſed them to his wife, if ſhe did not marry; but if ſhe ſhould marry, then his eldeſt ſon preſently after her marriage to enter, and hold the land to him and the heirs male of his body, the remainder to his other ſons in tail male; the wife did not marry; yet the court reſolved that the lands were entailed by the will, taking the intent of the deviſor to be, that the entail ſhould

should be created in all events, but that the eldest son should not enter till after the decease of the wife, unless in case of her marriage, and then to enter presently. 2 Show. 152. pl. 134. S.C. by the name of Brown v. Cutler. [Note, Raymond has reported merely his own argument.]

A man had issue, *A.*, *B.*, and *C.*, and having three houses, devised them all to his wife, with remainder of one house to each child, and his heir, and if any of his said issue die without issue of his body, the survivors to have *totam illam partem* between them, equally to be divided: these last words carry only an estate for life in the house of him that first dies to the survivors, for they imply no more than that the whole part of him that dies first shall go to the survivors, and there being no estate limited it can be only for life. 3 Leon. 129. 194. 3 Leon. 180. Cro. Eliz. 53. Hawkins's case. *Q. & vide supra.*

A. devised all his lands to his wife till his son should be of the age of 24 years, and then to his heir and to his heirs for ever, and when he comes to the age of 24 years, that she shall have the third part for her life, and if he dies before the age of 24 years, then she to have it all for life; and after her decease, if the heir has no issue, the remainder to *B.*, the remainder to the right heirs of the devisor; the heir came to the age of 24 years; but no entail was created by the will, for the fee-simple descended to him, and the limitations were to take place if he died before the age of 24 years, which he did not. Dyer, 124. Roll. Abr. 839.

A. devised lands to *B.* his son, and if *C.* his daughter survived *B.* and his heirs, then she should have the lands: it was adjudged, that *B.* had but an estate-tail, for the word *heirs* must be intended heirs of his body, for he could not die without (*a*) collateral heirs while his sister was alive. But if the will had said, that if *J. S.* a stranger survives *B.* and his heirs, then he should have the lands; there, *B.* would have had a fee-simple, and then the intended remainder over must be void, for it is to vest on a contingency of *B.*'s dying without heirs, which is too (*b*) distant to expect. Roll. Abr. 836. Cro. Eliz. 525. Cro. Jac. 415, 416. 448. Bulst. 193. Cro. Car. 41. 2 Lev. 162. (*a*) Salk. 233. pl. 12. Ld. Raym. 568. 1 P. Wms. 23. 5 Comyns, 82. pl. 51. [2 Eq. Ca. Abr. 305. pl. 2. Ca. temp. Talb. 1. Dougl. 254. Ambl. 363. Term Rep. 488. n. 491. 1 Vez. 89. 3 Atk. 617.] S. P. adjudged. (*b*) *Vide* Vaugh. 270, 271.

So, where *A.* devised to *B.* for his life, and to his heirs, and for want of heirs of him, to *C.* in the same manner, and for want of heirs of him, to *D.* and his heirs for ever, and the jury found that *B.* and *C.* were brothers, and that *D.* was next cousin and heir to them, though not mentioned in the will; the court held, that they had but an estate-tail, and the remainder in fee to *D.* was good, for *D.* being cousin and heir to them, proves that he intended heirs of the body: (*c*) also, want of heirs of him, are to be taken for want of heirs of his body. 3 Lev. 70. Parker and Thacker, adjudged. [Morgan v. Griffiths, Cowp. 234. S. P.] (*c*) 7 Co. 4. S. P.

[So, where *A.* devised lands to his son for life, then to his son *A.* for life, remainder to his son *G.*, and his heirs for ever, and if he should die *without heirs*, then to his two daughters; this was determined to be an estate-tail in *G.*; for it was impossible he Ca. temp. Talb. 1. Tyte v. Willis.

ſhould die without heirs whilſt his ſiſters were living; conſequently, the teſtator by *heirs*, could only mean *heirs of the body*.

1 P. Wms. 23. Nottingham v. Jennings.

The rule holds the ſame where the remainder is limited to the heirs of the teſtator himſelf, if ſuch heirs muſt alſo be heirs to the firſt deviſee. As, where *A.* deviſed to his ſecond ſon and his heirs for ever; and for want of ſuch heirs then to the teſtator's right heirs; here, though the deviſe to the teſtator's heirs was a mere nullity, as ſuch heirs muſt be in by deſcent, yet it was held ſufficient to manifeſt the intent, and aid the conſtruction of an eſtate-tail.

Attorney General v. Gill. 2 P. Wms. 369.

But where there was a deviſe to one and his heirs, and if he die without heirs, then to a *charity*; lord chancellor ſaid, the deviſe being to one and his heirs, and if he die without heirs, then over, ſuch deviſe over was void, and the word heirs ſhould not be conſtrued to ſignify heirs of the body, where the deviſee over is not inheritable.

2 Vez. 89. Tilburgh v. Barbut. 3 Atk. 617.

So, where the teſtator deviſed to his ſon *and his heirs*, and if he ſhould die *without heirs*, remainder over to another who was half brother to the firſt deviſee; upon a queſtion made, whether the firſt limitation was in fee or in tail? Lord *Hardwicke* ſaid, it was a plain caſe, and one of thoſe points which the court would not ſuffer to be argued, as having been determined before. This was a deviſe over to a ſtranger, as the law conſiders him, and who could not in any event inherit as heir to his brother.]

Robinſon's caſe, 1 Roll. Abr. 837. pl. 12.

If *A.* deviſes lands to *B.* for life, and if he die without iſſue then to remain to *C.*, this is an eſtate-tail in *B.*, for it is not to remain to *C.*, till the iſſue of *B.* be ſpent.

2 Brownl. 271. Moor, 682. Lit. Rep. 259. 1 P. Wms. 57. 1 Vent. 230. S. C. cited. (a) And therefore, wherever the anceſtor takes an eſtate for life, and there is a limitation to his heirs or iſſue, theſe words ſhall be words of limitation, and not of purchaſe, and veſt the inheritance in the anceſtor, laid down as a rule in Shelly's caſe, Co. 69. But on this rule of creating by implication an eſtate of inheritance in the anceſtor, there have been ſeveral nice diſtinctions, as appears by the caſes on this head.

Vent. 230. Burley's caſe, cited by Hale, C. J. to have been adjudged 43 Eliz. but Q. Whether there be any ſuch caſe on the roll?

So, of a demiſe to *B.* for life, the remainder to the next heir male, and for default of ſuch heir male, the remainder over; this is a good eſtate-tail, for the words *heir* and *iſſue* are *nomina collectiva*, and carry the land not only to the immediate heir or iſſue but to all that deſcend from the deviſee.

2 Co. 66. Archer's caſe. 2 Anderſ. 37.

But if lands are deviſed to *A.* for life, the remainder to his firſt heir male, and the heirs male of the body of ſuch heir male; the deviſee hath but an eſtate for life, by the expreſs words of the will; and the limitation of the remainder to the heir male, and to the heirs male of ſuch heir male, is a good contingent remainder in the heir male, becauſe it may veſt *eo inſtanti* that the particular eſtate determines.

6 Co. 16. b. Wyld's caſe. Moor, 397. S. C. Cro. Eliz. 743. S. C. Vent. 229.

Lands were deviſed to *A.* and his wife, and after their deceaſe to their children, they having then a ſon and a daughter; it was adjudged, that *A.* and his wife had but an eſtate for life, the remainder to the children for life; for no greater eſtate had paſſed at common law; and the intent of the deviſor muſt plainly appear

or they will never admit of a construction different from what they would allow in conveyances executed in the life of the party; and for that reason, if the devise had been to *A.*, and his children, or issue, *A.* having children at the time, *A.* and the children would have been jointenants for life. 10 Mod. 376. S. C. cited.

But if *A.* had devised land to *B.* and his children or issue, and *B.* had none at the time of the devise, then he takes an estate-tail, for it is plainly the intent of the devisor, that the children shall have the land; and they cannot take as immediate devisees, for they were not *in esse*; nor by way of remainder, for the devise was immediately to *B.* and his children; and therefore, the words shall be taken as words of limitation, *viz.* as children of his body. 6 Co. 17. Vent. 229. 2 Lev. 59, 60.

One having two sons, *A.* and *B.*, by his will in writing devises lands to his son *A.* for his natural life, and after his decease he gives the same to the issue of his body lawfully begotten on a second wife, (he having a first then living,) and for want of such to *B.* and his heirs for ever, with power to *A.* to make a jointure to such second wife for her life, and dies; *A.*, in the life of his first wife, suffers a recovery to the use of himself in fee, and dies without issue; and the question was, whether by this devise *A.* was tenant in tail, for then by the recovery the remainder was destroyed; or if he was only tenant for life, for then this recovery was a forfeiture of his estate: and it was adjudged in *B. R.* against the opinion of *Hale*, Ch. Just., that *A.* had but an estate for life; but this judgment was reversed in the *Exchequer-chamber*, where it was adjudged, that *A.* had an estate-tail. King v. Melling, Vent. 214. 225. &c. 2 Lev. 58. 3 Keb. 42. 52. Pollex. 101. Fitzgib. 23. S. C. cited. 8 Mod. 263. 384. S. C. cited. 2 P. Wms. 472. S. C. cited. As this seems to be the most ruling and established case relating to this doctrine, it may not be improper briefly to insert the reasons of the resolution, which are these: 1. Because that issue is *nomen collectivum*, and is a stronger word than *children*, which takes in only the immediate descendants of the parent; but issue takes in all from generation to generation; and so long as there is any issue of *A.* the remainder is not to take place. 2. In acts of parliament, issue is as comprehensive as heirs of the body; as in West. 2. *de donis*, it is said, *quo minus ad primum descendat*, which takes in all issues *in secula seculorum*. 3. He had no issue at this time, for then it would, as this case is, vest in them by way of remainder; but having none, leaves it to the construction of law, upon the import of the word *issue*. 4. It is issue of his body begotten, which is an eye of an estate-tail. 5. It is said, "*and for want of such issue*," which is a phrase agreeable to an estate-tail. 6. It is in case of the creation of an estate-tail, where *voluntas donatoris* has some influence. 7. It is in case of a will, where the intention of the testator is to govern.

[A testator gave and bequeathed to his grandson *S.* all that his meadow, *&c.* to hold unto *S.* and the heirs of his body lawfully begotten, *and their heirs for ever*, chargeable nevertheless, and charged with the payment of eight pounds a year unto *M.* during her natural life: but in case *S. should die without leaving issue of his body*, then he gave and devised the same to *G.*, to hold to him and his heirs for ever; chargeable as aforesaid, and also chargeable with and subject to the payment of 100 *l.*, unto his the testator's niece, within one year after *G.* or his heirs should be possessed of the same premises. *S.* entered and died seised, leaving issue a son, who also died seised, having previous to his death, made his will, and devised the same to his mother, and her heirs and assigns. And the question was, what estate *S.* took under this will? And it was contended, on behalf of the mother, that the son of *S.* took a fee-simple, the words "heirs of the body" operating as words of purchase to answer the intent; and it was said that a Denn v. Shenton, Cowp. 410.

ſtrong circumſtance was, the legacy of 100*l.* deviſed to the teſtator's niece, in caſe *S.* ſhould *die without iſſue*; of neceſſity therefore the teſtator muſt mean a dying without iſſue, at the time of his death; for if he intended ſhe ſhould wait till a *total failure of iſſue*, ſhe might wait for 100 years, or for ever. But Lord *Mansfield* ſaid the diſtinction was, between a deviſe of lands and perſonal eſtate: in the latter caſe, the words were taken in their vulgar ſenſe; that was, *dying without leaving iſſue at the time of his death*. The queſtion was, whether the grandſon took an eſtate-tail or an eſtate in fee? The deviſe was to *S.* and the *heirs of his body*, and *their heirs for ever*, but the words "*their heirs for ever*" were qualified by the ſubſequent words "in caſe he ſhall die *without* "*out leaving iſſue*," which clearly ſhewed it an eſtate-tail; and then the teſtator gave it over to the mother. It was too clear to admit of a doubt. And the other three judges concurred.]

Fountain and Gooch, Hil. 29 & 30 Car. 2. Rot. 1247. [S. C. cited by Lord Mansfield in Cowp. 380.]

Upon a ſpecial verdict, the caſe was; *Richard Gooch*, ſeiſed in fee of lands in *Suffolk*, by will in writing deviſes to *Richard*, ſon of his late brother, all his lands commonly called *P.* and alſo all other his lands during his natural life, and to the heirs male of his body begotten; and for want of ſuch iſſue, he the ſaid *Richard* to have the ſaid eſtate but during his natural life, and no longer; and then his will was, that the aforeſaid eſtate ſhould deſcend to *Philip* his nephew: *Richard* ſuffers a common recovery to the uſe of himſelf and his heir, and deviſes this land to the defendant in fee, and dies without iſſue male. It was adjudged to be an eſtate-tail in *Richard*, and ſo the remainder barred by the recovery, and not an eſtate for life, and ſo forfeited by the recovery; for the words *and for want of ſuch iſſue, he the ſaid* Richard *to have but an eſtate during his natural life*, are no more than the law implies; for if tenant in tail has no iſſue, it reſolves into an eſtate for life, and ſo it was adjudged. The objection was, that it ſhould be conſtrued thus: I give the land to *Richard* during his life, and no longer, in caſe he has no iſſue male of his body; and ſo an eſtate-tail upon a contingent; and he dying without iſſue male, it is now become but an eſtate for life *ab initio*; but the judgment was *ut ſupra*.

Driver v. Edgar, Cowp. 379.

[A teſtator deviſed lands to his daughter *E.* to hold the ſame after the death of the teſtator's wife, to his ſaid daughter and the *heirs of her body* lawfully begotten; and to his daughter *M.* other lands, to hold from and after his wife's deceaſe, to the ſaid *M.* and to the heirs of her body lawfully begotten; and declared his further mind and will to be, that in caſe either of his ſaid daughters ſhould happen to die ſingle, married, or widow, without leaving children or child *living at their deceaſe*, lawfully begotten, then the *eſtate* given her by his will, ſhould be void as to the *inheritance* of *heirs*, and of none effect, and the lands ſo given her ſhould go to his heir male, and his heirs male, he and they paying to the ſurviving daughter an annuity during her life. *E.*, after the deceaſe of her mother, ſuffered a common recovery of the lands ſo deviſed to her, and afterwards deviſed them, and died unmarried. Upon a queſtion, whether the recovery had barred the remainder over; it being contended on behalf of the claimant in remainder that

that upon the whole of the will the intention of the teſtator was not to give his daughter an immediate eſtate-tail, but an eſtate for *life* only, with remainder to her children in tail, if ſhe left any, and if not, then to the teſtator's heir male, *&c.*; but if not ſo, ſtill, that in providing for the event that had happened, he expreſsly revoked the eſtate of inheritance; the court ſaid, the validity of the recovery depended on the point, whether the daughter was tenant in tail, or tenant for life only; and that it was neceſſary for the plaintiff to ſupport the propoſition, that, at the death of the teſtator, *E.* was, during her own life, tenant for life only; that the eſtate was given *to her and the heirs of her body*, which was an eſtate-tail; that if ſhe was tenant in tail to the hour of her death, nothing was ſo clear, as that all conditions limited upon ſuch eſtate-tail, were avoided by the common recovery, which had been ſuffered. And the court were of opinion, that ſhe was tenant in tail.]

A copyholder in fee ſurrenders to the uſe of his will, and by will deviſes his copyhold lands to his wife, and if ſhe hath iſſue by the deviſor, that iſſue ſhall have it at his age of 21 years; and if the iſſue die before that age, or before his wife, *or if ſhe hath no iſſue*, then ſhe ſhall chooſe two attornies, and ſhe to make a bill of ſale of my lands to her beſt advantage. *Per curiam*, ſhe hath only an eſtate for life; and having no iſſue, hath no intereſt to diſpoſe, but an authority only to nominate two, who ſhall ſell, and the vendee ſhall be in by the will.

Cro. Jac. 199. Beal and Shephard, adjudged. 4 Mod. 318, 319. S. C. cited.

One by will deviſes lands to *A.* for life, without impeachment of waſte; and in caſe he ſhall have iſſue male, to ſuch iſſue male and his heirs for ever; and after the death of *A.*, in caſe he ſhall leave no iſſue male, to *B.* and his heirs for ever, and dies: *A.* ſuffers a recovery, and declares the uſe to himſelf in fee, and by his will deviſes it to *C.* in fee, and dies without iſſue; and the firſt queſtion was, whether by this deviſe *A.* took an eſtate in tail male, or only for life? and it was held to be but an eſtate for life in *A.* 1*ſt*, Becauſe it was deviſed to him expreſsly for life, and that without impeachment of waſte, which would have been needleſs, if it were an eſtate-tail. 2*dly*, The words, *and in caſe* A. *die without iſſue male, or leave no iſſue*, are not to be taken ſubſtantively and abſolutely, but relatively to what was ſaid before, *viz.*, if *A.* die without iſſue, who ſhall take the fee as before is appointed; and theſe oblique words cannot be intended to deſtroy by implication the eſtate expreſsly deviſed before to the iſſue male of *A.*, and there is no uncertainty in theſe words, *to the iſſue male*, which of them ſhall take, if there be ſeveral, for the eldeſt ſhall take the fee by purchaſe, *&c.*

3 Lev. 411. Ld. Raym. 203. S. C. cited in 8 Mod. 256. See Fitzgib. 21. 10 Mod. 403. between Loddington and Kime; and the court being ready to give judgment on this point, J. Powell jun. ſtarted another, *viz.* Whether theſe remainders could take place as executory deviſes, or contingent remainders? upon which it was twice argued; but before any judgment the parties agreed; but in Salk. 224. pl. 1. S. C. it is ſaid to have been further held, that this limitation to the iſſue was not an executory deviſe, being after a freehold, but a contingent remainder, ſo that a poſthumous ſon could never take; but there is no judgment; but *per* Raym. Ch. Juſt. in the caſe of Sparrow and Weigh it was determined, and judgment entered, Paſch. 9 W. 3. that it was only an eſtate for life; and it was likewiſe decided in the ſame manner in Chancery, and on an appeal to the Houſe of Lords, Abr. Eq. 183. [And ſee acc. Doe v. Reaſon, 3 Wilſ. 244.]

White v. Collins, Com. Rep. 289.

[A teſtator deviſed lands to his ſon *F.* to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part, and after his death and jointure, if any were made, *to the heirs male of his body lawfully begotten, during the term of his natural life, and for want of ſuch heir male*, he gave the ſame lands to another ſon. It was adjudged, that *F.* took only an eſtate for life.

Law v. Davis, 2 Ld. Raym. 1561.

Again, where a deviſe was to *B.* and his heirs lawfully to be begotten, *that is to ſay, to his firſt, ſecond, third, and every ſon and ſons ſucceſſively, lawfully to be begotten of the body* of the ſaid *B. and the heirs of the body of ſuch firſt, ſecond, third, and every other ſon and ſons ſucceſſively*, lawfully iſſuing as they ſhould be *in ſeniority of age and priority of birth*, the eldeſt always, and the heirs of his body to be preferred before the youngeſt, and the heirs of his body, remainder over; it was adjudged, that *B.* took only an eſtate for life; for that the ſubſequent clauſe was not *contrary* to the preceding general limitation to *B.*'s heirs lawfully to be begotten, but explanatory of what heirs, *&c.* were meant.

Doe v. Laming, 2 Burr. 1100. 1 Bl. Rep. 265.

Gavelkind lands were deviſed to *A. and the heirs of her body* lawfully begotten or to be begotten, as well females as males, and to their heirs and aſſigns for ever, to be divided equally, ſhare and ſhare alike, as tenants in common, and not as jointenants. It was holden, that the words *heirs of her body* did not operate as words of limitation, nor, conſequently, create an eſtate-tail in *A.* For here, theſe words did not ſtand independent and unqualified, but were corrected and explained, very expreſsly, by the words which followed and were coupled with them; the words *as well females as males*, annexed to the words *heirs of the body*, were incompatible with and expreſsly broke the deſcent, becauſe gavelkind lands cannot deſcend in that manner; and the deviſe expreſsly created a tenancy *in common*, which was impoſſible *by deſcent*, as that muſt have been *in coparcenary*; and beſides, there were words of limitation *in fee* grafted on the words *heirs of the body*, which could not have been ſatisfied by an eſtate-tail in the anceſtor.

Perrin v. Blake, 4 Burr. 2579. 1 Bl. Rep. 672. Dougl. 329. note.

W. Williams, being ſeiſed in fee of a plantation in *Jamaica*, deviſed in the following words:—"Should my wife be enſeint with "child, at any time hereafter, and it be a female, I give and "bequeath unto her the ſum of 2000*l.*, *&c.*; if it be a male, I "give and bequeath my eſtate, real and perſonal, equally to be "divided between the ſaid infant and my ſon *J. W.*, when the "ſaid infant ſhall attain the age of 21. *Item*, It is my intent and "meaning, *that none of my children ſhould ſell or diſpoſe of my eſtate "for longer time than his life*; *and to that intent* I give, deviſe, and "bequeath all the reſt and reſidue of my eſtate to my ſon *J. W.* "and the ſaid infant, for and during the *term of their natural lives*; "the remainder to my brother-in-law *J. G.* and his heirs, for "and during the lives of my ſaid ſon *J. W.* and the ſaid infant; "the remainder to *the heirs of the body of my ſaid ſon J. W.* "and the ſaid infant, lawfully begotten or to be begotten; the "remainder to my daughters, *&c.*" No other ſon was born, and the queſtion was, what eſtate *J. W.* took under this will? The

The court of King's Bench (*Yates*, J. *diſſent.*) determined, that he took only an eſtate for life. This judgment was reverſed in the Exchequer-chamber, from which an appeal was lodged in the Houſe of Lords. The judgment of that Houſe, however, was never had; for after the appeal had depended a conſiderable time, the parties compromiſed the diſpute, and the plaintiff obtained leave to withdraw his writ of error.

J. N. deviſed his eſtate to his two daughters, equally to be divided between them, not as jointenants, but as tenants in common, *viz.* the one moiety or half part thereof to his daughter *E. N.*, and her heirs for ever; and the other moiety to his daughter *S.* the wife of *W. H.* during the term of her natural life, and after her deceaſe *to the iſſue of her body lawfully begotten, and their heirs for ever.* It was adjudged, that *S.* the ſecond daughter took only an eſtate for life, with remainders to her children, as purchaſers. For if the deviſe of the ſecond moiety were conſtrued to give an eſtate-tail to this daughter, the deviſor's eſtate would not be equally divided, for then the ultimate reverſion of the ſecond moiety would be again ſubdivided between the heirs of the two daughters; and the firſt daughter and her heirs would take a moiety of this reverſion over and above what they take under the deviſe of the firſt moiety of the whole.] Roe v. Collis, 4 Term Rep. 294.

A. deviſes his eſtate to truſtees and their heirs, in truſt for *B.* for life, and to his firſt and other ſons in tail; but in caſe *A.* died without an heir male of his body begotten, the truſt to be void; and in ſuch caſe he gave the eſtate to *J. S.* It was held, that theſe words, *if he die without heir male of his body begotten*, did not give him an eſtate-tail by implication, nor enlarge an expreſs eſtate deviſed to him for life. 2 Vern. 427. 449. Popham and Bamfield. 1 P. Wms. 54. S. C. 1 Salk. 236. S. C. but ſaid by Lord Hardwicke, in 1 Ver. 6 to be wrong reported by him. S. C. cited in 8 Mod. 260. Fitzgib. 26, 27. 1 P. Wms. 333.

If *A.* deviſes to *D.*, his daughter for life, and after her deceaſe to her firſt ſon, and the heir of his body; and if he dies without heirs of his body, then to her ſecond and other ſons, and the heirs of their bodies, and after them to *N. in eâdem formâ*, and for default of ſuch iſſue, to *J. S.* in fee; and after the will was finiſhed, but before publication, the teſtator adds this clauſe: *Memorandum, the intent and meaning of the teſtator is, that* D. *ſhall not alien the lands given to her, but they ſhall be to her heirs male; and for want of ſuch iſſue, to* N. This reſtrictive clauſe explains the intent of the teſtator, and therefore *B.* ſhall have an eſtate for life, and not an eſtate-tail by implication. Skin. 240. pl. 5. 3 Mod. 62. 311. S. C. cited. Vent. 230. 4 Mod. 318. Pollex. 657. 2 Show. 405. pl. 377. Eq. Abr. 184. pl. 25. Friend and Bouchier.

[Where the deviſe was to *A.* for life, with power to truſtees to ſettle a jointure, if he married a gentlewoman, and, ſubject to ſuch jointure, a direction to limit the eſtate on the iſſue of the marriage in ſtrict ſettlement; but if *A.* died without iſſue of his body, then over; Lord *Hardwicke* held, that the latter words gave *A.* an eſtate-tail by implication. Allanſon v. Clitherow, 1 Ves. 24.

Sir *W. D.* deviſed all his manors, meſſuages, lands, *&c.* to his daughter *M. D.* for life, remainder to truſtees to preſerve, *&c.* remainder to her firſt ſon in tail *male*, remainder to every other ſon in tail *general*; and gave all his perſonal eſtate to truſtees, to be Letheullier v. Tracey, 3 Atk. 774. Ambl. 204. 220. S. C.

be laid out in land; and ſettled upon his daughter and her iſſue, in ſuch manner as he had deviſed his manors, &c.; and *in caſe his ſaid daughter ſhould die without iſſue of her body living at her deceaſe*, then he deviſed to truſtees his manors, &c. and alſo all his perſonal eſtate, to be laid out as aforeſaid; upon truſt, to receive the rents and profits thereof annually, as well of the lands ſo to be purchaſed, as of all other the premiſes ſo as aforeſaid deviſed to them, and lay out the ſame in the purchaſe of lands of inheritance in the county of *G.* or ſome adjacent county, and alſo the rents thereof, until his couſin, Sir *H. N.* ſhould attain his age of 21 years. And then the will goes on in theſe words: "*Item*, I "give and deviſe all my manors, &c. unto my couſin, Sir *H. N.* "after he ſhall have attained the age of 21 years, (taking the "name of *D.*) for life, without impeachment of waſte; with re- "mainder to his firſt, &c. ſons in tail male, remainder to his "daughters in tail. And in default of ſuch iſſue, or in caſe "the ſaid Sir *H. N.* ſhall happen to die before he attain his ſaid "age of 21 years, and without iſſue, then to *S. L.* (taking the "name of *D.*) for life, with remainders to his ſons in tail male; "and for default of ſuch iſſue" —— And then there was a blank, without any farther diſpoſition. Lord *Hardwicke* held, that *M. D.* the teſtator's daughter, was not entitled to an eſtate-tail by implication; for that the words "if my ſaid daughter *ſhould die with-* "*out iſſue living at her deceaſe*," are to be conſidered as if he had added *during the minority of Sir* H. N., and do not give an eſtate-tail to the daughter, but her iſſue take by purchaſe.

Robinſon v. Robinſon, 1 Burr. 38.

A teſtator deviſed all his real eſtate to *L. H.* for and during the term of his natural life, *and no longer*; provided that he altered his name, and took that of *R.* and live at his houſe at *B.*; and after his deceaſe to *ſuch* ſon as he ſhould have, lawfully to be begotten, taking the name of *R.*: and for default of *ſuch iſſue*, then he bequeathed the ſame to his couſin *W. R.* and his heirs for ever: And he further willed, that the ſaid *W. R.* have liberty to preſent whom he pleaſes to any vacancy that ſhould happen in any of his (the ſaid teſtator's) preſentations, during his life; and in caſe any of his children ſhould take or be deſigned for holy orders, then it was his (the ſaid teſtator's) deſire, that in caſe of any vacancy in either of his preſentations, bonds of reſignation be taken to ſuch child or children, if the vacancy happen before he or they attain ſuch orders; and after the ſame ſhould be diſpoſed of as aforeſaid, then he gave *the perpetuity of the ſaid preſentations to the ſaid* L. H. *in the ſame manner, and to the ſame uſes*, as he had before given his eſtate. The court of King's Bench certified; that upon the true conſtruction of this will, the ſaid *L. H.* muſt, by neceſſary implication, to effectuate the manifeſt general intent of the teſtator, be conſtrued to take an eſtate in tail male, he and the heirs of his body taking the name of *R.*; notwithſtanding the expreſs eſtate deviſed to the ſaid *L. H. for his life, and no longer*.

Evans v. Aſtley, 3 Burr. 1570.

Sir *S. D.* deviſed all his manors, &c. to *S. D.* ſon of *C. D.* during his natural life, and the heirs male of his body lawfully to

to be begotten; and for want of such issue, to *C. D.* another of the sons of the said *C. D.* during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to *J. D.* another of the sons of the said *C. D.* during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, then to every son and sons of the said *C. D.* which should be begotten on the body of *Sarah* his then wife; and for want of such issue, then to *W. H.* for his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to *S. G.* for and during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to *J. G.* for and during his life, and the heirs male of his body lawfully to be begotten; with the reversion to the testator's right heirs. There was a proviso annexed to the devise to the said *S. D. and others*, that if the estates devised to him or them and their descendants, should come to him or them and be in possession, then and thereupon he and they and their descendants to whom the premises should come and be in possession, should procure an act of parliament to take his name and arms; otherwise their estates should determine. The testator also devised several things to go, as heir-looms, along with the estate; and he gave powers to make leases and jointures. The three sons of *C. D.* viz. *S. D.*, *C. D.* and *J. D.* all died without issue. But *C. D.* had a fourth son, named *W.* born after the making of the will, who became seised, and took the name and arms according to the directions of the will. It was adjudged, that this son took an estate-tail, for that the testator evidently intended the same estate for the after-born sons, as he had given to the others.

J. B. devised, after the death of his nephew *W. B.*, eldest son of his brother *R. B.* without issue, to the second son of his said brother *R. B.* for and during the term of his natural life; and after the death of the said second son of his said brother *R. B.* then to the first son of the body of such second son of his said brother *R. B.* lawfully begotten or to be begotten, and to the heirs male of the body of such second son lawfully to be begotten; and for want of such issue, to the third, fourth, fifth, and every younger son or sons of the said second son of the said *R. B.* (according to their seniority) and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of the said *R. B.*, with remainders over. At the time of making the will, *R. B.* had no other son but *W. B.* His second son *T. B.* was born after the making of the will, and after the testator's death. The question being, whether *T. B.* the second son of *R. B.* took an estate-tail under this will, or an estate for life only? It was pressed upon the court in order to make it an estate for life only, to change the limitation to the heirs male of the body of such second son, to the heirs male of the body of such first son of such second son, and to insert a limitation to the second son of the said second son; but the court said, that they could not supply a contingency omitted in the most favourable case that could exist; that adding these words in this case would introduce a void limitation, for that a possibility could not be devised upon a possibility; that it would defeat the intention

Chapman v. Brown, 3 Burr. 1626.

tention of the teſtator; that that intention could not be anſwered but by giving the ſecond ſon of *R. B.* an eſtate-tail; and that, as the words ſtood in the will, he took an eſtate-tail.

Hay v. Earl of Coventry, 3 Term Rep. 83.

An eſtate was deviſed to *A.* for life, remainder to truſtees to preſerve, *&c.* remainder to his firſt and other ſons in tail male, remainder to *B.* for life, remainder to truſtees to preſerve, *&c.* remainder to his firſt and other ſons in tail male, remainder to the uſe of all and every the daughters of *A.* and *B.* as tenants in common; and in default of ſuch iſſue, to the uſe of the right heirs of the deviſor. After the death of *A.* and *B.* without any ſon, an only daughter of *B.*, it was adjudged, took only an eſtate for life, for that here the teſtator has uſed no words teſtifying his intention to give an eſtate of inheritance to the daughters, and the court could not ſupply them.

Doe v. Applin, 4 Term Rep. 82.

A teſtator deviſed to his nephew *W. D.* all his eſtate at, *&c.* to hold to him during his natural life, and after his deceaſe *to and amongſt his iſſue*, and *in default of ſuch iſſue*, he gave the eſtate over. The court ſaid, that in this caſe, as in that of *Robinſon* v. *Robinſon*, they muſt, to anſwer the deviſor's general intention, defeat ſome particular intent: that his general intent was to give *W. D.* an eſtate-tail; and that to effectuate that intent they muſt reject the words "*to and amongſt.*"]

2 Vern. 526. between Leonard and Earl of Suſſex, decreed in Chancery.

If *A.* deviſes lands to truſtees to pay debts and legacies, and then to ſettle the remainder of one moiety of what ſhould remain unſold to *H.*, and the heirs of his body by a ſecond wife, and in default of ſuch iſſue to her ſon *F.* and the heirs of his body; the other moiety to *F.* and the heirs of his body, with remainders over, taking ſpecial care in ſuch ſettlement, that it never be in the power of either of my ſaid ſons *F.* or *H.* to dock the entail of either of the ſaid moieties given them, as aforeſaid, during their or either of their life or lives; this eſtate being only executory, it muſt be conſtrued as if like proviſion had been contained in marriage-articles; and therefore the ſons ſhall have eſtates for life conveyed to them; but it muſt be without impeachment of waſte.

Attorney General v. Sutton, 1 P. Wms. 754. 2 Br. P. C. 282. S. C. Vin. Abr. tit. Deviſe, (B. b.) pl. 22. S. C. Fort. 66. S. C. cited.

[*J. S.* being ſeiſed in fee of a legal eſtate in *L.*, and of a truſt or equitable eſtate in *S.*, by his will directed *B.* his nephew and truſtee in the land in *S.* to convey his land in *S.* to the uſes of his will; which if he refuſed to do, or to acknowledge the truſts of his will in manner therein mentioned, then "all the gifts, legacies, and bequeſts in the ſaid will given, deviſed, and bequeathed to the ſaid *B.* and the heirs male of his body ſhould be void." He then deviſed all his lands in *L.* and *S.* to *B.* for life, and afterwards to the firſt ſon, or iſſue male of his body lawfully to be begotten, and to the heirs male of the body of ſuch firſt ſon, remainder to *B.*'s ſecond ſon, and his iſſue mail in tail, (not carrying over the limitations to his third or other ſon,) ſubject to a proviſo, "that the ſaid *B.* or his aſſigns and the heirs male of his body ſhould not commit waſte upon the ſaid premiſes, and ſhould not impeach, queſtion, or endeavour to defeat, avoid, deſtroy, invalidate, or obſtruct the payment of all or any the annuities, legacies, or charitable bequeſts in the ſaid will." And from and after the death of the teſtator's wife, and of the

ſaid

ſaid *B.* without iſſue male of his body, or after the death of ſuch iſſue male, he deviſed all his ſaid premiſes to truſtees for charities. Afterwards *A.* ſuffered a recovery, and died without iſſue; and the queſtion was, whether the recovery barred the charities? As to which, on an appeal from the court of Exchequer to the Houſe of Lords, it was agreed by all the Lords, that the recovery was good of the lands in *L.*, of which the teſtator had a legal eſtate, and that the charities were barred by it; but as to the truſt lands in *S.* the order of the court of Exchequer was reverſed by a majority; the effect of which being only to reverſe the plea allowed by the Exchequer, it only put the reſpondent to anſwer over, without determining the right any way againſt him. However, in conſequence of this order, the Barons decreed, that the recovery of the truſt eſtate was void, as contrary to the truſts created by the will; and there having been no conveyance of the lands in *S.* to truſtees, purſuant to the directions in the will, they directed ſuch a conveyance, and a perpetual injunction for quieting poſſeſſion. As to the lands in *L.*, in which the teſtator had the legal eſtate, the court, after a trial at law, and a ſpecial verdict found, gave judgment for the leſſors of the plaintiff, being of opinion that the nephews took an eſtate-tail in thoſe lands, and they ordered the tenants to attorn.

Lands were deviſed to truſtees and their heirs, in truſt, until the marriage or death of the teſtator's grand-daughter, to receive the rents and profits, and pay her an annuity for her maintenance, and as to the reſidue to pay his debts and legacies, and after payment thereof, in truſt for his grand-daughter; and if ſhe married a proteſtant, after her age, or with conſent, *&c.* then to convey the eſtate after ſuch marriage to the uſe of her for life, without impeachment of waſte, remainder to her huſband for life, remainder to the iſſue of her body, with ſeveral remainders over. Lord *Talbot* held, that the grand-daughter was *tenant for life* only, with remainders over in ſtrict ſettlement. Lord Glenorchy v. Boſville, Ca. temp. Talb. 4.

An eſtate was deviſed to truſtees to convey to the uſe of the teſtator's daughter, for the term of her natural life, and ſo as ſhe alone, or ſuch perſon as ſhe ſhould appoint, ſhould take and receive the rents and profits thereof, and ſo as her huſband was not to intermeddle therewith; and from and after her deceaſe, in truſt *for the heirs of the body* of the ſaid daughter for ever. Lord *Hardwicke* ſaid, that it was plainly the intention of the teſtator, that the huſband ſhould have no manner of benefit from the eſtate either in the lifetime of the wife, or after her deceaſe, (for immediately upon her deceaſe it was to be conveyed in truſt for the heirs of her body); the wife therefore could only take an eſtate for life; for if ſhe were entitled to an eſtate-tail, the huſband muſt be entitled to be tenant by the curteſy. Roberts v. Dixwell, 1 Atk. 607.

A. M. deviſed all his lands in *B.* and *C.* to truſtees, in truſt, to ſell the ſame, and with the money ariſing by the ſale, to purchaſe other freehold lands, or long annuities, or ſtock, or ſome other publick fund; and then to permit the defendant and his aſſigns to receive the intereſt and profits thereof during his life; and he further Meure v. Meure, 2 Atk. 265.

further directed, that the defendant ſhould receive the rents and profits of the eſtates until ſold to his own uſe; and after the defendant's deceaſe, then in truſt to permit the plaintiff and his aſſigns to receive the intereſt and profits of the ſaid money as aforeſaid, or the rents and profits of the ſaid land, if unſold, or ſuch other lands as ſhould be purchaſed, during his natural life; and after his deceaſe, then in truſt for the uſe of the iſſue of the body of the plaintiff lawfully begotten; and in default of ſuch iſſue, the eſtates were deviſed over in fee. One of the truſtees in the will died before the eſtates were ſold, but after he had proved the will. On a bill brought by the plaintiff to have the eſtates ſold by a decree of the court, and that the money ariſing thereby might be diſpoſed of according to the will; the queſtion was, whether an eſtate-tail was to be limited to the plaintiff in the lands to be purchaſed, or an eſtate for life only? By the Maſter of the Rolls:—Where lands are to be ſettled to one for life, and to the heirs of his body, there is no caſe where ſuch a limitation has not been held to be an eſtate-tail: on the other hand, there is no caſe where they are to be ſettled to one for life, and after his death to the iſſue of his body, that ſuch a limitation hath been conſtrued an eſtate-tail. In *Sweetapple* v. *Bindon*, 2 *Vern.* 536. there was no eſtate for life particularly given before the word *iſſue*, which differs it from the preſent caſe; and yet Lord Keeper *Wright* ſaid, upon the like words in marriage articles it would not have been conſtrued an eſtate-tail, when it appeared the eſtate was intended to be preſerved for the iſſue. And in the caſe of *Bale* v. *Coleman* it is laid down, that there is a difference between a deed and a will, as to conſtruction. There is ſomething in this will that denotes the intention of the teſtator, that the plaintiff ſhould only take an eſtate for life, for there is a diſtinction between the wording and framing of the limitations: in the firſt place, the eſtate is during the lives of the defendant and the plaintiff to continue in the truſtees; and when the teſtator limits it to the plaintiff for life, it is to permit the plaintiff to receive the rents and profits, *&c.*; and when the limitation is to the iſſue, it is to their uſe and behoof, and the court ſhould, as near as they can, preſerve the intention of the teſtator. The words, *in default of ſuch iſſue* to *A. F.*, ſhew the teſtator intended, that *F.* the remainder-man ſhould not take while there was iſſue of the plaintiff: iſſue of his body takes in both male and female, and there muſt be croſs-remainders to the iſſue female. Lord *Glenorchy* v. *Boſville* is in point, and I ſhall in this caſe make my decree accordingly.

Bagſhaw v. Spencer, 2 Atk. 246. 570. 577. 1 Ves. 142. See obſervations on this caſe in Jones v. Morgan, 1 Br. Ch. Rep. 206. Fearne's Con-

A. deviſed lands to five truſtees, their heirs and aſſigns, in truſt, by rents and profits, ſale or mortgage, to pay his debts, *&c.*; and after payment thereof, he deviſed the ſame eſtates to three of the ſame truſtees, their executors, *&c.* for 500 years upon truſt to pay his legacies, and an annuity of 200 *l. per annum* to his ſiſter for life; and after the determination of the ſaid eſtate for years, he deviſed the ſame premiſes to all the ſaid truſtees and their heirs, in truſt, as to a moiety, to the uſe of *T.*, his nephew for life, without impeachment of waſte, and after the determination of that eſtate,

eſtate, to the truſtees and their heirs during the life of *T.*, to ſupport contingent remainders, and after his deceaſe, to the uſe of the heirs of the body of *T.* lawfully begotten, and for want of ſuch iſſue, then to the uſe of his nephew *B.* for the term of his natural life, without impeachment of waſte, and after the determination of that eſtate, to the ſame truſtees during the life of *B.*, to preſerve contingent remainders; and after his deceaſe, then to the uſe of the heirs of the body of *B.* lawfully begotten, with like remainders to other nephews. The firſt deviſee *T.* died without iſſue; upon whoſe deceaſe *B.* the next in remainder filed his bill, praying, among other things, to be let into poſſeſſion of a moiety of the eſtates: afterwards *B.* dying pending the ſuit, his widow and deviſee brought a bill of revivor and ſupplemental bill, charging, that *B.* in his lifetime, by bargain and ſale enrolled, conveyed this moiety of the eſtates to two perſons and their heirs, to make them tenants of the freehold, and ſuffered a recovery thereof (in which he was vouched) to the uſe of himſelf in fee; and afterwards deviſed his ſaid moiety to his widow in fee, and died without iſſue. The general queſtion between the parties was, whether an eſtate-tail, or an eſtate for life only, paſſed by the will of *A.* to *B.*? It was inſiſted for the plaintiff, that it was an eſtate-tail, upon the general rule, that where lands are limited to a man for life, with a limitation in the ſame deed or giſt to the heirs of his body, that this makes an eſtate-tail; and that a deviſe of lands in the ſame way paſſed the ſame eſtate; that the limitation was either a legal eſtate, or a truſt veſted or executed, and not executory. On the other hand, it was contended, that thoſe rules were artificial, not founded in juſtice, but for ſupport of the feudal tenures, and therefore the judges ought to ſhew themſelves *aſtuti* in ſupporting exceptions to ſuch rules. The Maſter of the Rolls, however, held it to be a *truſt*, and not a *legal eſtate*; but decreed that *B.* was entitled to an *eſtate-tail* in the moiety ſo deviſed to him; as it was the caſe of an immediate deviſe, and not a deviſe of lands *to be ſettled*. Upon an appeal to Lord *Hardwicke* from this decree, he agreed, that this deviſe was only a truſt in equity; but that this being the caſe of a truſt, the court was bound to carry it into execution according to the intent of the teſtator; that the intent was clear that the words "heirs of the body" ſhould be taken as words of purchaſe, from the clauſe, *without impeachment of waſte*, and the limitation to truſtees to *ſupport contingent remainders:* that there was no diſtinction between truſts executed and executory; that all truſts were in notion of law executory, and to be carried into execution by the court. His Lordſhip therefore reverſed ſo much of the decree at the Rolls as gave *B.* an eſtate-tail under the will.

ting. Remaind rs, 4th Ed. 177. &c.

J. A. deviſed 6000 *l.* South-ſea ſtock, and 1200 *l.* to truſtees, to ſell and lay out in the purchaſe of lands, to convey to *G. J. A.* for life, and afterwards to the iſſue of his body: in default of ſuch iſſue, then over. *G. J. A.* brought a bill for performance: the queſtion was, whether he had an eſtate for life, or in tail? It was inſiſted for him, that if it had been a deviſe of land, he would be tenant in tail; and there ſhould be the ſame conſtruction in this

Aſhton v. Aſhton, 1 Ver. 149.

this caſe: but the court held it an eſtate for life only of the lands to be purchaſed.

White v. Carter, Ambl. 670.

Perſonal eſtate was bequeathed to truſtees, in truſt, to lay out the ſame in land to be ſettled and aſſured as counſel ſhould deviſe, unto and upon the truſtees and their heirs, upon truſt, and to and for the uſe of *P. and the heirs male of his body*, to take in *ſucceſſion* and *priority of birth*, and for default of ſuch iſſue male, then, upon further truſt, and to and for the uſe of *B. and the heirs male of her body*, to take in ſucceſſion and priority of birth, remainder over. And the teſtator ordered the truſtees to pay the remainder of the intereſt, dividends and profits, after deducting the expences of the truſt, until the purchaſe or purchaſes made, to *P.* and *B.* reſpectively, and to their *reſpective ſons and iſſue male*, who ſhould be *reſpectively entitled* to the rents and profits of the eſtates to be purchaſed. Upon the queſtion, whether the lands to be purchaſed ſhould be ſettled on *P.* as tenant in tail, or in ſtrict ſettlement upon him for life, with remainder to his firſt and other ſons in tail male, Lord *Northington*, on hearing, directed the ſettlement to be made on him for life, with remainder to his firſt and other ſons in tail male. Upon a re-hearing, Lord *Camden* was clearly of opinion to confirm the decree, and took a diſtinction between the caſe where a teſtator has given complete directions for ſettling his eſtate with perfect limitations, and where his directions are incomplete, and are rather minutes or inſtructions: in the former caſe, he ſaid, the legal expreſſion ſhould have legal effect, though perhaps contrary to his intention, as in *Garth* v. *Baldwin*; in the latter, the court would conſider the intention, and direct the conveyance according to it. Here, the intention was very plain; the teſtator directed the ſettlement to be made by *advice of counſel, and in ſucceſſion and priority*. He meant ſomething different from an eſtate-tail, when he wanted the aſſiſtance of counſel; and though the words *in ſucceſſion and priority* might have effect in caſe *P.* took an eſtate-tail, yet they were meant to give an intereſt to the ſons after the death of *P.*; the latter clauſe put it out of doubt; he there explained his meaning by making uſe of the words *ſons* and *iſſue*.

Baſtard v. Proby, 2 P. Wms. 478. note.

P. P. deviſed "to *A.*, *B.*, and *C.*, and their heirs and aſſigns "for ever, to the uſe of them, their heirs and aſſigns for "ever, all his manors, lands, *&c.* in the county of *D.* and elſe- "where, upon truſt, to ſet the ſame out in ſuch manner as they "ſhould approve, for the benefit of his (the teſtator's) daughter "*J.*, and the rents and profits thereof, to lay out and apply for "her moſt advantage, until ſhe ſhould attain her age of 21, or be "married; and on her attaining that age, that the ſaid truſtees "or the ſurvivor of them, or the heirs of ſuch ſurvivor, *ſhould, as* "*counſel ſhould adviſe, convey, ſettle, and aſſure* the ſaid manors, "lands, *&c. unto, or to the uſe of, or in truſt for the ſaid J. for her* "*life, and after her death, then on the heirs of her body lawfully* "*iſſuing*; but in caſe his ſaid daughter ſhould die without leaving "iſſue of her body lawfully begotten, then he deviſed all his ſaid "real eſtates to his brother *J. P.*, his heirs and aſſigns for ever."

On a bill filed by the daughter and her husband to have the trusts of this will carried into execution, Sir *Lloyd Kenyon*, M. R. declared, that on the true construction of the will, in the events which had happened, the real estates ought to be settled on Mrs. *Bastard* for life, with remainder to her first and other sons successively in tail general, remainder to her daughters in tail general, as tenants in common, with cross-remainders in tail general, with remainder in fee to *J. P.* And his Honour ordered, that the Master should settle proper conveyances according to such directions, and that the defendants, the trustees, should execute the same.]

A. makes a settlement of his estate on *B.* his son, for life, remainder to his first, *&c.* son in tail male. Afterwards the reversion in fee being in himself, he made his will as followeth: *As touching my lands and tenements*, &c. *my will is, that if my son's wife die, during the life of her husband, without issue male, that then he shall have power to make a jointure to any other wife; and for want of such issue male of my said son, then the lands shall be and remain to my son*, &c. *by any other wife, and my grandaughter shall have* 4000 *l. And in case of failure of issue male by my son, then all my lands shall go to my grandchildren and their heirs, share and share alike.* Adjudged, that the settlement and will being distinct conveyances, the estate for life in the settlement cannot be tacked to the estate in the will, so as to create an estate-tail in the son, so that he continued only tenant for life.

4 Mod. 316. Skin. 359. pl. 1. Ld. Raym. 37. S. C. Moor and Parker. [Lady Lanesborough v. Fox, Ca. temp. Talb. 262. S. P. Doe v. Fonnereau, Dougl. 487. S. P. Habergham v. Vincent,

5 Term Rep. 92. 2 Vez. jun. 204. S. P. So, an equitable estate for life cannot unite with a legal estate-tail, nor *vice versâ*. Shapland v. Smith, 1 Br. Ch. Rep. 75. Knight v. Ellis, 2 Br. Ch. Rep. 570.]

A man seised in fee, devised to *J. B.* for his life only, without impeachment of waste, and from and after his decease, then to the issue male of his body lawfully to be begotten, if God shall bless him with any, and to the heirs male of the bodies of such issue lawfully begotten; and for default of such issue, remainder to *J. C.* and the heirs male of his body; and for want of such issue, he limits two remainders over in the same words: it was adjudged, that *J. B.* took only an estate for life, for the estate was given to him for life, and there was a limitation afterwards to his issue, which was a description of the person who was to take the estate-tail.

Abr. Eq. 184. pl. 27. 10 Mod. 181. cited in Fitzgib. 12. 22. 8 Mod. 261. 383. Forteſc. 133. Ch. Caſ. 173. Backhouſe and Wells. Gilb. Ca. 8vo. 20. 129.

A. devised certain lands to his eldest son for life, without impeachment of waste, remainder to *J. S.* his grandchild for life, without impeachment of waste, with power to him to limit a jointure of the same land to any woman he should marry, for her life; and after his death he devised the lands to the first son of *J. S.* the grandchild in tail, and so to the sixth son; and then devised, that if *J. S.* the grandchild should die without issue male, the land should remain to *J. B.* Held that *J. S.* took an estate-tail; for if there had been a seventh son, he could not have taken; and there it was necessary to create an estate-tail by implication.

Abr. Eq. 185. P. Wms. 759. S. C. cited, 8 Mod. 258. 384. Fitzgib. 14. Langley and Baldwin, certified to be an estate-tail by the court of Common Pleas, and decreed accordingly in Chancery. S. C. cited in 1 Vez. 26. and said to be wrong reported in Eq. Abr.

Legatt and Shewell, 2 Vern. 551: S C. but no resolution. Eq. Abr. 389. 394. pl. 7. Gilb. Eq. Rep. 145. 1 P. Wms. 87. 90, 91 pl. 17.

A. devised the surplus of his personal estate to be laid out in a purchase of lands to be settled on *B.* his nephew for life, and after his decease to the heirs male of the body of the said nephew, and to the heirs male of the body of every such heir male severally and successively one after another, as they shall be in seniority of age and priority of birth, every elder, and the heirs male of his body, to be preferred before every younger; and for want of such issue, to his brother in the same manner. On a case stated for the opinion of the court of Common Pleas, three of the judges certified (*a*), that the nephew should have an estate-tail conveyed to him, but Judge *Tracy* held it only an estate for life.

(*a*) Though P. Williams says the parties agreed, yet in 2 Vez. 657. Lord Hardwicke says, that Lord Cowper thought himself bound to agree with the three judges, and so decreed.]

Abr. Eq. 185-6 Papillion and Voyce, decreed at the rolls. 2 P. Wms. 471. pl. 150. Fitzgib. 38. S. C. cited in Ca. temp. Talb. 8.

The plaintiff's father, by his will, devised the estate in question to the plaintiff for life, without impeachment of waste, remainder to trustees during his life, to support contingent remainders, with remainder to the heirs of the body of his said son, reversion to himself in fee, with a power to the son to make a jointure of such a part; and devised likewise a considerable personal estate to be laid out in a purchase of lands, and settled to the same uses; and the only question was, whether the plaintiff took an estate-tail, or only an estate for life? and it was held, that he took only an estate for life, as the words were express, and had all the other marks attendant on an estate for life; and, consequently, that the heirs of the body should take by purchase; and though the estate would vest in the first son as tenant in tail by way of purchase, yet not so as to exclude the other sons, or their issue, from taking the like estate, whenever his estate determined for want of issue.

Abr. Eq. 184. pl. 28. Gilb. Eq. Rep. 28. 3 Danv. Abr. 178. pl. 26. 8 Mod. 253. 382. Forteſc. 58. 2 Stra. 798. Barnard. K. B. 54. Fitzgib. 7. Shaw and Weigh, adjudged an estate-tail in the sister, in the Great Sessions of Wales, but that judgment reversed by B. R. where it was held only an estate for life; but

A. devises lands to his wife for life, and for her better support he gives and bequeaths unto her the sum of 500 *l.* to be raised by his executors or administrators, by sale of timber, or by sale of any part of the premises, or otherwise, by digging, sinking, getting, and sale of coal on the premises, or any part thereof, at her, her executors and administrators, choice and election; and if my said wife shall happen to die before the said sum be raised, as aforesaid, then such person whom she had appointed in her life time to raise, &c. for which I give them and her full power and authority; provided nevertheless, that if either of my sisters hereafter named, or such person for whom my trustees hereafter named shall be trustees, shall pay unto my wife, her executors, &c. the said sum of 500 *l.*, that the said power of selling shall cease; and after the decease of my said wife, I devise all the estate before mentioned to *A.*, *B.*, and *C.*, and the survivor and survivors of them, upon the trusts hereafter mentioned, that is to say, in trust for my sisters *A. L.* and *D. E.* equally betwixt them during their natural lives, without committing any manner of waste, from and after the decease of my said wife; provided always, that what sum or sums of money, in part or in full of the 500 *l.* hereby left my wife, shall be really paid my wife, her executors, &c. by either of my said sisters, that in that case my

is, that ſuch money be likewiſe raiſed by the getting of coal on the premiſes only; and if either of my ſaid ſiſters happen to die, leaving iſſue or iſſues of her or their bodies lawfully begotten, or to be begotten, then in truſt for ſuch iſſue or iſſues of the mother's ſhare, or elſe in truſt for the ſurvivor or ſurvivors of them, and their reſpective iſſue or iſſues; and if it ſhall happen that both my ſaid ſiſters die without iſſue, as aforeſaid, and their iſſue or iſſues too die without iſſue or iſſues lawfully to be begotten; the ſaid truſtees to ſtand and be intruſted to and for my kinſman *J. S.* and the heirs male of his body, *&c.* and for want of ſuch iſſue, then in truſt for *R. G.* This was held an eſtate-tail in the ſiſters.

the judgment of B. R. reverſed in the Houſe of Peers, by the opinion of Eyres, C. J. Pengelly and Forteſcue. 3 Br. P. C. 469.

[*A.* deviſed lands, in truſt, for *B.* for life, with a leaſing power, and after his deceaſe, in truſt, for the heirs male of his body. Lord Keeper decreed an eſtate-tail to be conveyed to *B.*, although he admitted, that upon articles of marriage, founded upon an agreement, *B.* might in ſuch caſe be made only tenant for life; but in a will (he ſaid) *you muſt take words as you find them.*

Bale v. Coleman, 1 P. Wms. 142. 2 Vern. 679. S. C. Vin. Abr. tit. Deviſe (D. b), pl. 7.

S. C. more fully reported.

Lands were deviſed to a truſtee, in truſt, to pay the rents and profits to *S.* for her ſeparate uſe during her life, as if ſhe were ſole, and after her deceaſe, to pay the ſame to *E.* her ſon for life, and afterwards to pay the ſame to the heirs of his body, and for want of ſuch iſſue, to pay the ſame to all and every other ſon or ſons of the body of *S.* begotten, *&c.* Lord *Hardwicke* decreed a conveyance in tail to *B.* of the eſtate ſo deviſed.

Garth v. Baldwin, 2 Ves. 646.

A teſtator deviſed to truſtees and their heirs, upon truſt, after his death, by and out of the rents and profits to raiſe 500 *l.* with intereſt, and pay the ſame to his five grandchildren; and ſubject to the raiſing and paying of the ſaid 500 *l.*, and the intereſt thereof, to the uſe of his nephew for life; ſubject nevertheleſs to his nephew's qualifying himſelf according to a proviſo thereinafter contained, with remainder to the ſaid truſtees and their heirs to preſerve contingent remainders, with remainder to the uſe of the heirs male of the ſaid *T. R.* and their heirs, provided that, in caſe his ſaid nephew *T. R.* ſhould die without having any iſſue male of his body living at his death, then he charged the premiſes with 100 *l.* a-piece to two nieces, if then living, at their reſpective ages of 21 years; if either died, her part to go to the ſurvivor: And he empowered his ſaid truſtees, as ſoon as conveniently could or might be after the death of the ſaid *T. R.* without iſſue male as aforeſaid, by and out of the rents and profits of the premiſes, to raiſe and pay to his ſaid two nieces the ſaid 100 *l.* a-piece; and for default of ſuch iſſue male of the ſaid *T. R.* then he deviſed the premiſes (ſubject to the payment of the ſaid 500 *l.* and 200 *l.*) to the uſe of all and every his ſaid five grandchildren, or ſuch as ſhould be living at the time of failure of iſſue male of the ſaid *T. R.*, to take as tenants in common, and to their reſpective heirs and aſſigns, equally to be divided between them, ſhare and ſhare alike, provided that the ſaid *T. R.* ſhould, immediately after the teſtator's death, be placed out an apprentice to a ſurgeon, or ſome other

Wright v. Pearſon, Fearne's C. R. 187. Ambl. 358. S. C.

good trade, for ſeven years, or elſe be ſent to ſome college in Cambridge, there to continue till he was qualified to be ordained a clergyman; and in caſe he ſhould refuſe or neglect to be put out, and continue ſuch apprenticeſhip, or qualifying himſelf to be ordained a clergyman, then his will was, that the eſtate ſo before limited to the ſaid *T. R. for his life*, ſhould ceaſe and determine and be void, as if he had been dead, and that the ſaid premiſes ſo limited to the ſaid *T. R. for his life, and his iſſue male* as aforeſaid, ſhould thenceforth revert over, and go and remain to the uſe of ſuch of his five grandchildren as ſhould be living, to be equally divided amongſt them, and to their reſpective heirs, as tenants in common. Lord Keeper *Henley* determined, that *T. R.* took an eſtate-tail.

Auſten v. Taylor, Ambl. 376.

A teſtator, after giving certain lands to truſtees and their heirs in the firſt place to the intent his ſiſters ſhould reſpectively have an annuity, or rent-charge of 80 *l.* for their lives, with power of diſtreſs and entry; and ſubject thereto in truſt for *P.* for life, remainder to truſtees to preſerve, *&c.*, remainder to the heirs of the body of *P.*, remainder to his own right heirs; gave the reſidue of his perſonal eſtate to truſtees, in truſt, to buy lands in fee ſimple; which he directed ſhould remain, continue, and be to for, and upon ſuch and the like eſtate and eſtates, uſes, truſts, intents, and purpoſes, and under and ſubject to the like charges, reſtrictions, and limitations, as were by him before deviſed, limited and declared of and concerning his lands and premiſes thereinbefore laſt deviſed, or as near thereto as might be, and the death of perſons would admit. It was adjudged by Lord Keeper *Henley*, that *P.* was entitled to an eſtate-tail in the lands to be purchaſed.

Jones v. Morgan, 1 Br. Ch. Ca. 206.

A teſtator deviſed his eſtate to truſtees, to raiſe money (in a of his perſonal eſtate) for payment of debts; and after payment debts, and after limitations to the uſe of his youngeſt ſon, and heirs male of his body, in the ſame manner as thoſe following his eldeſt ſon *W.*, *to the uſe of his ſon* W. *for and during his natural life, without impeachment of waſte, and from and after his deceaſe to the uſe and behoof of the heirs male of the body of his ſaid ſon lawfully begotten, ſeverally, reſpectively, and in remainder, the one after the other, as they and every of them ſhould be in ſeniority of age and priority of birth, with remainder over.* Powers were given to the teſtator's ſons, whilſt in poſſeſſion, of leaſing, making jointures for wives, and raiſing portions for younger children. Upon a claim by the perſonal repreſentative of *W.*, to the amount of incumbrance which *W.* had paid off in exoneration of the eſtate, one point inſiſted upon in anſwer to it was, that *W.* was tenant in tail; and therefore his paying off the incumbrance was an exoneration of the eſtate. And Lord *Thurlowe* was of opinion, that *W.* took an eſtate-tail. The deciſion of the cauſe, however, did not depend merely on the point of the deviſee's taking an eſtate-tail; but the complexion of the chancellor's arguments, and the inferences from them, leave little room to doubt that his decision would have been the ſame, if it had turned on that point.

A. deviſed to his daughter *B.* for life, and after her death to her lawful iſſue, and if ſhe ſhould have no iſſue, that ſhe ſhould have power to diſpoſe of the eſtate at her will and pleaſure. *B.* was the teſtator's heir at law, and died without iſſue. She took an eſtate-tail, and a contingent fee by the will, and had a fee by deſcent. Goodtitle v. Otway, 2 Wilſ. 6.

Lands were deviſed to *M.* and his wife for their lives, remainder to the next heir male of their two bodies. It was holden a deviſe in tail; for that a deviſe to the heir male was a deviſe in tail, unleſs there are words of limitation ſuperadded, ſo as to bring it within the reaſon of *Archer*'s caſe, and that the words firſt, next, or eldeſt made no difference. Miller v. Seagrave, Rob. Gav. 96.

A teſtator deviſed lands to *N. for his life*, and after the deceaſe of *N.*, *to the heirs male of the body of* N. lawfully to be begotten, and *his heirs* for ever; but if the ſaid *N.* ſhould happen to die without ſuch *heir male*, then he deviſed the lands to *B.*, *&c.*: The queſtion was, whether *N.* took an eſtate-tail, or for life only, by the will? It was contended on one ſide, that the teſtator intended him only an eſtate for life, by his deviſing to him expreſsly for life; and then here were ſuperadded words, *his heirs for ever*, engrafted on the words *heirs male*; that though theſe words *heirs male* were in the plural, yet the ſubſequent words *his* and *for default* of ſuch *heir male* qualified them, ſo as to make them ſignify the ſame thing as *next heir male* in *Archer*'s caſe. But the judges were all unanimous in opinion, that *N.* took an eſtate-tail, that the rule was ſettled ſo firmly that it was not to be diſputed. They held that the ſubſequent words *his* and if he dies without *ſuch heir male*, were not ſufficient to reſtrain and alter the operation of the words *heirs male* and ſo qualify them as to make them a deſcription of the perſon. Goodright v. Pullyn, 2 Ld. Raym. 1437. 2 Str. 729. S. C. 1 Barnard. 6. S. C. 2 Eq. Ca. Abr. 315. S. C.

A deviſe to *L. for life*, then to *the heirs of the body of* L., *and their heirs*, and if ſhe died without *ſuch heir* of her body, then over, was holden to be an eſtate-tail. 1102. Morris v. Le Gay, cited 2 Burr. 2 Atk. 249.

A deviſe was to the teſtator's eldeſt ſon *W.* for life, remainder to his firſt ſon for life, remainder to the right heirs male of his body; remainder to other ſons of *W.* and the heirs male of their bodies; remainder to the teſtator's ſon *T.* for life, and after to the *firſt heir male* of his body; remainder over. The court of *C. B.* held, that the words *heir male* were to be underſtood collectively, and gave an eſtate-tail to *T.*, it being diſtinguiſhed from *Archer*'s caſe, by no limitation being ſuperadded to the words *firſt heir male*, and the word *firſt* ſignifying *firſt* in order of time. And the court of *K. B.* affirmed the judgment of *C. B.* Dubber v. Trollope, Ambl. 453.

Again, a deviſe was to *R. M.* and the firſt heir male of his body, and the heirs male of his body; and in default of ſuch iſſue, to *E. M.* and the heirs male of his body, and their iſſues, remainder over. Lord *Hardwicke* held, that *R. M.* took an eſtate-tail. Minchull v. Minchull, 1 Atk. 411.

Again, a deviſe was to *C. for life*, remainder to truſtees *to ſupport contingent remainders* during the life of *C.*, remainder to *the heirs of the body of C.* lawfully begotten. Upon a queſtion, whe- Coulſon v. Coulſon, 2 Str. 1125. 2 Atk. 246.

ther *C.* took an eſtate-tail or for life? a caſe was ſtated for the opinion of the judges of *B. R.*, who certified, that by reaſon of the remainder interpoſing between the deviſe to *C.* for life, and the ſubſequent limitation to the heirs of his body, *C.* took an eſtate for life, not merged by the deviſe to the heirs of his body, but by that deviſe an eſtate-tail in remainder veſted in *C.*

Roe v. Grew, 2 Wilſ. 322.

A teſtator deviſed lands to his nephew, to hold to him during the term of his natural life, and from and after his deceaſe to the uſe of *the iſſue male of his body* lawfully begotten, and the *heirs male* of the body of ſuch *iſſue male;* and for want of ſuch *iſſue male*, remainder over. The deviſee had no iſſue at the time. The court of *C. P.* held, that he took an eſtate-tail; and one judge ſaid, he thought too great regard had been paid to the words, "heirs male of the body of ſuch iſſue."

Sayer v. Maſterman, Ambl. 344. Fearne C. R. C. R. 250. S. C.

A deviſe was in the following words: "After the deceaſe of "my ſaid brother *E. S.*, and on failure of iſſue as aforeſaid, I give "the ſaid ſeveral eſtates and farms to my brother *G. S.*, and *the* "*heirs of his body, the males having preference as aforeſaid*, and ſuc- "ceeding according to *their births*, and to *preſerve the contingent* "*remainders from being barred during the life of the ſaid* G. S., *I give* "*the ſaid eſtates and farms to my ſaid friend Dr.* R.; and on failure "of iſſue of the ſaid *G. S.*, I give the ſaid eſtates and farms to "my ſaid niece *M. C.*" On the death of *E. S.* without iſſue, the queſtion was, whether *G. S.* took an *eſtate-tail*, or an eſtate for *life* only, under the will? The court held, that the whole inheritance was not veſted in the truſtee in this caſe; that he took only a deſcendible freehold during the life of *G. S.*, for the word *eſtates* there meant only the thing and not the intereſt, it being coupled with the word *farms:* that by inſerting the limitation to the truſtee next after the limitation to *G. S.*, the caſe would be like *Coulſon* v. *Coulſon*, with this difference, that it would not be quite ſo ſtrong; becauſe the eſtate was not given expreſsly to *G. S.* for life. They referred to Lord *King*'s opinion in *Papillon* v. *Voice*, that the limitation to truſtees did not control the eſtate-tail; and the court declared, that *G. S.* was entitled to an eſtate-tail.

King v. Burchell, Ambl. 378. 2 Term Rep. 496. note. S. C.

A teſtator deviſed, after his wife's death, and failing iſſue of her body, a meſſuage, &c. in *A.* to *J. H.* for life, remainder to the iſſue male of *J. H.*, and to his and their heirs, ſhare and ſhare alike; and for want of ſuch iſſue, to the iſſue female of *J. H.*, and her and their heirs; and for want of ſuch iſſue, to *W. B.*, his heirs and aſſigns for ever. He alſo gave other houſes at *R.* to his wife, remainder to *J. H.* for life; and from and immediately after the determination of that eſtate, to the *iſſue male* of the body of *J. H.* and to *their heirs*; and for want of ſuch iſſue, to *W. R.*, his heirs and aſſigns for ever; with a proviſo, that the bequeſt and limitation of all the premiſes limited to *J. H.*, and ſuch *iſſue male and female*, was upon a ſpecial conſideration, that if *J. H. or his iſſue* or any of them, ſhould alienate, mortgage, or incumber, or commit any act or deed to alter, change, charge, or defeat the bequeſts they ſhould pay, &c.; and he did thereby charge the premiſes with

with the payment of 2000 *l.* unto ſuch perſon or perſons, his or their heirs, as would, ſhould, or ought to take next by virtue of any of the bequeſts or limitations. *J. H.* having no ſon, but two daughters, who were heirs at law of the teſtator, he joined with his daughters, in ſuffering a recovery of the eſtate in *M.*: Upon which, the plaintiff brought his bill for payment of the 2000 *l.* But Lord Keeper *Henley*, after conſideration, gave his opinion, that *J. H.* took an eſtate-tail, and that the proviſo was repugnant to the eſtate.

C. V. deviſed to the defendant, and the iſſue of his body lawfully to be begotten, *living at his death*; and for want of ſuch iſſue, to the Univerſity of *Oxford*, to be diſpoſed of in ſuch manner as by the will directed. Lord Keeper *Henley* held, that it was a clear eſtate-tail. University of Oxford v. Cliftons, Ambl. 385.

A deviſe was to *A.* for life, remainder to truſtees to preſerve contingent remainders during *A.*'s life, and from and after his deceaſe, then to the heirs of his body. It was adjudged that *A.* took an eſtate for life, with a veſted remainder to himſelf in tail, the words "heirs of the body" being words of limitation. Hodgſon v. Ambroſe, Dougl. 337. judgment in B. R. affirmed in the Houſe of Lords, Feb. 14, 1781.

A teſtator deviſed all the reſt and reſidue of his eſtate, both real and perſonal, to his nephew *A. W.* and his ſons in tail male; and for want of ſuch iſſue male, to his brother *J. W.* and to his ſons in tail male; and in failure of ſuch iſſue male, then to his (the teſtator's) right heirs. Neither *A. W.* nor *J. W.* had any iſſue at the time of making the will, or at the death of the teſtator. Upon the death of *A. W.* without iſſue, the queſtion was, what eſtate *J. W.* took in the premiſes under the will? And the court of *C. P.* held, that, upon the will and circumſtances above ſtated, he took an eſtate in tail male. Wharton v. Greſham, 2 Bl. Rep. 1083.

A. deviſed all his lands, *&c.* to a truſtee and his heirs, in truſt, as to part, to ſuffer the teſtator's wife *Rebecca* to receive the rents and profits for her life; and as to the ſaid part after his wife's deceaſe, and the reſidue after his own deceaſe, to other truſtees for 100 years, to raiſe 200 *l.* thereon for the uſe of his daughter *Mary*, and ſubject thereto, in truſt, to pay the rents and profits to his daughter *Rebecca*, the wife of *P. Barry*, for her ſeparate uſe during her natural life; and after her deceaſe, "to the uſe and "behoof of the heirs of the body of the ſaid *Rebecca Barry* law"fully iſſuing; the elder of ſuch iſſue, and his, her, and their "heirs to inherit and take place before the younger of ſuch "iſſue, his, her, and their heirs," with remainders over in default of ſuch iſſue. Both the daughters ſurvived the teſtator, and his wife, and on the death of the latter, *Rebecca Barry* entered on the reſidue, and afterwards died, leaving two daughters, the defendant *Mary Anne*, the wife of *Ignatius Purcel*, and the plaintiff *Jane*, the wife of *Francis Heny*, and no other iſſue. The queſtion was, whether *Jane Heny* took any and what eſtate in any and what part of the premiſes? And the court of *C. P.* certified, that the defendant *Mary Anne Purcel* took in the firſt place an eſtate-tail in the whole of the premiſes, and that the plaintiff Heny v. Purcel, 2 Bl. Rep. 1002.

Jane Heny took an eſtate-tail in remainder, expectant on the determination of the precedent eſtate-tail, in the whole of the ſame premiſes, with remainders over in default of the heirs of her body.

Doe v. Lord Mulgrave, 5 Term Rep. 320.

Lord *Mulgrave* deviſed his eſtates real and perſonal, in theſe words, *viz.* "in truſt to *T.* &c. for my firſt and every other ſon in "tail male; failure of ſuch iſſue, to my brother *H.* and his firſt and "every other ſon in tail male; failure of ſuch iſſue, to my brother "*E.*, and his firſt and every other ſon in tail male; failure of ſuch "iſſue, to my brother *A.*, and his firſt and every other ſon in tail "male; failure of ſuch iſſue, to my daughter *C.*, and her firſt and "every other ſon in tail male; and in failure of ſuch iſſue, to her "eldeſt daughter, and her firſt and every other ſon in tail male; "failure of ſuch iſſue, to her daughters reſpectively in ſucceſſion; "failure of ſuch iſſue, to the laſt ſurviving Lord *Mulgrave*: in all "the foregoing caſes without impeachment of waſte, other than "wilful." Then, after making a proviſion for his daughter, he proceeded, "My will is, that the money lodged at *Child*'s to pay "for the purchaſe of the *Lyth* rectory, be applied to that purpoſe "as ſoon as Sir *J. S.* can complete the title; and the renewals to "be made by the tenant for life."—"I name the executors in "truſt of this my will Mrs. *A. J.*, my brother *H. P.*, or which-"ever of my brothers may ſucceed to the eſtate." It was adjudged, that *B.* took only a life eſtate, with remainder in tail to his iſſue.

Fell v. Fell, 3 Wilſ. 399

A teſtator appointed his couſin *Solomon Fell* ſole executor of his will, and heir for life of all his eſtates (except, &c.), and after his death to his ſon *Thomas Fell*, and his heirs male for ever; but if ſaid *Thomas* ſhould die without iſſue, then to his next heir male for ever, the elder to be preferred before the younger; and if no iſſue male left behind ſaid *Solomon*, then the eſtate to devolve to the females; and if no females, then my ſaid couſin *Solomon* to give and diſpoſe of the ſame as he ſhall think fit. The teſtator died without iſſue, leaving *Solomon Fell* (the father of the defendant *Solomon Fell*, the deviſee named in the will) his couſin and heir at law, who afterwards died, leaving the defendant *Solomon Fell* his only ſon and heir at law. The defendant *Solomon Fell* had, at the time of the teſtator's death, and at the time the ſaid will and codicil were made, *Thomas* his eldeſt ſon, and the plaintiff his only daughter, and no other children living; but he had had another ſon named *Solomon*, who was dead when the will was made; but the teſtator, though he knew that the defendant had had ſuch a ſon *Solomon* born, did not then know that he was dead. *Thomas Fell*, the ſon of the defendant, died ſoon after the teſtator, and the plaintiff was the only ſurviving child of the defendant. A bill being filed by the plaintiff to reſtrain the defendant from cutting down timber and committing waſte on the eſtates deviſed, a caſe was ſent out of Chancery for the opinion of the judges of the court of *C. P.* as to what eſtate the defendant took in the premiſes under the will; and whether the plaintiff took any, and what eſtate in them. And the judges certified, that the defendant took

took an eſtate for life; and his ſon *Thomas* dying without iſſue, his daughter, the plaintiff, took an eſtate in tail general, and that a remainder in fee-ſimple was veſted in the defendant.]

(E) Of Terms for Years, and uncertain Intereſts by Deviſe.

IF a man deviſes lands to his executors for payment of his debts, and after debts paid the remainder over; the remainder is good; but it ſhall not veſt at the death of executors, but the eſtate ſhall be conſidered as an uncertain intereſt, which ſhall go from executor to executor for the payment of the debts; for if it were to determine by the death of the executors, the debts might never be paid. 8 Co. 96. a. Cro. Eliz. 315. Roll. Abr. 829. S. C.

If a man deviſes his land *to be ſold by his executors*, or *to his executors to be ſold*, the executors ſhall have the profits to their own uſe, and not as aſſets, therefore they are obliged to ſell to the firſt purchaſer: but if the deviſe had been, *that his executor ſhould ſell the land* (*a*), there, they have not the profits of the land before the ſale; for there are no words to break the deſcent from the heir, and carry it from him; and for that reaſon the land ſhall deſcend to him till the ſale. Compton, 2 P. Wms. 308.] Co. Lit. 112. b. 236. a. *vide* head of Heir and Anceſtor. [(*a*) See acc. Lancaſter v. Thornton, 2 Burr. 1027. Yates v.

If a man poſſeſſed of a term for years, deviſes the land to another generally, the deviſee ſhall have all the term, without any limitation to determine upon his death. Roll. Abr. 831.

A. deviſes his lands to his executors till his ſon comes of age; the profits to be employed in the performance of his will: though the ſon dies before he be of age, yet the intereſt of the executors continues till he might be of age, if he had lived; for ſince the intent of the deviſor governs in wills, it might deſtroy that, if the executor's intereſt ceaſed at the death of the ſon; for it is reaſonable to believe that the teſtator found on a computation, that the profits of the land in that time would anſwer his debts, ſo that this is a good deviſe of the term till the ſon would be twenty-one, though he die before. 3 Co. 20. Boraſton's caſe. Chan. Ca. 113. S. P.

If a man deviſes land to his wife *till his ſon comes of age*, to provide his children with neceſſaries; though the wife dies before the ſon comes of age, yet her intereſt does not determine by her death, becauſe it was not a matter of mere confidence, but ſhall go to her executors: but (*b*) if the deviſe had been, *that his land ſhould deſcend to his ſon*, but *that his wife ſhould have the full profits thereof until the full age of his ſon*, for his education; here is nothing deviſed to the wife, but a mere confidence that ſhe ſhall take profits for the education of the ſon; and by the will ſhe is but in nature of a guardian or bailiff, for the benefit of the infant, which determines by her death. Cro. Eliz. 252. 2 Leon. 211. Dyer, 210. (*b*) 2 Leon. 221. S. P.

A man deviſed certain lands to his wife till his ſon and heir apparent ſhould attain to his age of twenty-one years, and when his Abr. Eq. 195. Gilb. Eq. Rep. 36.

Mansfield and Dugard, decreed Hil. 1713.

his ſon ſhould attain to his age, then to his ſon and his heirs, and died; the ſon lived to the age of thirteen years, and then died; and the wife, ſuppoſing that ſhe had a title to hold the lands till ſuch time as the ſon would have attained his age of twenty-one years, in caſe he had lived to that time, continues in the perception of the rents and profits of the ſaid lands for ſeveral years; and the bill was brought againſt her by the heir at law of the ſon, to have an account of the rents and profits from the death of the ſon; and though the wife was executrix likewiſe of her huſband, yet it not being deviſed during that time, *for payment of debts, nor any creditors, nor want of aſſets appearing* *, it was held by my Lord *Chancellor*, that the wife's eſtate determined by the death of the ſon, and that the remainder veſted preſently in the ſon upon the teſtator's death, and was not to expect till the contingency of his attaining his age of twenty-one years ſhould happen, for then in that caſe it never would have veſted, he dying before that age; and therefore decreed the wife to account for the profits from the time of the ſon's death; and upon a re-hearing his Lordſhip continued of the ſame opinion, and grounded himſelf on the diſtinctions taken in 3 *Co.* 19. and 6 *Co.* 35.

* This diſtinguiſhes it from the caſe above.

Sid. 151. Roll. Abr. 831.

A term was deviſed to *B.*, and if he died within the term, the reſidue to go to *C.* after he attained his age of twenty-one years, *B.* died, and then *C.*, before he came to that age: by this deviſe *B.* had the (*a*) whole term in him, (for if a termor deviſes his houſe, or his term, without more words, the deviſee has the whole term,) and the reſidue of it was to go to *C.* on a precedent contingency, *viz.* when he came of age, which never happened, and, conſequently, his executors can never have it: and the executors of the deviſor have neither an intereſt, nor a poſſibility of one, becauſe he made a total diſpoſition of the term; as if a copyholder for life ſurrenders to the uſe of *B.* for life, who is admitted, and dies in the life of the ſurrenderor; yet he ſhall have no benefit by ſurviving him, becauſe the whole intereſt was ſurrendered; therefore it was adjudged in the principal caſe, that the executors of *B.* ſhould have the remainder of the term.

(*a*) So, if a term for 1000 years be deviſed to *A.*, the remainder to *B.*, and the heirs of his body; the whole term is veſted in *A.* and *B.*, has only a poſſibility, and no intereſt veſts in him till the death of *A.* becauſe, by the ſtrict rules of law, an eſtate of freehold is greater than any term for years. 3 Lev. 264. Douſe and Earl.

2 Lev. 191. Vent. 326. 2 Mod. 223. 2 Jon. 73. Paget and Voſcius.

A. deviſed to *B.* during his exile, and if it pleaſe God to reſtore him to his country, or if he die, then to *J. S.* *B.* was a *Dutchman*, and had a penſion from the ſtates, but upon ſome diſpleaſure the ſtates deprived him of his employment, and of his penſion, and gave them to another, whereupon he voluntarily left the country, and lived here with *A.*, who had been his acquaintance beyond ſea; and after his coming hither a war happened between the *Dutch* and *Engliſh*, and afterwards a peace was concluded between the two nations, yet *B.* continued here; and whether his eſtate was determined, was the queſtion? and the court held it was not; for that the exile intended by *A.* was the leaving his country, becauſe of the ſtates diſpleaſure to him, and the withdrawing of his penſion upon that diſpleaſure.

If a copyholder deviſes his land to *A.* and *B.* his two ſons, and to the heirs of their two bodies begotten, and wills, that each of them ſhall enter at the age of twenty-one years; the executors ſhall not take the profits till they are both of full age, but he who comes of age firſt ſhall enter, and then the other when he comes of age, and they ſhall hold the land jointly. Cro. Jac. 259. Yelv. 183. *vide* Bulſt. 48. *cont.*

A. deviſed his lands to *B.* and *C.* and the ſurvivor of them, till 800*l.* ſhould be raiſed out of them: it was adjudged, that *B.* and *C.* ſhould have the land no longer than they might have received it out of the profits; and that if a ſtranger enters after the death of the deviſor, they may have an account of the meſne profits, but cannot hold the land longer than the ſum might have been levied; for if that were allowed, they may make it an eternal charge on the heir's eſtate: but if the heir himſelf enters and diſturbs them, they may hold over, for the heir ſhall have no benefit of his own wrong; or they may have their action againſt him, at their election. 4 Co. 82. Corbet's caſe. Cro. Eliz. 890. Salk. 153. pl. 1. 1 P. Wms. 518.

(F) Of Deviſes for the Payment of Debts.

CReditors are ſo far favoured, eſpecially in equity, that wherever it appears to be the teſtator's intent, that his lands ſhould be liable to his debts, they ſhall be ſubjected thereto, although there are not expreſs words to charge them; and it ſeems remarkable, that in all the caſes on this head, the lands have been held liable, and that chiefly on the intention of the teſtator; and therefore it ſeems difficult to lay down any rules in this matter, which depends purely on conſtruction. Thus much, however, may be inferred from the very caſes on which the lands have been held liable, that *a bare declaration by the teſtator, that his debts ſhould be paid* is *not* ſufficient; for this being no more than the law ſays, ſhall be intended of perſonal, and not out of the real eſtate. Eq. Abr. 197. Vern. 457.

A. deviſed all his lands to *B.*, and the heirs of his body, and in another part of his will, reciting, that he owed *B.* money upon account, he therefore deviſed to him all his perſonal eſtate, and made him executor, willing him to pay his debts; and upon the reading of the will, though the clauſe, as to the payment of debts, ſeemed to relate to the perſonal eſtate only; and though the lands were deviſed to *B.* in tail, with a remainder over to another; and it was objected, that a tenant in tail could not be a truſtee; yet the court decreed both real and perſonal eſtate to be ſold for payment of the teſtator's debts. Vern. 411. Clowdſley and Pelham. 2 Vern. 229. S. C. cited, and the decree ſaid to be affirmed in the Houſe of Lords.

If *J. S.* deviſes his lands to his brother, who is his heir at law, in fee, and likewiſe deviſes ſeveral legacies, and makes his brother executor, deſiring him to ſee his will performed according to the truſt and confidence he had repoſed in him; this makes the real eſtate liable, for the teſtator needed not have deviſed the eſtate to his brother, being heir at law, unleſs he intended that he ſhould take them chargeable with the debts and legacies. 2 Vern. 228. Alcock and Sparhawk, decreed in Chancery, and affirmed in the Houſe of Lords.

A. deviſed

2 Vern. 690. *A.* deviſed in the following words: *I do by this my will diſpoſe of ſuch wordly eſtate as it hath pleaſed God to beſtow upon me: firſt, I will that all my debts be paid and diſcharged, and out of the remainder of my eſtate I give and bequeath unto my wife* 300 l.; *my mind and will is, that my wife have one moiety of what is left, after my debts paid:* Item, *I give to my dear brother* R. B. *a cloſe lying in the pariſh of* ——, *and for the remaining part of my eſtate, as well real as perſonal, I give and bequeath unto my brother* J. B. *whom I make executor:* it was held clearly, that theſe words ſubjected his real eſtate to the payment of his debts.

Abr. Eq. 198-9. Trot and Vernon. 2 Vern. 708. S. C. where it is ſaid, that ſome ſtreſs was laid on the word deviſe. So, where *A.* being ſeiſed of a real eſtate, and alſo poſſeſſed of ſome perſonal eſtate, made his will in writing, and thereby deviſed in theſe words: Imprimis, *I will and deviſe that all my debts, legacies, and funeral charges ſhall be paid and ſatisfied in the firſt place.* Item, *I give and deviſe;* and then proceeds to diſpoſe of his real and perſonal eſtate; the perſonal eſtate not being ſufficient, the queſtion was, whether that clauſe in his will ſhould amount to a charge on his real eſtate for the payment of his debts, legacies, and funerals? and my Lord Chancellor *Cowper* was clearly of opinion, that it ſhould; for as to his debts, it was but natural juſtice they ſhould be paid, and his perſonal eſtate would have been liable to the payment thereof, whether he had given any directions in his will about them, or not; when therefore he wills and deviſes, that his debts, legacies, and funerals ſhall be paid and ſatisfied in the *firſt place*, theſe words muſt be intended to give a preference, for thoſe purpoſes, to any other whatſoever; and ſince he does not deviſe his real or perſonal eſtate to any perſon in particular, for thoſe purpoſes, the perſons who come within this deſcription muſt be ſuppoſed to be within his view; and it muſt be taken as a deviſe for their benefit, preferable to any other diſpoſition whatſoever, either of his real or perſonal eſtate, and, conſequently, both of them are thereby made liable thereto.

Newman v. Johnſon, 1 Vern. 45. [A man ſeiſed of copyhold lands ſurrenders them to the uſe of his will, and then by his will ſays, *viz. My debts and legacies being firſt deducted, I deviſe all my eſtate, both real and perſonal, to* J. S. It was holden by the Lord Chancellor, that this ſhould amount to a deviſe to ſell for payment of his debts.

Bowdler v. Smith, Pr. Ch. 264. One deviſed in theſe words: *As to my temporal eſtate, wherewith God hath bleſſed me, I give and diſpoſe thereof as follows:* Firſt, *I will that all my debts be juſtly paid, which I ſhall at my death owe or ſtand indebted in to any perſon or perſons whatſoever; alſo I deviſe all my eſtate in* G. *to* R. B.—This eſtate in *G.* was all the real eſtate the teſtator had. *Per* Lord Keeper, this will creates a charge on the real eſtate for payment of his debts.

Lumley v. May, *Id.* 36. *R. M.* ſeized of freehold and copyhold land, ſurrenders to the uſe of his will, and then deviſes to his wife all his goods, chattels, and eſtate whatſoever, upon condition that ſhe paid his debts and legacies; and by the will bequeathed 600 *l.* to the defendant his eldeſt ſon and heir, and 400 *l.* to the plaintiff his daughter, and other legacies to other people, and the ſurplus of his eſtate, after his

his wife's death, to be equally divided between his four children, and made his wife executrix, and died, leaving the defendant, his ſon, an infant; and the wife died before probate. This bill was brought by the creditors and legatees to have the eſtate ſold to pay them; and the court was of opinion, that the words *goods, chattels, and eſtate whaſoever*, with all the other circumſtances of the caſe, and the perſonal eſtate falling ſhort, would paſs the teſtator's lands well enough, and decreed a ſale, and the heir to join when he came of age: but he being an infant, they gave him a day to ſhew cauſe, when he came of age.

So, where a will began, "As to all my wordly eſtate, *my debts* "*being firſt ſatisfied*, I deviſe the ſame as follows:" the real eſtate was holden to be charged, nothing being deviſed till the debts are paid. Harris v. Ingledew, 3 P. Wms. 91.

So, where a will began, "As to my wordly eſtate, which it hath "pleaſed God to beſtow upon me, I give and diſpoſe thereof in "manner following: that is to ſay, *Imprimis*, I will that all my "debts which I ſhall owe at the time of my deceaſe be diſcharged "and paid." Lord *King* decreed, that theſe words created a charge upon the real eſtate for ſuch debts as the perſonal eſtate was not ſufficient to pay; and this decree was affirmed in the Houſe of Lords. Legh v. Earl of Warrington, 4 Br. P. C. 90. Hatton v. Nicholls, Ca. temp. Talb. 110. Lypet v. Carter, 1 Vez. 499.

Earl of Godolphin v. Penncok, 2 Vez. 271. ſimilar deciſions on almoſt the ſame words.

J. J. by his will, firſt, orders all his debts and funeral expences to be honourably paid after his deceaſe. In a ſubſequent clauſe he deviſes particular premiſes, (enumerating them,) excepting *H.* and *R.*; all which enumerated premiſes, except *H.* and *R.*, he deviſes to truſtees, by and out of the money ariſing by ſale, and out of the rents and profits thereof in the mean time, in the firſt place to pay and diſcharge his debts, funeral expences, and all legacies given by this will, or by other writing under his hand. He afterwards goes on and ſays, that *H.* and *R.* ſhall be in the firſt place for payment of the legacies mentioned in his will. On a bill by creditors to have the real eſtate by the will ſubjected to the payment of their debts, in aid of the perſonal, ſo far as that proved deficient, inſiſting, that the whole real eſtate was by the will eſtabliſhed as a fund for that purpoſe; Sir *J. Strange*, M. R. ſaid, that though on the firſt part of the will the court might take the whole real to be charged with debts, yet as there is no expreſs lien on the real by theſe general words, and afterwards the teſtator diſtributes ſuch part of his real eſtate for debts, and ſuch for legacies, it is too much to lay hold on the general words to ſay, the whole ſhould be charged with payment of debts. It can be done only by implication on the general words, which may be explained afterwards, and that implication deſtroyed. Conſequently, the plaintiffs can only have a decree for an account of the perſonal eſtate in courſe of adminiſtration, and then the other parts of the real eſtate, except *H.* and *R.*, for payment of their debts. Thomas v. Britnell, 2 Vez. 313.

But where there is a clear, full charge of the whole real eſtate in aid of the perſonal for the payment of debts and legacies, this ſhall Elliſon v. Airey, 2 Vez. 568.

ſhall not be reſtrained by a ſubſequent deviſe of a particular part of the real eſtate for that purpoſe, unleſs negative words are added.

Davis v. Gardiner, 2 P. Wms. 187.

A will began thus: *As to my worldly eſtate, I diſpoſe of the ſame as follows, after my debts and legacies paid;* and then gives ſeveral legacies and portions to the teſtator's daughters; and then ſays, that "*after all my legacies paid,*" the ſurplus of the perſonal eſtate ſhall go to the ſon. After which follows a deviſe of land to the ſon; but if he dies without iſſue in the life of any of the daughters, then to the daughters. There was a ſufficiency out of the perſonal eſtate to pay great part, though not all of the legacies. It was holden, that the land was not chargeable to ſupply the deficiency.]

Vern. 104. 2 Chan. Ca. 205. S. P. decreed.

If lands are deviſed to truſtees for the payment of debts and legacies (*a*) out of the rents and profits, the truſtees may ſell the land itſelf.

[(*a*) But where the introductory words were, "First, I will and direct that all my legal debts, *legacies*, "and funeral expences ſhall be fully paid;" it was holden, that they did not authoriſe the raiſing of pecuniary legacies out of the real eſtate to the loſs and diſappointment of ſpecifick deviſees. Keightley v. Keightley, 2 Vez. jun. 328.]

Vern. 104. Trafford v. Aſhton, 1 P. Wms. 415.

But if the deviſe be to pay debts and legacies out of the annual rents and profits; by theſe words the land ſhall not be ſold.

Vent. 256. 2 Vent. 357. S. P.

If there be a deviſe of a ſum certain to be raiſed out of the profits of lands, and the profits will not amount to raiſe the ſum in a convenient time: *per* Lord Chancellor, It is the law of this court to decree a ſale.

2 Vern. 26. Berry and Aſkam.

A. deviſes, that his executors ſhall receive the rents, iſſues, and profits of his perſonal eſtate, in the firſt place to pay 60*l. per ann.* to one for life; and after that perſon's death, out of the remainder of his eſtate, his debts being paid, to raiſe portions for ſeveral children, payable at twenty-one, and maintenance in the mean time; and deviſes all his lands in ſeveral parcels to ſeveral perſons, at future times: the Maſter of the *Rolls* held, that the lands were liable to be ſold, and that the ſales ſhould be out of all the deviſee's lands, unleſs the perſonal eſtate were ſufficient, or the rents and profits in a reaſonable time; and ordered an account to be taken thereof in the firſt place.

(*b*) Ivy v. Gilbert, Pr. Ch. 583. 2 P. Wms. 13. S. C. Evelyn v. Evelyn, 2 P. Wms. 669. Okedin v. Okedin, 1 Atk. 550. (*c*) Ivy v. Gilbert, *ubi ſupra.* Mills v. Banks, 3 P. Wms. (*d*) Small v.

[But notwithſtanding theſe caſes, a court of equity will not decree a ſale of the lands, if no time for payment (*b*) be appointed; or if any other mode is preſcribed to ſatisfy the charge (*c*), as if the inſtrument contain a power of leaſing, or of mortgaging the premiſes; or if it diſtinctly appear, that the rents and profits were excluſively intended to ſatisfy the charge (*d*). And ſo much do courts of equity reſpect the intention, that Lord *Hardwicke* ſaid, (*e*) that "where a man creates a truſt for payment of debts, and "declares the truſt of the term to be by perception of rents and "profits, or by leaſing or mortgaging, to raiſe ſufficient money "for payment of his debts, it reſtrains it merely to a payment of "rents and profits. But if it had been a truſt of the rents and "profits, the term might have been ſold for the ſatisfaction of "creditors."—"But where there are other limiting words fol-

"lowing

" lowing rents and profits in a truſt for payment of debts, his " Lordſhip obſerved, he did not remember any caſe which would " authorize a ſale." And this opinion ſeems ſupported by Lord *Loughborough* in the following caſe (*f*): *T. B.* by his will directed all his debts to be paid out of his eſtate with all convenient ſpeed, and ordered his perſonal eſtate to be converted into money, and applied in aid of his real eſtate, in payment of funerals and debts, as far as the ſame would extend. In caſe he ſhould die without iſſue, he deviſed his eſtate of *B.* (ſubject to the charge) to truſtees in truſt to pay the yearly rents and profits as follows, *viz.* in diſcharge of his wife's jointure, and his ſiſter's annuity, and in payment of ſuch of his debts, and the intereſt thereof, as his perſonal eſtate ſhould fall ſhort of ſatisfying, and ſubject thereto, to pay his brother *H. B.* an annuity of 100*l. per annum*, to continue till after his debts affecting his lands ſhould be paid off by the rents and profits of his eſtate; and immediately after the payment of his debts, then 200*l.* in lieu of the 100*l.*, and an additional annuity of 50*l.* to his ſiſter. And as to the reſidue of the rents and profits, he gave them to the firſt and other ſons of *H. B.*, with remainders over. On a bill filed by the ſpecialty creditors and annuitants againſt Lord *Derby* a mortgagee, and the other parties, praying an account of the perſonal eſtate, and that if it ſhould prove inſufficient to pay the debts, the deficiency might be made up by ſale of the real eſtate; the Maſter of the Rolls had ordered the money for the payment of debts to be raiſed by mortgage; but it appearing that a ſufficient ſum could not be raiſed by that means, the queſtion was, whether the court could, under the will, decree a ſale?—By Lord *Loughborough:* Where the deviſe is to pay the debts out of the *profits* of the eſtate, it is equivalent to a deviſe to the truſtees to ſell, and a decree for a ſale is only an execution of that truſt. But I am afraid you will find, that both by the words and conſtruction of the ſtatute of fraudulent deviſes, where there is a deviſe for the payment of debts, it takes the caſe out of the ſtatute, and it ſtands as it would have done before the ſtatute was made: the creditor can come only as the will directs. I take it to be the clear intent of the teſtator here, that not an acre ſhould be alienated for the payment of his debts; therefore, there cannot be a ſale.—But it is to be obſerved, that Lord *Thurlowe* was of opinion in a ſubſequent caſe, that in order to take a deviſe of real eſtate for the payment of debts out of the ſtatute againſt fraudulent deviſes, it muſt be effective; and therefore where a teſtator, after generally charging his real eſtate with his debts, had deviſed a particular eſtate to truſtees for that purpoſe, excepting the manſion-houſe, his Lordſhip ſaid, that if the maſter reported that the debts could not be paid by the means provided in the deviſe, he ſhould either here or in the Houſe of Lords (unleſs the Houſe overruled him) order the eſtate to be ſold, notwithſtanding the ſtatute; and conſider it ſo far as fraudulent: that in the preſent caſe, he ſhould order the deviſed eſtate to be ſold, without including the capital manſion-houſe, if, without it, the eſtate was ſufficient for

Wing, 3 Br. P. C. 503.

(*e*) Ridout v. Earl of Plymouth, 2 Atk. 104.

(*f*) Lingard v. Earl of Derby, 1 Br. Ch. Rep. 311.

Hughes v. Doulben, 2 Br. Ch. Rep. 614.

for the payment of the debts; if not, the manſion-houſe muſt be ſold.

In what caſes a deviſe for payment of debts will make the eſtate either legal or equitable aſſets, ſee tit. *Executors and Adminiſtrators*, vol. iii. p. 59.]

(G) Of Deviſes by Implication.

Vaugh. 261. 3 Lev. 260. Roll. Abr. 843. 13 H. 7. 17. b. Cro. Jac. 75. Horton's caſe. Bro. tit. Deviſe, 52. 2 Sid. 53. 2 Lev. 207.

THE law in conveying eſtates did not regularly ſuffer any to paſs by implication, becauſe it is a manner of transferring no way agreeable to the plainneſs and ſolemnity of the law; as, if *A.* ſurrenders to the uſe of *B.*, and, for want of iſſue of *B.*, the remainder over to *C.*; this, in a conveyance at law, had been but an eſtate for life to *B.*, and no eſtate-tail by implication. But there has been greater favour and latitude allowed in the diſpoſition of eſtates by will; and in the conſtruction of them, the judges, to ſupport the intent of them, where it is very apparent, have admitted eſtates by implication, though to the diſheriſon of the heir at law. However, in thoſe caſes, ſuch eſtates have been allowed only to ariſe by a neceſſary, and not a poſſible implication or intention in the deviſor; for the heir's title being plain and obvious, no words which will bear a contrary ſignification ſhall, by conſtruction, impeach it.

Vide the authorities in the preceding ſection, and Vern. 22. 2 Vern. 572. 2 Vent. 223. S. P.

As, if *A.* deviſes lands to his (*a*) heir after the death of his wife; this is a good deviſe to the wife for life by implication; for by the expreſs words of the will, the heir is not to have it during her life; and if the wife has it not, none elſe can, for the executors cannot intermeddle.

(*a*) So, if one having a wife, and two daughters, heirs at law, deviſes lands to one of the daughters after the wife's death; this gives the wife an eſtate for life, though the daughter is but one of the coheirs. 2 Vern. 723.

Bro. Dev. 52. Cro. Jac. 75. Vern. 22. 2 Vern. 572. 2 Vent. 223. Roll. Abr. 844.

But if a man deviſes to a ſtranger, after the death of his wife, this gives the wife no eſtate for life by implication; for it is but a demonſtration when the eſtate of the ſtranger ſhall commence.

So, if a man deviſes his *term* to his ſon, after the death of his wife; this raiſes no eſtate for life in the wife by implication; for here is no neceſſary implication, that the wife ſhall have it as in the former caſe, becauſe the ſon is not by law to have the term as the heir at law is to have the inheritance, without a particular deviſe, but the executor: and therefore the term in this caſe may go to the executor during the life of the wife.

Tyte v. Willis, Ca. temp. Talb. 1.

[So, on the other hand, if an eſtate is deviſed to *A.* and his heirs, it ſhall not be controlled and cut down to an eſtate-tail in reſpect of the words, "and if he die without heirs, remainder to *B.*," if *B.* is a ſtranger and cannot be heir to *A.*

Higham v. Barker, Cro. Eliz. 16.

If an eſtate be deviſed to *A.* and the heirs male of his body, and if he die without iſſue of his body, remainder over; and *A.* di

die without iſſue male, having iſſue *female*; no eſtate will ariſe to ſuch iſſue *female* by implication.] Moor, 124. Lady Laneſborough v. Fox, Ca. temp. Talb. 262. Bodens v. Watſon, Ambl. 478.

If a man deviſes land to *J. S.* and his heirs, after the death of *J. D.*, or after twenty years, and the deviſor dies during the life of *J. D.*, or before the twenty years expired, the land in the *interim* ſhall deſcend to the heir at law; for during this time the deviſor has made no diſpoſition of it, but left it to deſcend according to the rules of law, which carry it to the heir. Roll. Abr. 844.

Where a man deviſed all his paſture lands in *D.* to his youngeſt ſon, and alſo willed that all bargains, grants, &c. which he had from *C.*, ſhould be to his youngeſt ſon, and the heirs of his body; it was reſolved, that the youngeſt ſon ſhould not have an eſtate-tail in the paſtures of *D.* by implication; for the words of a will to diſinherit the heir at law, muſt have a clear and apparent intent; and this at moſt could have been but a poſſible implication, that the deviſor might have intended the ſon an entail in the paſtures, which is not ſufficient to deſtroy the plain title of deſcent to the heir at law. Vaugh. 262. Cro. Car. 368.

A. leaſes, upon condition, that the leſſee ſhall not alien to any beſides his children; the leſſee deviſeth the term to *H.* his ſon, after the death of his wife: it was adjudged, that this deviſe was no breach of the condition, for the wife took no eſtate by implication; for there can be here but a poſſible implication at moſt; and ſince the intent of the deviſor is the beſt rule to conſtrue wills by, it would be abſurd to ſay, that the deviſor intended to convey ſuch an eſtate as muſt forfeit his own; therefore, the executor ſhall have it (*a*) while the wife lives. Cro. Jac. 75. Vaugh. 266. Roll. Abr. 844. (*a*) If a term be deviſed to executors after the death of the wife: *Quære*, Whether ſhe ſhall have an eſtate for life, or ſhall the executors have it during her life, to perform his will, and after her death as legatees? *Vide* Cro. Jac. 75. Vaugh. 261.

A. ſeiſed of a manor, part in demeſne and part in ſervices, deviſed all the demeſne to his wife expreſsly, for her life, and all the ſervices, for fifteen years, and then deviſed the whole manor to a ſtranger after her death: it was reſolved, that the laſt deviſe ſhould not take effect till after her death, and yet ſhe ſhould not have the ſervices for her life by implication, but that the heir ſhould enjoy the ſervices after the fifteen years, while ſhe lived; for there appears no neceſſary implication that ſhe ſhould have the whole for her life, with an excluſion of the heir; and a poſſible implication is not ſufficient to exclude him; for nothing but the apparent intent of the deviſor can do that: but if the deviſor had ſaid, that after the death of his wife and the ſtranger, the heir ſhould have the manor, there, the wife by a neceſſary implication ſhall have the whole manor while the ſtranger and wife live, and the ſtranger cannot take any thing whilſt ſhe lives. Moor, pl. 24. Vaugh. 265.

From this it appears that the rule, *viz.* where a deviſee takes any thing by an expreſs deviſe, he ſhall not have any other thing deviſed by the ſame will by implication, is deſtroyed by the diſtinction of a neceſſary and a poſſible implication; for the former caſe proves, that a neceſſary implication will give an eſtate, though Cro. Eliz. 16. Vaugh. 263.

the deviſee took by an expreſs deviſe before; and a poſſible implication is ſufficient in no caſe to convey an eſtate to the diſheriſon of the heir; for that is the principal point between *Gardner* and *Sheldon*, in *Vaugh.* 263. where the words of the will are, that if my ſon *G.* and my daughters *M.* and *K.* die without iſſue of their bodies, then my lands to remain to my nephew *W.*, it was adjudged, that the deviſe to *G.*, being ſon and heir, was void, and that the daughters took no eſtate by that poſſible implication; but their dying without iſſue is only a deſignation of the time when the nephew is to take.

3 Lev. 259. 2 Vent. 57. Moor, 31. Wright and Wivell.

A. deviſed to his wife 600 *l.* to be paid to *J. S.* for the payment of lands he purchaſed from him, and are already ſettled on her for her jointure; the lands were not ſettled on her; and adjudged they did not paſs by the will by implication, for there appears no intent that ſhe ſhould have them by the will, and, conſequently, they cannot paſs from the heir at law by implication, ſince the deviſor was only miſtaken as to the ſettlement of them in his life-time.

Chan. Ca. 196. North and Compton, *vide* head of Uſes and Truſts, of Truſts by Implication.

A. deviſed all his eſtate real and perſonal for the payment of debts and legacies, and deviſed 100 *l.* to his heir at law: this was decreed a good deviſe in fee, but no implied truſt aroſe to the heir at law for the ſurplus; for by that conſtruction the deviſee would have no benefit by the deviſe: beſides, the legacy of 100 *l.* to the heir at law is in this caſe an excluſion of the heir from any further benefit.

4 Leon. 14.

A. has two ſons *B.* and *C.*, and deviſes part of his land to *B.* in tail, and the other part to *C.* in tail; and if any of his ſons die without iſſue, then the whole land ſhould remain to a ſtranger in fee; *C.* died; yet the ſtranger could not enter into his part, for the other brother took it by implication, the words of the will being, that the whole land ſhall remain to a ſtranger, which he cannot have while either of the ſons or any iſſue of their body be living.

Vide ſupra, letter (D). Dyer, 171. a. Bendl. pl. 114. Moor, 113. 2 Leon. 226. Vent. 230.

Another rule relating to deviſes by implication is this, that where the deviſee takes a particular eſtate of inheritance by expreſs words in the will, ſuch eſtate ſhall not be enlarged by implication (*a*) for ſince deviſes by implication are allowed in favour to will that where the intention of the teſtator may be preſumed, the judges will purſue it, though it be not expreſſed in plain words yet there is no room for ſuch conſtruction where the deviſee has an eſtate given him by expreſs words in the will; for that would be to over-rule the plain meaning of the teſtator againſt his own words: therefore, if *A.* deviſes to *B.* for life, the remainder to *C.*, and the heirs male of his body, and if it happens that *C.* ſhall die without heirs of his body, then the remainder to *D.*, this is but an eſtate in tail-male to *C.*, becauſe that eſtate being given to him by expreſs words, ought not to be over-ruled by a bare implication, that the teſtator intended him a greater eſtate by the words, *if he* chance to die without heirs of his body.

[(*a*) Although the rule here laid down, that an eſtate expreſsly defined by the teſtator ſhall not be enlarged by implication, be generally true; yet if the manifeſt general intent of the teſtator require it, courts of juſtice will, in order to effectuate ſuch general intent, diſregard the particular intent, however expreſsly declared, if inconſiſtent with the gen-

intent. See the caſe of Doe v. Applyn, 4 Term Rep. 82. Robinſon v Robinſon, 1 Burr. 44. and other caſes *ſupra* D. and ſee 2 Eq. Tr. 58. note (*b*) by Mr. Fonblanque.]

If a deviſe be to *A.* and his heirs male, and if he die without heirs of his body, then to remain to *B.* in fee, this is but an eſtate in tail-male to *A.*, for the law ſupplies the words *of his body;* and ſince the deviſor only gave it by (*a*) expreſs words to him and his heirs male, it would be againſt his plain words to let in his iſſue female by implication on the other words, *if he die without heirs of his body.*

Bulſt. 63. Dyer, 171. a. *in marg.*

(*a*) So, if a man deviſe to *A.* and the heirs of his body, and if he die without heirs, theſe laſt words will not, againſt the expreſs declaration of the teſtator, give the deviſee a fee ſimple by implication. 2 Vern. 451.

B. having iſſue a ſon and two daughters by ſeveral venters, the ſon died leaving two daughters, and then *A.* deviſes one of his meſſuages to *B.* his own daughter, and her heirs for ever, and his other meſſuage to *C.* his daughter, and her heirs for ever; and if *B.* die without iſſue, living *C.*, then *C.* ſhould have *B.*'s part to her and her heirs; and if *C.* die before her age of ſixteen years, then *B.* ſhould have her part in fee; and if both his ſaid daughters ſhould die without iſſue of their bodies, then his grand-daughters ſhould have the meſſuages: *C.* died without iſſue, having paſſed her age of ſixteen years: the grand-daughters had judgment for her part; and the words of the will, *if his two daughters died without iſſue of their bodies*, did not create croſs remainders for each other's part by implication, but only denoted the time when the heirs at law ſhould have the meſſuages; for, ſays the book, no ſuch implication will ſerve when there is an expreſs gift and limitation made to the deviſees by the teſtator himſelf.

Bendl. 212. Clatches's caſe. Dyer, 330. Vaugh. 267. [That when expreſs and diſtinct eſtates are limited to two or more, and their ſeveral and reſpective iſſues, and for want of ſuch iſſue over, croſs remainders ſhall not be implied; the words *ſeveral* and *reſpective* ſevering the title; ſee Davenport v. Oldis, 1 Atk. 579. Williams v. Browne, 2 Str. 996. Gray v. White, Cowp. 777. Phipard v. Mansfield, *Id.* 800.—With reſpect to croſs remainders in a will, it may be obſerved, that the preſumption is in favour of them, where they are to be raiſed between more; but where between *more than two*, it is againſt them. But it being only a preſumption, it may, of courſe, be rebutted in either caſe by circumſtances of plain, manifeſt intention. The words "*in default of ſuch iſſue*," and a deviſe over of all the teſtator's eſtates, have been holden to raiſe croſs remainders. Phipard v. Mansfield, *ubi ſupra*. Comber v. Hill, 2 Str. 969. Atherton v. Pye, 4 Term Rep. 710. Wright v. Holford, Cowp. 31. S. C. by the name of Wright v. Enſefield, Ambl. 468. and by the name of Wright v. Lord Cadogan, 6 Br. P. C. 156. Holmes v. Willett, 1 Freem. 483. Barratt v. Townly, 1 Vez. 102. The preſuming againſt croſs remainders between more than two, is for a technical reaſon, becauſe the law avoids the ſplitting of tenures. 1 Vez. 104-5. *per* Lord Hardwicke.]

[Where an expreſs eſtate-tail is given by the will, it will not be charged to a deviſe in fee by implication, from the land's being charged with the payment of annuities, or of a groſs ſum, not even if it be a charge in fee; for the charge in ſuch caſe ſhall iſſue out of the whole eſtate, and not out of the particular eſtate only; and being governed by the directions of the will, it ſhall take effect according to the limitations thereof, and affect the whole inheritance.]

Doe v. Fyldes, Cowp. 833. Denn v. Slater, 5 Term Rep. 335. Dutton v. Engram, Cro. Jac. 427.

(H) Of the Diſpoſition of Goods and Chattels by Will, by what Deſcription, and to whom good.

[See under the diviſion *Legacies*, B. 2, 3.]

(I) Of executory Deviſes of Lands of Inheritance And herein of Contingent Remainders, and Cro Remainders, as far as they relate to this Place.

Abr. Eq. 186.

AN (a) executory deviſe is defined to be a deviſe of a future in tereſt, which cannot veſt at the death of the teſtator, but de pends upon ſome contingency which muſt happen before it can ve

(a) Of which there are three kinds: 1. Where the deviſor departs with his whole fee-ſimple, but upon ſome contingency qu lifies that diſpoſition, and limits a fee upon that contingency, which is new in law, as appears by Bro 234. Dyer, 33. Vaugh. 271., and was firſt advanced in the caſe of Hind and Lyon, 19 Eliz. 3 Le 64. *per* Nottingham. 3 Chan. Caſes, 1. &c. in the caſe of the duke of Norfolk. Second ſort is, w the deviſor gives a future eſtate to ariſe upon a contingency, but does not part with the fee at preſent, ſuffers it to deſcend to his heir, as a deviſe to the heirs of *J. S.* till he ſhall have one, &c. and have been frequent. Of the third ſort are leaſehold intereſts, or terms for years, for which *vide* letter (K), and Salk. 226.

Fearne's Executory Deviſes, 4th ed. 1, 2, &c.

[This is the definition commonly given of an executory devi But it has been objected to as defective in point of accuracy a preciſion, inaſmuch as it is not confined to executory deviſes on but embraces every kind of contingent intereſt in lands given deviſe, and ſome contingent intereſts by deviſe are contingent mainders. An executory deviſe is, ſtrictly, ſuch a limitation future eſtate or intereſt in lands or chattels (though in the caſe chattels perſonal, it is more properly an executory *bequeſt*) as law admits, in the caſe of a will, though contrary to the rule limitation in conveyances at common law. It is only an ind gence allowed to a man's laſt will and teſtament, where other the words of the will would be void; for wherever a future tereſt is ſo limited by deviſe, as to fall within the rules which law has preſcribed for the limitation of contingent remainde ſuch an intereſt is not an executory deviſe, but a contingent mainder.]

Dyer, 41. Co. 85. Plow. 29. 2 Leon. 69. Co. Lit. 19. Poph. 34. 2 Roll. Rep. 220. Godolp. 355.

To underſtand this doctrine, it muſt be obſerved as an eſtabli ed rule, that a fee cannot be limited on a fee; as if lands limited to one and his heirs, and if he dies without heirs, t ſhall remain over to another, this laſt limitation is void: ſo, if la are given by deed to one and his heirs, ſo long as *J. S.* hath i and after the death of *J. S.* without iſſue, to remain over another, this remainder is likewiſe void, becauſe the firſt dev had a fee, though it was a baſe and determinable fee.

Cro. Eliz. 205. Roll. Abr. 626. Dyer, 124.

Yet, in a will, ſuch limitations may be good upon a contingc that may happen within the compaſs of a life or lives in (b) *eſſ* nine months after the expiration of a life, or (c) a reaſonable n ber of years; for theſe tend not to a (d) perpetuity, which odious in law; but this not by way of direct (e) remainder, bu way of executory deviſe.

(b) All the candles muſt be lighted, and burning out at the ſame time, *per* Twiſden. (c) That 20, nay 30 years have been thought a reaſonable Salk. 229. pl. 8. (d) As the caſe of Gardiner and Sheldon does, which therefore has been denied law, which *vide* in Vaugh. 271. (e) Where a contingent eſtate is limited, and depends upon hold which is capable of ſupporting a remainder, it ſhall never be conſtrued to be an executory but a contingent remainder. 2 Sand. 380. Purefoy and Rogers. 3 Lev. 434. S. P. Cuth [Doe v. Holmes, 3 Wilſ. 237. 241. 2 Bl. Rep. 777. S. P. Goodtitle v. Billington, Doug Doe v. Morgan. 3 Term Rep. 763, S. P. Walter v. Drew, Com. Rep. 372. S. P. Wealthy v. Ba Ca. temp. Hardw. 258. S. P. Carwardine v. Carwardine, Fearne's Executory Deviſes, 4th

As, if tenant in fee-ſimple deviſes his land to *A.* and his heirs, and if he dies without iſſue in the life of *B.*, then to *B.* and his heirs; though this be a limitation of a fee-ſimple upon a fee; yet, becauſe the remainder to *B.* muſt veſt upon a contingency, which will fall in a life, it has been held good as an executory deviſe. 3 Chan. Ca. 9.

So, in the celebrated caſe of (*a*) *Pell* and *Brown*, where one having three ſons, *A.*, *B.*, and *C.*, by his will in writing deviſes lands to *B.*, his ſecond ſon, and his heirs for ever, paying 20*l.*, and if *B.* dies without iſſue, living *A.*, then *A.* to have thoſe lands to him and his heirs for ever; *B.* enters and ſuffers a common recovery to the uſe of himſelf and his heirs, and then deviſes thoſe lands to *J. S.* and his heirs, and dies without heirs, living *A.*: it was adjudged, firſt, that *B.* had a fee-ſimple, and yet the limitation to *A.* good, as an executory deviſe in fee; for it was to happen within the compaſs of a life; and therefore if *B.* died with iſſue, living *A.*, or without iſſue, after the death of *A.*, then this future intereſt was never to ariſe: ſecondly, it was adjudged, that this being a mere collateral poſſibility was not bound by the recovery; for it had not exiſtence at all when the recovery was ſuffered; and therefore the recompence in value could not extend to it: beſides, to allow the particular tenant to deſtroy any ſuch future intereſt, would be the means of fruſtrating the moſt commendable intentions of the deviſor, providing for his younger children, or for the payment of his debts, *&c.* (*a*) Reported Cro. Jac. 590. Roll. Abr. 611. Palm. 131. 2 Roll. Rep. 216. 2 Leon. 111. Vaugh. 272.

One by will deviſes his lands to his mother for life, and after her death to his brother in fee, provided that if his wife (being then *enſient*) be delivered of a ſon, that then the land ſhall remain to him in fee, and dies, and the ſon is born: it was held, that the fee of the brother ſhould ceaſe, and veſt in the ſon by way of executory deviſe upon the happening of the contingency. Dyer, 127. *in margine.*

[A teſtator deviſed lands to his wife for life, and after her death to ſuch child as ſhe was then ſuppoſed to be *enſient* with, and to the heirs of ſuch child for ever; provided that if ſuch child as ſhould happen to be born, ſhould die before the age of 21 years, leaving no iſſue of its body, the reverſion ſhould go over. The court held it to be a deviſe to the wife, remainder to the child in contingency in fee, with a deviſe over, which they held a good executory deviſe, as it was to commence within twenty-one years after a life in being; and that if the contingency of a child never happened, then the laſt remainder was to take effect upon the death of the wife: that the number of the contingencies were not material, if they were all to happen within a life in being, or a reaſonable time after. Gulliver v. Wickett, 1 Wilſ. 105.

So, where a teſtator deviſed to his wife for 3 years, remainder to his ſon for 99 years, if he ſhould ſo long live, remainder to him for 99 years, if ſuch wife as he ſhould marry ſhould ſo long live, remainder to the *heirs of* his ſon's body, and the heirs of their bodies; the court held the deviſe to the *heirs* of the ſon's body good, as an executory deviſe, being to take place *in futuro*, within the compaſs of a life in being. 1 Wilſ. 225. Doe v. Carleton.

Harris v. Barnes, 4 Burr. 2157.

Again, where a teſtator deviſed his lands to *C.*, for the term of 90 years from his (the teſtator's deceaſe) if he ſhould ſo long live, and after the determination of that term, he deviſed the lands to the *heirs of the body of the ſaid* C. remainder over; upon a queſtion referred to the judges of *K. B.*, whether the heirs of the body of *C.* took any and what eſtate under the will? they certified their opinion, that the clear manifeſt intent of the teſtator was to give an eſtate-tail to ſuch perſon *as ſhould be heir of the body of* C. *at his death*, (the only determination of the 90 years term in the teſtator's view,) *to him and to the heirs of the body of the ſaid* C., with remainder over as in the will; which intent of the teſtator might by law take effect as an executory deviſe, for the contingency muſt happen within the compaſs of a life in being; and the freehold in the mean time being undiſpoſed of, deſcended to the heir at law.]

Palm. 135. Dyer, 33. *in margine.* Cro. Eliz. 359. Cro. Jac. 592. (*a*) So, if a deviſe of borough-engliſh lands had been to the eldeſt ſon, paying ſuch a ſum to the younger ſons, and in default of payment, that the land ſhould go to them and their heirs; though the word *paying* in a will amounts to a condition, yet becauſe that muſt deſcend to the deviſee as heir, and no one elſe can take advantage of his default, it muſt be an executory deviſe, to veſt in default of payment by the eldeſt. 3 Co. 21. 2. Cro. Eliz. 833. Hainſworth and Pretty.

One having iſſue *A.*, his only daughter and heir apparent, by will deviſes lands in *D.* to her and her huſband, and her heir, upon condition that they ſhould aſſure lands in fee to his executors and their heirs, to perform his will; and if they failed, then he deviſed the ſaid lands in *D.* to his executors and their heirs, and died: it was adjudged to be no condition; (*a*) for then by the deſcent to the daughter being heir, it would be deſtroyed; but it was held a limitation, or an executory deviſe to his executors, in caſe the aſſurance was not made, and that they might, for breach thereof, enter and ſell; for though a fee cannot be limited upon a fee abſolute, yet upon a fee determinable it may, and enures as a new original deviſe to take effect when the firſt deviſee fails to make the aſſurance.

Cro. Eliz. 878. [(*b*) It is inaccurate to call it a remainder, for the reaſon aſſigned for the judgment proves the limitation was allowed to operate as an executory deviſe. Fearne's E. D. 4th ed. 25.]

If *A.* deviſes lands to *B.* for five years from *Michaelmas* following, the remainder to *C.* and his heirs, this is a good remainder (*b*) although it cannot veſt before the particular eſtate begins, and the freehold cannot be in expectancy, for in the mean time the fee ſhall deſcend to the heir.

3 Roll. Rep. 197. Palm. 132. [Thruſtout v. Denny, 1 Wilſ. 270. S. P.]

One deviſes lands to his wife till his ſon came to the age of 21 years, and then that his ſaid ſon ſhould have the lands to him and his heirs, and if he dies without iſſue before his ſaid age, then to his daughter and her heirs: this is a good contingent or executory deviſe to the daughter, if the contigency happens, and in the mean time the fee deſcends to the ſon as heir; and if he lives to 21, though he after die without iſſue, or leave iſſue, though he die before 21, yet the daughter is not to have the lands, becauſe he is to die without iſſue, and before 21, elſe the daughter cannot take.

Cro. Car. 185. Spalding and

But where one having iſſue three ſons, *A.*, *B.*, and *C.*, deviſes to his ſon *A.* after the death of his wife, to him and the heirs of his

his body lawfully begotten in fee-ſimple; and if he die in the life-time of my wife, that then my ſon *C.* ſhall be his heir, and dies; *A.* hath iſſue, and dies, in the lifetime of the wife; it was adjudged, that the iſſue ſhould have the land after the death of the wife, and not *C.*; for it was in effect a deviſe to the wife for life, remainder to *A.* in tail, remainder to *C.* in fee, upon the contingency of *A.*'s dying in the life of the wife, and does not abridge the eſtate tail, expreſsly given *A.* by his dying in the life of the wife. Spalding, S. C. cited. 3 Lev 434. Ld. Raym. 524.

[A deviſe was to two truſtees and their heirs to receive the rents until *B.* ſhould attain 21; and if *B.* ſhould attain 21 or have iſſue, then to *B.* and the heirs of his body, but if *B.* ſhould happen to die before 21 *and* without iſſue, remainder over; *B.* attained his aged of 21, and afterwards died without iſſue: Lord *Hardwicke*, conſidering the word *and* as uſed for *or*, and the condition as diſjunctive inſtead of copulative, decreed that the remainder over ſhould take effect, upon the apparent intent of the teſtator, that it ſhould take place, either in default of *B.*'s attaining 21, or on his dying without iſſue. 2 Vez. 243. Brownſword v. Edwards.

A *feme covert*, purſuant to a power, left her huſband the profits of certain eſtates for life, and after his death her eſtates to her children, if ſhe ſhould *leave any to ſurvive her*; but in caſe ſhe ſhould leave no ſuch child or children, nor the iſſue of ſuch child or children, after the deceaſe of her huſband, ſhe gave the eſtates to *J. K.* making him her ſole heir in *default of iſſue left by her*. Lord *Hardwicke* held, that the children took eſtates-tail, and not in fee, and that the deviſe to *J. K.* was a *veſted remainder*, and not a limitation to take effect only on the event of the teſtatrix's dying without *leaving* any child or the iſſue of any *living* at her deceaſe. He ſaid the teſtatrix had only expreſſed the double contingency, which there is in the caſe of every limitation in remainder after an eſtate-tail, *viz.* there being no iſſue at all, or all ſuch iſſue dying without iſſue. Southby v. Stonehouſe, 2 Vez. 610.

But where a teſtator deviſed to *B.* his ſon and heir, and if he died before 21, *and* without iſſue of his body *then living*, the remainder over, *&c.* and *B.* ſurvived the 21 years; it was held, that he had a fee-ſimple immediately, and that the eſtate-tail was to ariſe upon a contintency which never happened, as he attained 21. So, where the teſtator deviſed land to his wife till his ſon came to his age of 21 years, and then that his ſon ſhould have the lands to him *and his heirs*, and if he died without iſſue *before* his ſaid age, then to his daughter and her heirs; it was held to be an executory deviſe to the daughter, if the contingency happened; and that in the mean time the fee deſcended to the ſon, and if he attained 21, though he afterwards died without iſſue, or if he ſhould leave iſſue, though he died before 21, yet the daughter was not to have the lands; becauſe he was to die without iſſue, *and* before 21, to entitle her.] Collinſon v. Wright, 1 Sid. 148. 1 Eq. Abr. 188. pl. 8. And *vide* Barker v. Suretees, 2 Stra. 1175.

Baron and *feme* being ſeiſed of a copyhold, to them and the heirs of the *baron*, baron ſurrenders it to the uſe of his will, and then deviſes it to the heirs of the body of the feme, if they attain the age of 14, and dies without iſſue, and then ſhe marries a ſecond 1 Lev. 235. Snow v. Cutler. Eq. Ca. Abr. 188.

huſband and has iſſue that attains the age of 14, and then ſhe dies; and whether this was a good deviſe, by reaſon of the double contingency, *ſcilicet*, the having heirs of her body, and that ſuch heir ſhould live till 14, was doubted; but it was admitted that if the deviſe was good, it muſt be by way of executory deviſe, which is allowable, when to take effect within the compaſs of a life, but not after a dying without iſſue; for that tends to a perpetuity: and it cannot take effect by way of remainder; for it is a new deviſe to take effect after her death, and is not as a remainder joined to her eſtate: but the court being divided upon the point of contingency, it was agreed to be adjourned into the Exchequer-chamber, and the reporter ſuppoſes the parties agreed afterwards, for he heard no more of it.

2 P. Wms. 28. Gore v. Gore.

[Where *A.* deviſed his lands to truſtees for 500 years upon truſts, and after the determination of that term to the firſt ſon, *&c.* of *B.* (who had no ſon born at the teſtator's death), this executory deviſe to the unborn ſon of *B.* was held good; becauſe it was clear the freehold muſt veſt, either on the birth of ſuch ſon, or on *B.*'s death without having had any ſon.

Prec. Chan. 67. Fairfax v. Herod.

So, where one deviſed all his lands after the death of his executor, to *A.* his executor's ſon, and his heirs for ever, but if *A.* died *leaving* no ſon, then to that ſon of his executor, to whom he ſhould think fit to give them by his will; and for want of a ſon of his executor, then to *B.*; it was held a good executory deviſe to *B.* as confined to the period of a life in being.

Where lands were limited by marriage ſettlement to the uſe of *A.* and his wife, for their lives, remainder to truſtees and their heirs during the lives of *A.* and his wife, to preſerve contingent remainders; remainder to the firſt and other ſons of the marriage ſucceſſively in tail-male, remainder to the right heirs of *A.*; with a proviſo, that if the heirs of the wife ſhould within twelve months after the death of the ſurvivor of the huſband and wife, pay 4000*l.* to the heirs or aſſigns of the huſband, that then the fee ſhould remain to the uſe of the heirs of the wife: the Houſe of Lords held this executory limitation of the uſe to the heirs of the wife to be good.

Loyd v. Carew. Chanc. Prec. 72. Show. Parl. Caſ. 137.

10 Mod. 419. Marks v. Marks. Strange, 129.

So, where a teſtator deviſed to his wife for life, remainder to *C.* his ſecond ſon in fee, provided if *D.* his third ſon ſhould, within three months after his wife's death, pay 500*l.* to *C.* his executors, *&c.* then he deviſed the ſame lands to *D.* and his heirs; it was adjudged a good executory deviſe to *D.*]

2 Mod. 289. Taylor and Biddulph. Abr. Eq. 188. [S. C. cited and relied upon by the judges in Ca. temp. Talb. 232.]

If a man having only one ſiſter and heir, who had iſſue *A.* and after married *B.* by whom ſhe had iſſue *C.* and *D.* deviſes lands to his ſiſter until *C.* attains 21, and after *C.* attains that age, to *C.* and his heirs; and if *C.* dies before 21, then to the heirs of the body of *B.* and their heirs, as they ſhall attain their reſpective age of 21, and dies, *C.* dies before 21, living *B.*, and after *B.* dies, *D.* either as heir of *C.* in whom the fee was veſted, or as heir of the body of *B.* (though he could not be ſo during the life of *B.*) being of age after the death of *B.* ſhall have the eſtate by way of executory deviſe, and not the right heir of the deviſor.

[So,

[So, where the teſtator deviſed lands to his grandſon *W.* and his heirs, and if *W.* ſhould die under age, then to his grandſon *T.* and if *T.* ſhould die under age, then to ſuch other ſon of the body of his daughter *M. S.* by his ſon-in-law *T. S.* as ſhould happen to attain his age of 21 years, remainder over; and the teſtator died leaving two grandſons *W.* and *T.* who both died under age; afterwards another ſon *A.* of the body of *M. S.* by *T. S.* was born; it was decreed a good executory deviſe to this after-born ſon *A.* if he ſhould attain his age of 21 years. Caſ. temp. Talb. 229. Stephens v. Stephens.

Where *A.* deviſed to *B.* his ſon all his eſtate until *C.* ſhould attain his age of 21 years, and no longer; and afterwards ſaid, *item*, I give and bequeath unto *C.* all my meſſuages in *H.* and *T.* for ever, that is, if he have a ſon or ſons (who ſhall attain 21); but if my kinſman *C.* ſhall chance to die without ſon or ſons to inherit, my will is, that the ſon of my ſon *B.* ſhall inherit; *C.* took an eſtate in fee at 22 years of age, ſubject to be defeated by an executory deviſe over, which was not confined to veſt on the death of *C.* if he left iſſue, but awaited the event of that iſſue dying under 21, which could not be decided until a period of 21 years after a life in being. Heath v. Heath, 1 Br. Ch. Rep. 147.

It is the ſame in regard to perſonal eſtate. For where the teſtator bequeathed the reſidue of his perſonal eſtate to his niece *A.* for life, and after her death the intereſt to be applied for the maintenance of ſuch children as ſhe ſhould have, until the ſons had attained 21, and the daughters 18 years of age, and at ſuch their ages, to be paid their portions, and *for want of ſuch iſſue*, then to the children of *S.*; the niece died without iſſue, and it was contended that the bequeſt over to the children of *S.* was too remote; for if the words *for want of ſuch iſſue* ſhould ſignify for want of ſuch children of *A.* as ſhould attain the ſaid ages, yet it would exceed the rule which had confined theſe ſort of bequeſts (eſpecially of mere perſonal eſtates) to lives in being: but Lord Chancellor *King* held it to be a good executory deviſe, and cited the caſe of *Maſſenburgh* v. *Aſh*, where the like executory deviſe of a term for years was held good. Madox v. Staines, 2 P. Wms. 421. Maſſenburgh v. Aſh, 1 Vern. 234. 257. 304.

So, where the money in the orphan's fund and bank ſtock was limited by the teſtator in truſt for ſuch of his brother's children then unborn as ſhould attain their ages of 21; it was adjudged a good executory deviſe. Caſ. temp. Talb. 245. Sabbarton v. Sabbarton.

An eſtate by way of executory deviſe may be ſo limited, as that its taking effect or not may depend upon the act of the owner of the fee, which precedes it. Thus, *W.* by will deviſed his eſtates in *B.* except, *&c.* to his ſon *F.* and his heirs, *&c.* and the reſt of his eſtates to his ſon *C.* and his heirs, *&c.* and if either *F.* or *C.* ſhould die without having ſettled or otherwiſe diſpoſed the eſtates ſo deviſed, or without leaving iſſue of his or their reſpective body or bodies lawfully begotten, or having ſuch iſſue, ſuch iſſue ſhould die before his or their age or ages of 21, and without leaving lawful iſſue, he willed that the premiſes ſo given to ſuch of his ſons *F.* and *C.* ſo dying, ſhould go, and he gave the ſame unto the ſurvivor of them, his heirs, *&c.* for ever; and if the Beachcroft v. Broome, 4 Term Rep. 440.

the ſurvivor ſhould die without having ſettled or otherwiſe diſpoſed thereof, or of the eſtates thereby originally deviſed to him, or, &c. and his ſon *W.* ſhould then be dead without iſſue, then he gave ſuch of the ſaid deviſed premiſes as ſhould not have been ſettled or diſpoſed of as aforeſaid, unto the right heirs of *G.* then deceaſed, in fee. *F.* died without iſſue, *C.* by leaſe, releaſe, and recovery, conveyed part of the eſtate ſo limited as above mentioned to *I. S.* in fee, and then died; after which *W.* died without iſſue. And the queſtion was, whether under the deviſe to *C.* and the conveyance by him, *I. S.* took an abſolute and indefeazable eſtate of inheritance in fee-ſimple? And it was held, firſt, that on failure of the firſt limitation, the ſecond might have taken effect, as an executory deviſe. Secondly, that the teſtator had in expreſs terms given one eſtate to one ſon and his heirs, and another to another ſon and his heirs, and if either of them died, without having ſettled or diſpoſed of his eſtates, or without iſſue, then that it ſhould go over; that this was a lawful intention; and that *C.* having ſettled and diſpoſed of the eſtate given to him, had thereby defeated the limitation over.]

Lev. 11. Holmes and Plunkett. Ld. Raym. 28. 47. Keb. 29. 119.

If *A.* hath iſſue two ſons, *viz.* *B.* and *C.* and deviſes lands to *B.* for life; and if he dies without iſſue living at his death, that then the fee ſhall remain to the heirs of *B.* for ever, by which deviſe *B.* has only an eſtate for life, the remainder to his heir not executed; and though the reverſion deſcend on *C.* as heir of *A.*, yet it drowns not the eſtate for life, againſt the expreſs deviſe and intention of the will, but leaves an opening, as it is termed, for the interpoſition of the remainder, when it ſhall happen to interpoſe between the eſtate for life and the fee; and this being a contingent remainder, and not an executory deviſe, will be barred by a recovery ſuffered by *B.*

2 Sand. 380. Purefoy and Rogers. 4 Mod. 284. 2 Lev. 39. 3 Keb. 11. 3 Salk. 299.

If one deviſes lands to his wife for life, and if ſhe hath a ſon, and cauſes him to be called by the chriſtian and ſurname of *Sampſon Shelton*, then after her death deviſes the ſame to her ſon, and if he dies before 21, to the right heirs of the deviſor, and dies; and after the wife marries *Broughton*, by whom ſhe hath a ſon, which ſhe cauſed to be chriſtened *Sampſon Shelton*, &c. the deviſe is good by way of contingent remainder, but not by way of executory deviſe; for when a contingent eſtate is limited, and depends upon a freehold, which is capable of ſupporting a remainder, it ſhall never be conſtrued an executory deviſe, but a contingent remainder; adjudged, and that the reverſion deſcending to the heir of the deviſor till the contingency happened, by the bargain and ſale, and fine thereof, by the heir of deviſor to *B.* and his wife, and their heirs, before the birth of their ſon, the contingent remainder was deſtroyed.

Salk. 226. pl. 4. Goodright and Corniſh. Ld. Raym. 3. Skin. 408. pl. 3. 4 Mod. 255.

A. having two ſons *B.* and *C.* deviſed lands to *B.* for 50 years, if he ſhould ſo long live, and for my inheritance after the ſaid term I deviſe the ſame to the heirs male of the body of *B.* and for default of ſuch iſſue then to *C.* And the court reſolved, *1ſt*, that *B.* had not an eſtate-tail by implication upon the words *without iſſue*, becauſe the deviſor had given him an eſtate for years by expreſs

preſs words, and the court cannot make ſuch a conſtruction againſt expreſs words, when thereby they would drown the eſtate for years, and make an eſtate of inheritance. 2*dly*, The court held this deviſe to the heirs male of the body of *B.* to be void in its creation for want of an eſtate of freehold to ſupport it; and they ſeemed not to think it an executory deviſe, becauſe it was limited as a remainder, and becauſe it was limited *per verba in præſenti*; for if one deviſes his eſtate to the heir of *J. S.* and *J. S.* is living, the deviſe ſhall not be conſtrued an executory deviſe, and ſuch deviſe is therefore void; but if it were to the heir of *J. S.* after the death of *J. S.* that is good as an executory deviſe. 3*dly*, The court held the limitation to the heirs of *B.* was become void by the event, whatever it was in its creation, becauſe *John* is now dead without iſſue. 4*thly*, The court held, that if the remainder to the heirs male of *B.* was void in point of limitation, then the next remainder limited to *C.* took effect preſently.

S. C. 12 Mod. 53. S. C. cited in 2 P. Wms. 56.

C. ſeiſed in fee deviſed to truſtees for 11 years, and then to the firſt ſon of *A.* and the heirs male of his body, and ſo on to the ſecond, third, *&c.* ſons in tail male, provided they the ſaid ſons ſhall take on them my ſurname; and in caſe they, or their heirs, refuſe to take my ſurname, or die without iſſue, then I deviſe my land to the firſt ſon of *B.* in tail male, provided he take my ſurname; and if he refuſe, or die without iſſue, then to the right heirs of the deviſor. *A.* had no ſon at the time of the deviſe, and died without iſſue, and *B.* had a ſon who was living at the time of the deviſe, who took the ſurname of the deviſor. The whole court agreed, that the deviſe to *B.* was not a contingent remainder, becauſe of the precedent eſtate for years, which could not ſupport it; it appears likewiſe by the caſe, to be the opinion of *Treby*, C. J. and J. *Powel*, that it could not be good as an executory deviſe, if it were conſidered as a deviſe to the heirs of *A.*, being limited *per verba de præſenti* (*a*); but *Blencow*, Juſt. held, that the deviſe to the ſon of *A.* was future; for he ſuppoſed the teſtator knew that *A.* had no ſon, and the rather becauſe he does not name him; but it was adjudged in *C. B.* and affirmed in *B. R.* that the remainder to the firſt ſon of *B.* was good, and veſted in him.

Salk. 229. pl. 8. Scatterwood and Edge. 12 Mod. 278. S. C.

[(*a*) In the caſe of a future limitation to the unborn children of the teſtator's grandſon, Lord Talbot thought its being limited *per verba de præſenti* no objection to its taking effect as an executory deviſe. Chapman v. Bliſſett, Ca. temp. Talb. 150.]

[Tenant for life, remainder to his wife for life, remainder to his own right heirs, deviſed in manner following: "*Item*, My lands at "*W.* my wife is to enjoy for her life; after her deceaſe, of right "it goeth to my daughter *E.* for ever, provided ſhe hath heirs; "if my ſaid daughter *E.* ſhould die before her mother, *or* without "heirs, and my ſaid wife ſhould marry again and have an heir-"male, I bequeath him all my right to that eſtate; not thinking "I can ſufficiently reward her love: if my ſaid wife marrieth "again and fails of heir-male, after her deceaſe and my daugh-"ter's, ſhe failing of heirs, I bequeath 50*l. per annum* of that "eſtate to my brother *J.* and his heirs for ever." The teſtator died, the wife married again, and had iſſue-male, afterwards the daughter died without iſſue. Upon a queſtion whether the heir at law of deviſor, or the heir-male of the wife was entitled

Wright v. Hammond. 1 Str. 427. 2 Eq. Abr. 338. pl. 11. Vin. vol. 8. p. 110. pl. 32.

titled to the eſtate? the court held the former part of the will to be no deviſe, but only a declaration how the eſtates were ſettled; and therefore there being no particular eſtate to ſupport the limitation to the heirs-male of the wife, it could not enure as a contingent remainder; if it were an executory deviſe, it muſt either be to take effect on the daughter's dying before her mother, *and* without heirs (by taking the word *or* for *and*, and ſo conſtruing it copulatively), in which caſe the condition had not happened, becauſe the daughter ſurvived the mother; or elſe it was to take effect in either of the events of the daughter's dying before the mother, *or* her dying without heirs: now one of theſe events had failed, becauſe the daughter ſurvived the mother, and the limitation upon the other, *viz.* of the daughter's dying without heirs, was too remote.

2 Burr. 873. Goodman v. Goodright.

A. upon the marriage of her niece *B.* covenanted to ſettle lands (at or after ſuch time as *C.* the huſband of her niece ſhould ſettle his eſtate to the ſame uſes) to the uſe of herſelf for life, remainder to truſtees for 200 years, remainder to *C.* for life, remainder to truſtees to preſerve contingent uſes, remainder to *B.* for life, remainder to the firſt and other ſons of *C.*, upon the body of *B.* in tail ſucceſſively, remainder to the firſt and other daughters of *C.* upon the body of *B.* in tail ſucceſſively, remainder to the right heirs of *A.* Afterwards, and before any ſettlement was made, *A.* by her will reciting the articles, and that ſhe had agreed to ſettle the lands in manner aforeſaid, deviſed the ſaid lands, &c. and the *abſolute inheritance* thereof, to the uſe and behoof of *the heirs of the body* of the ſaid *B.* by any other huſband to be begotten, and for *want of ſuch iſſue*, to the uſe of her nephew *L.*, and the heirs of his body, with ſeveral remainders over; remainder to her own right heirs. *A.* died ſeiſed; *C.* and *B.* his wife entered and ſuffered a common recovery, in which they were vouched; the uſes of the recovery were to *C.* for life, remainder to *B.* for life, remainder to truſtees to ſupport contingent remainders, remainder to the firſt and other ſons of *C.* and *B.* ſucceſſively in tail-male, remainder to the daughters in like manner, remainder to the uſes to be jointly appointed by *C.* and his wife, remainder to the right heirs of *B.* *B.* died without iſſue, afterwards *C.* died; and the queſtion was betwixt the heir at law of *B.* and the daughter of *L.*

The points upon which this queſtion depended were; 1*ſt*, Whether the will was to be taken as an execution of the articles? 2*dly*, If not, whether the eſtate to the *heirs of the body of* B. by another huſband ſhould be tacked to the eſtate given her by the articles? 3*dly*, Whether the deviſe to the *heirs of the body of* B. by any other huſband was not abſolutely void, being a deviſe *in verbis de præſenti* to a perſon not *in eſſe*; and if ſo, whether *L.* did not take immediately, as much as if there had been no preceding deviſe; or at leaſt, whether the preceding deviſe to the heirs of the body of *B.*, by any other huſband, ought not to be laid out of the caſe, having become void in the event, ſince the event of her having iſſue by any other huſband never happened?

After this caſe had been very fully argued, the court reſolved, that if the will ſhould be taken as an execution of the articles, and

as an actual deviſe of the particular eſtates, according to the limitation contained in the articles, then the ſubſequent limitation to the heirs of the body of *B.* by a ſecond huſband, would veſt in her as an eſtate-tail (in remainder), and, conſequently, the recovery by her and her huſband had barred the ſubſequent limitation to *L.* But that it was unneceſſary to enter into the queſtion, whether the articles and the will could be *tacked together?* becauſe if a deviſe of the particular eſtates expreſſed in the articles could not be implied by conſtruction, *ſuppoſing the deviſe to the heirs of the body of* B. *by a ſecond huſband to be void*, the limitation to *L.* and the heirs of his body could not be a contingent remainder (for want of a preceding eſtate). And it was too remote as an executory deviſe, being not to take place till after an indefinite failure of iſſue of the body of *B.*; and being too remote in its creation, the event could not vary the conſtruction: ſo that the death of *B.* without iſſue, could make no difference in the caſe. Therefore either way, *L.* could have no title, unleſs it were conſidered as *a preſent immediate deviſe* to him. But the court held that neither the words nor the nature of the proviſion would admit of that conſtruction: and that it could not be imagined that *A.* intended to exclude the iſſue of her favourite niece *B.*, in order to prefer *L.* and his iſſue (*a*).

(*a*) It appears from a note in Dougl. Rep. 507. extracted from a copy of Lord Kenyon's note of this caſe, that this deciſion in the caſe of Goodman v. Goodright, went upon the alternative, either of the niece having taken an eſtate-tail by implication, or of the firſt deviſe (to the heirs of the body of the niece by any other huſband) being too remote, and, of courſe, the ſecond. The court thought it unneceſſary to determine, whether the niece took an eſtate by implication; and according to Lord Kenyon's note, Lord Mansfield in giving judgment ſaid, "the whole of the caſe comes to this; whether the teſtatrix intended by the deviſe *to give the heirs of the body of her niece* A. L. *by a ſecond huſband*, the remainder, or reverſion, or eſtate, (whatever it is called,) after the deaths of herſelf *E. W.* and *A. L.*, and failure of iſſue between them, or whether ſhe meant to give an eſtate in poſſeſſion to the iſſue of *A. L.* by a ſecond huſband;" his Lordſhip, therefore, (being clear that it was not an immediate deviſe,) put the caſe *entirely* on the remoteneſs of the firſt deviſe.

We have ſeen above that an executory deviſe is, properly, a future deviſe to take effect at a period ſubſequent to the deceaſe of the teſtator; for if the deviſe take effect upon a contingent event, to be decided at or before death, it is then a *conditional deviſe.*

French v. Cadell, 6 Br. P. C. 58.

A. ſeiſed of divers eſtates in ſeveral counties of *G.*, *R.*, and *S.*, in *Ireland*, by virtue of a ſettlement made by his mother, to the uſe of himſelf for life, with remainder in ſtrict ſettlement, with a remainder in fee-ſimple, veſted in himſelf as right heir of his mother, made his will, in manner following, reciting that he had, by his marriage ſettlement, ſettled a jointure of 400*l.* a-year upon his wife, and being deſirous to make a better proviſion for her, he thereby deviſed to her all the fortune he was entitled to in her right, provided ſhe ſhould be content and ſatisfied therewith, and with 200*l.* a-year out of his real eſtate, during her life; "*and* "*upon default of iſſue male and female of his own body*," he deviſed all his eſtate in the counties of *G.*, *R.*, and *S.* to truſtees, in truſt, in the firſt place, *to pay all his juſt debts and legacies*, and after payment thereof, and ſecuring the proviſion made for his life, he limited his eſtates in the counties of *G.* and *S.* to the uſe of his brother *K.* for life, remainder to his firſt and other ſons in ſtrict ſettlement, with divers remainders over: and as to his eſtates in the county of *R.*, *upon default of iſſue of his body, and after payment of his debts and legacies*, he deviſed the ſame to his nephew *C.* for life, remainder

remainder to his firſt and other ſons in ſtrict ſettlement, with divers remainders over. And he thereby bequeathed *annuities* to his *ſiſters*, and ſome *ſmall legacies* to his *nieces* and other *nephews*, and deviſed his real eſtate, *in default of iſſue*, to his daughters ſucceſſively, and the heirs of their bodies; and if there ſhould be any younger daughter or daughters, who ſhould live to marry, to have ſuch portions on the eſtate as the truſtees and their heirs ſhould appoint. And by a codicil, after making ſome alterations with regard to the life annuities, and legacies bequeathed by his will, he revoked the bequeſt of the money and ſecurities that he had, or was entitled to, as his wife's portion, and bequeathed the ſame to the appellants and their heirs, to be laid out in lands, in truſt, for his grand nephew *K.*, with ſuch remainders as were limited of his eſtates in the counties of *G.* and *S.* The caſe aroſe on an appeal from a decree in favour of the deviſees, by the Lord Chancellor of *Ireland*, and the queſtion, material to the preſent ſubject in conſideration was, as to the validity of the deviſe of the lands in the counties of *G.*, *R.*, and *S.* It was contended on one ſide, that the deviſe of them was void, for want of a particular eſtate to ſupport it as a remainder, and too remote, after a general failure of iſſue, to take place as a future or executory deviſe. On the other ſide it was argued, that the deviſe to the remainder-men, under the will of *F.*, was, at his death, a deviſe *in poſſeſſion*, and not an executory deviſe. No eſtate was limited to the iſſue by the will; but it was plain he meant a failure of iſſue, *living at the time of his death*. The contingency was determined the inſtant the will took place, *viz.* at his death. The firſt truſt was to pay debts, legacies, and annuities to his ſiſters for their lives; and he could not have intended that thoſe truſts ſhould take place one hundred or two hundred years after his death. The legacy given by the codicil to *J. C.*, of which the firſt payment was to be made on the 1ſt of *May* or *November*, which ſhould firſt happen *after his death*, ſhewed what he meant by dying without iſſue, *viz.* if he ſhould have no iſſue, *when his will ſhould take effect*. And the codicil was expreſſed to be an addition to the will, and directed, that the will ſhould ſtand in all points not thereby altered; and therefore the legacies were, by the will and codicil, payable only on the event of his dying without *leaving* iſſue at his death. And by this conſtruction, none of thoſe dangers could ariſe, which prevent the effect of executory deviſes; nor was any rule of law broken. And the appeal was diſmiſſed, and the decree therein complained of confirmed.

4 Burr. 2165. So, in the caſe of *Wellington* v. *Wellington*, which aroſe on a deviſe to the following effect, *viz.* "*Item, in* DEFAULT of *iſſue of* "*my own body*, I give, deviſe, and bequeath," *&c.* and ſo gives all his eſtates in ſeveral counties unto truſtees and their heirs, in truſt, to pay out of the rents, iſſues, and profits unto the teſtator's ſiſter an annuity during ſuch time, and until all his juſt debts, funeral expences, and legacies (other than annuities) ſhould be fully paid and ſatisfied, and alſo other annuities and ſeveral legacies. Then the teſtator willed that, immediately from and after ſuch time as all his juſt debts, funeral expences, and the legacies

gacies given by his will (other than annuities) ſhould be fully paid and ſatisfied, by his ſaid truſtees, from and out of the rents and profits of his ſaid eſtates; and ſubject to the annuities before given, he gave and deviſed all his eſtates, as in the will is mentioned. A queſtion was ſent out of the court of Chancery, for the opinion of the court of King's Bench: whether the truſtees in the will took *any*, and *what* eſtate under the ſaid will? It was argued, on the part of the plaintiff that they took a *baſe* fee determinable upon the payment of debts, legacies, and annuities; that the default of iſſue of his body was only a condition precedent. The teſtator was a batchelor; his will was to take no effect, if he married and had children. That this deviſe being conditional, the court would ſupport the intention of the teſtator. That the expreſſion "in default of iſſue of my own body," differed from ſaying "on failure of iſſue of my own body"; the latter expreſſion ſuppoſed that iſſue would exiſt; the former did not. That it was conſiſtent with the event of ſuch iſſue never exiſting, as well as of their dying in his lifetime. That was not too remote for an executory deviſe. It was to take no effect, if the teſtator ſhould have children at his death. He had only expreſſed what the law would have implied. *E contra*, it was contended on behalf of the defendants, that the words, "in default of iſſue of my own body," meant an indefinite failure of iſſue, and was therefore too remote in point of law. That though the teſtator was a batchelor, and might think it probable that he ſhould remain ſo, and therefore, in that event, might mean his deviſee over to take, yet, the ſame intention for them to take was as probable, in caſe a different event had happened, namely, that of his marrying and having iſſue, and that iſſue afterwards failing; both diſpoſitions were equally reaſonable and proper and might (for aught that he knew to the contrary) be equally legal. That the teſtator did not mean to give his truſtees a baſe fee. He only meant to give them an eſtate "*on failure of his own iſſue*", whenever they ſhould become extinct. Then, and not till then, his deviſees over were to take. But that was a period too remote for ſupporting it as an executory deviſe. That there was no foundation to ſupport this deviſe, as an immediate deviſe. *Sed per* Lord *Manſfield*, when a deviſe muſt take effect at the death of the teſtator, it is not properly an executory deviſe. Such a deviſe is a deviſe upon a contingent event, which muſt happen at or before the death of the teſtator; an executory deviſe is a deviſe that is to take place *in futuro*. And the court certified that they were of opinion that the truſtees took a *fee*, determinable when the purpoſe of paying the teſtator's debts, legacies, and funeral expences, out of the rents, iſſues, and profits of the deviſed premiſes, in aid of the perſonal eſtate, ſhould be performed.]

A man deviſed lands to his executors till his ſon ſhould come of age, and when his ſon ſhould come of age, then he ſhould enjoy them for him and his heirs: this is a remainder executed in the ſon, and not in contingency, for the words *when* and *then* in this caſe only denote the time when the remainder is to execute, and will no more make the remainder contingent than in the common caſe,

3 Co. 19. Barnſton's caſe, *vide* head of Remainder and Reverſion.

caſe, when a leaſe is made for life or years; and after the deceaſe of the tenant for life, or the expiration of the term for years, then to remain to another; for though the words be *after the term it ſhall remain*, yet it is a preſent and not a contingent remainder, for where words refer to that which *muſt needs happen*, there ſhall be no contingency.

Dyer, 303. Hob. 33.

A. having iſſue five ſons, (his wife being *enſeint* with a ſixth,) deviſed two-thirds of his lands to his four younger ſons, and the child *in ventre ſa mere*, if it were a ſon, and their heirs; and if they all die without iſſue male of their bodies, or any of them, that the lands ſhall revert to the right heirs of the deviſor: by this deviſe, the younger ſons are tenants in tail in poſſeſſion, with croſs remainders over to each, and no part ſhall revert to the heirs of the deviſor, till all the younger ſons be dead without iſſue male of their bodies.

Cro. Jac. 695.

A man having two ſons, deviſed part of the lands to one of them and his heirs, and the reſt to the other and his heirs, and further willed that the ſurvivor ſhall be heir to the other, if either die without iſſue; by this the deviſees are tenants in tail, with remainder in fee executed of each other's part.

Cro. Jac. 448. 655. Gilbert and Whitty, S. C. cited in Saund. 104.

But where a man having three ſons, and ſeiſed of three houſes, deviſed a houſe to each ſon and his heirs, with this proviſo, that if all his ſaid children ſhall die without iſſue of their bodies lawfully begotten, that then all his ſaid meſſuages ſhall remain over, and be to his wife and her heirs: it was held in this caſe, that theſe words did not raiſe any croſs remainders, but that at the death of any of the ſons, his houſe ſhould go immediately to the wife; and though a croſs remainder may be by implication where lands are limited to two, yet they cannot riſe where three or more houſes are limited to three, (*a*) without expreſs limitation.

(*a*) No croſs remainders can be created by implication in a deed, nor by will between three or more, unleſs the words of the will do plainly expreſs the intent of the deviſor to be ſo; as where Black Acre is deviſed to *A.*, White Acre to *B.*, Green Acre to *C.*, and if they die without iſſues of their bodies, *vel alterius eorum*, then to remain; there, by reaſon of the words *alterius eorum*, croſs remainders ſhall be. Vent. 224. *per* Hale, C. J. *Vide ſupra* [F].

(K) Of Executory Deviſes of Leaſes for Years. And herein of the Limitation of the Truſt of a Term as far as it relates to, and agrees with a Deviſe thereof.

Cro. Car. 198. Roll. Abr. 610. 8 Co. 94. (*a*) The great queſtion in theſe caſes was, Whether the diſpoſition of the term to a man for his life was not ſuch a to diſpoſition of it, that no remainder could be limited over, it being in the eye of the law a greater eſt than for any number of years? and this was reſolved in the affirmative in the reign of E. 6. Dyer, by all the judges of England; but this reſolution ſeeming very ſevere, and againſt natural juſtice, th man ſhould be hindered from making proviſion for his family, and the contingencies of it, occaſione contrary reſolution. 19 Eliz. Co. Lit. 46. Dyer, 35. For the judges obſerving the good effect limitations by way of truſt had, which were allowed in Chancery, permitted farmers to diſpoſe of t leaſes in the ſame manner by laſt will; and then the Chancery, the better to fix them in it, allowed bills by the remainder-man, to compel the deviſee of the particular eſtate to put in ſecurity, that he remainder ſhould enjoy it according to the limitation; but when they perceived that this multipl

IF a farmer deviſes his term to *A.* for life, the remainder to another, though *A.* has the whole eſtate, (for that is in him during his life,) and ſo no remainder can be limited over at common law, yet it is good by way of (*a*) executory deviſe.

Chanc
that the
long ſect
within
great mi
So,
for 18
eldeſt
male a
if he h
as an
contin
inaſmu
one wi
a term, d
dies, C. t
ance on t
years was
that this w
Manning'
But i
deceaſe
deviſe t
it canno
than to
be void
allowed
voured
theſe re
dure tho
pect the
allowed
able rea
of huma
continge
over it.
There
poſition
diſpoſal,
it, and ſh
executors
If one
mainder
ſecond ſo
remainde
in the dyi
riſe was
agreed it
life only,
contingen
death.
Vol. IV

Chancery ſuits, they reſolved that there was no need of that way, 10 Co. 47. a. 52. b. Sid. 451. but that the particular deviſee ſhould not have power to bar the remainder-man; ſo that the law has been long ſettled, that executory deviſes of terms for years are good, provided the contingency is to happen within a life, or 20 lives all *in eſſe*; for then there can be no tendency to a perpetuity, which was the great miſchief apprehended from theſe kinds of limitations. Abr. Eq. 191.

So, if *A.* poſſeſſed of a term for years, deviſe it to *B.* his wife, for 18 years, and after to *C.* his eldeſt ſon for life, and after to the eldeſt iſſue male of *C.* for life, though *C.* had not any iſſue male at the (*a*) time of the deviſe, and death of the deviſor; yet, if he have iſſue male before his death, this iſſue male ſhall have it as an executory deviſe; for although it be a contingency upon a contingency, and the iſſue not *in eſſe* at the time of the deviſe; yet, inaſmuch as it is limited to him but for life, it is good, and all one with (*b*) *Manning*'s caſe. Roll. Abr. 612. Cotton and Heath, adjudged by Jones, Croke, and Berkley, on a reference out of Chancery.

(*a*) If *A.* poſſeſſed of a term, deviſes it to *B.* his wife for life, and after her death to his children unpreferred, and after *B.* dies, *C.* then being the only daughter of *A.* ſhall have it; for an executory deviſe, that hath a dependance on the firſt deviſe, may be made to a perſon uncertain. And. 60, 61. (*b*) Where a term of 50 years was deviſed to *B.* after the death of *C.*, and that *C.* ſhould have it during his life, it was adjudged that this was a good deviſe of as much of the term as remained at the death of *C.* 8 Co. 95. Matthew Manning's caſe.

But if *A.* deviſe his term to his wife for her life, and after her deceaſe to *B.* his ſon; and if *B.* die without iſſue, then to *C.*, this deviſe to *C.* after the death of *B.* without iſſue is void; for ſince it cannot veſt while *B.* had iſſue of his body, the deviſe is no more than to *B.* and the heirs of his body, which, without doubt, would be void; for though men preſumed on the judges when they firſt allowed of remainders of terms after eſtates for lives, and endeavoured to bring remainders upon eſtates-tail within the reaſon of theſe reſolutions and conceſſions; yet, the courts would never endure thoſe remainders, becauſe it is too foreign and diſtant to expect them after the man's death without iſſue; and if they were allowed of, would make a direct perpetuity, which is an undeniable reaſon againſt any ſettlement, for it is againſt the nature of human affairs ſo to ſettle an eſtate in a family, that upon no contingency or revolution of fortune the owner ſhall have power over it. Cro. Car. 167. Roll. Abr. 610. Sid. 456. Cro. Jac. 461. 6 Inſt. 87. 3 Chan. Ca. 6. 10.

Therefore, the deviſe to *B.* in the above caſe is an abſolute diſpoſition of the term to him, and veſts it totally in him, and at his diſpoſal, and ſhall go to his executors during the continuance of it, and ſhall never for default of iſſue of his body revert to the executors of the deviſor. Sid. 451. Roll. Abr. 611. 831. But *vide* 10 Co. 87. Leonard Lovie's caſe, and Sid. 37. which ſeem *contra*, but have been denied to be law. 3 Chan. Ca. 6. 10.

If one poſſeſſed of a term deviſe it to his wife for life, the remainder to his firſt ſon for life, and if he die without iſſue, to his ſecond ſon, *&c.* the remainder to the ſecond ſon is void, for the remainder of a term cannot depend upon a poſſibility ſo remote, as the dying without iſſue; although it was objected that the deviſe was not to the firſt ſon and his iſſue, (in which caſe it was agreed it ſhould go to his executor,) but it was given to him for life only, with an executory deviſe to the ſecond ſon, upon the contingency of the firſt's not having iſſue at the time of his death. Lev. 290. Love and Wyndham. 2 Chan. Rep. 14. S. C. Sid. 450. Vent. 79. Mod. 50. 2 Keb. 637.

2 Freem. 210. Burford v. Lee. 2 Freem. 287. Anon.

[So, where a leſſee for 1000 years without impeachment of waſte, deviſed to *L.*, and if he ſhould die without iſſue, then to *B.*; the court held, that the remainder was void, and that the whole veſted in *L.*, his executors and adminiſtrators. And where a perſonal eſtate was deviſed to *A.*, and in caſe ſhe ſhould die without iſſue, then to *B.*, it was reſolved that the deviſe over to *B.* was void, and the whole decreed to *A.*

Fitzgib. 68. Green v. Rod.

Again, where *A.* poſſeſſed of a perſonal eſtate, appointed by will that it ſhould be ſold, and the money ariſing from the ſale be to the uſe of his ſiſter *M.*, and if ſhe ſhould die without iſſue, it ſhould go equally between his other ſiſters; and in a ſubſequent clauſe it was ſaid, *then after the death of* his ſiſter *M.* in *manner aforeſaid, &c.*; there, it was contended, that although the firſt limitation to *M.* contained nothing to reſtrain the generality of the meaning, *of dying without iſſue;* yet the words in the ſubſequent clauſe *then after the death* amounted to a reſtriction, which confined it to a dying without iſſue *living at the death of* M. But the court obſerved that the words in *manner aforeſaid*, prevented ſuch a conſtruction; becauſe they referred to the firſt limitation, and were tantamount to a repetition of it; which being a dying without iſſue generally, the limitation over was too remote, and therefore void.

And ſo in a caſe of later date, where the teſtator ſaid, *M. D. I make my ſole heir and executrix, and if ſhe die without iſſue*, then to go to *L. B.*; Lord *Hardwicke* held, that no authority came up to ſupporting the point, that *ex vi termini* ſuch a limitation of a perſonal eſtate ſhould be confined to a dying without iſſue *living* at the death of the firſt taker; and that as the limitation was general, and not reſtrained by any circumſtance in the will, the deviſe over was void. And his lordſhip was of the ſame opinion in a ſubſequent caſe, when he ſaid, "Where there is a deviſe of a "leaſe for years to a man, and if he die without iſſue, remainder "over; there is no doubt but the whole intereſt veſts in the firſt "taker."]

2 Atk. 308. Beauclerk v. Dormer.

2 Atk. 376. Saltern v. Saltern.

Cro. Jac. 459. Child and Baily. Palm. 333. 336. C. S. Jon. 15. S. C. Roll. Abr. 612, 613. S. C.

If a man poſſeſſed of a term for years deviſes it to *D.* his wife for life, and after to *W.* his eldeſt ſon, and his aſſigns, and if he dies without iſſue *then living*, to *T.*, this being a perpetual limitation by intendment of law is void; and if men ſhould be admitted to make ſuch deviſes, there would not be any end of them, nor any certainty.

Mod. 52. cited, and Sid. 37. cited. And in 3 Chan. Ca. 1. &c. in the Duke of Norfolk's caſe, where it is denied to be law; and in Salk. 225. pl. 3. Carth. 226. denied to be law; and that the eſtabliſhed law in caſes of this nature is the Duke of Norfolk's caſe. See the next caſe.

3 Chan. Ca. 2., &c. decreed by my Lord Nottingham, but reverſed by North, Lord Keeper. Vern. 163. But upon an ap-

A. having iſſue ſeveral ſons (the eldeſt *non compos*) created a term for years, and by another deed declared the truſt thereof to his ſecond ſon, and the heirs male of his body, remainder to his other ſons; provided that if his eldeſt ſon died without iſſue, or not, leaving his wife *enſient* with a child, living the ſecond ſon, ſo that the earldom of —— deſcended on the ſecond ſon, then the ſaid term to remain to the third ſon and the heirs male of his body, with like limitations to the other ſons; the eldeſt ſon died without

without issue, living the second, and this limitation to the third son was held good.

peal to the House of Lords, Lord North's decree was reversed, and Lord Nottingham's established. Chan Ca. 53. And has been ever since admitted to be law; and note, that executory devises and limitations of the trust of a term are governed alike. Vern. 234. Pollexfen, 15 to 50.

If a man possessed of a term devise it to his son; and if he die unmarried and without issue, to his daughters; and if his son be married, and have no issue then living to enjoy it, then after the death of his son's wife he devise it to his said daughters; the devise to the daughters is void, being a limitation after the death of their brother without issue; for it is not to be taken (as objected) that the dying should be without issue living at his death, and so the contingency to happen within the compass of a life; and if it should be intended of such dying without issue, yet the court held it would be void, according to *Child* and *Bayly*'s case; for though such a devise hath prevailed in case of an inheritance, as in *Pell* and *Brown*'s case, yet it hath not yet prevailed in case of a term; and the court said they would not extend the devises of chattels to make perpetuities farther than they had been.

3 Lev. 22, 23. Gibbons and Summons. But Q. of this case, for it does not seem to be law; and *vide* the case of Sanders and Cornish, Roll. Abr. 612. Cro. Car. 230. and Cro. Jac. 461. a case cited where *A.* possessed of a term for years devised it to his wife for life, and then that *J.* his son should have the occupation thereof as long as he had issue; and if he died without issue unmarried, in the same manner to another son, the remainder over; this remainder upon the death of the son unmarried was adjudged good; for here the limitation is, if he dies without issue unmarried, then the remainder over, which is upon the matter, if he dies within the term unmarried, for he cannot have issue, unless he marries; and this is a possibility which the law will expect, because it will happen in a life; and there is no difference between the occupation or use of a term, or the profits of the land, and the land itself, or the lease or farm; for a devise of any of them will carry the whole interest. And *vide* the following cases.

If a term be devised to *A.* and the heirs of his body; and if *A.* die without issue, living *B.*, then to *B.* this is a good limitation, the contingency arising within the compass of a life.

Salk. 225. pl. 3. Comb. 208. Lamb and Archer.

A. devises to his son, his executors, administrators, and assigns for ever, a leasehold estate; but if he died before 21 without issue, in that case he devises it over to his brother; and the question was, whether the remainder over was good? It was objected, that it was a perpetuity, for that the remainder depends on the son's dying without issue; for if he die before 21, though he leaves a child, and that child afterwards die without issue, the son may be said to be dead before 21 without issue; yet the court held the remainder good.

Carth. 266. S. C.

2 Vern. 151. Martin and Long.

One *F.* being possessed of a term for years devises it to his wife for life, and after her death to *R. F.* for her life, and after her death to *T. F.* and his children, and then devises in this manner: and if it shall happen the said *T. F.* to die before the expiration of the said term, not having issue of his body then living, then to go over to the plaintiff for the residue of the term; the defendant's title was by an assignment of *R. F.* and *T. F.* of all their estate, right, title, and interest; *R. F.* was dead, and *T. F.* died without issue; and the plaintiff brought his bill to have an assignment of the term, pursuant to the will. All that was insisted upon for the defendant to difference this case from the Duke of *Norfolk*'s of a term, and of *Pell* and *Brown*'s case of a fee, was, that this contingency

Abr. Eq. 193. Fletcher's case.

tingency of his dying without iſſue was not confined to his own death; but that the words *then living* ſhould relate to the words *before the expiration of the term*, and ſo this went farther than any of the caſes had ever yet been carried; for he might have iſſue for ſeveral generations, and yet if ſuch iſſue failed at any time before the expiration of the term, then it was to go over, and this in a long term tended plainly to a perpetuity, and therefore ought not to be allowed; but by the deviſe to *T. F.* and his children, and the ſubſequent words, and if he die without iſſue, the whole term and intereſt was veſted in him, and he might diſpoſe thereof as he thought fit, and it could not be reſtrained by the words *then living*, which related only to the words *before the expiration of the term*, and ſo the remainder over to the plaintiff void. But for the plaintiff it was argued and agreed, that the remainder to him was good by way of executory deviſe, and that the words *then living* muſt relate to the time of his death; for otherwiſe there would be no difference between this and the common limitations of a a term to one, and the heirs or iſſue of his body, and if he dies without iſſue, the remainder to another, which is void; for there it muſt likewiſe be intended, if he die without iſſue before the expiration of the term, or during the term; ſince after the expiration of the term he can limit no remainders over, becauſe nothing remains then to be limited; but, here, it being limited over upon this contingency, if he die without iſſue then living, *viz.* at the time of his death, it is good, becauſe this contingency muſt happen within one life, or not at all; for upon his death it will be certainly known whether he leaves iſſue or not; if he does, the contingency cannot take place; if he does not, then it may; and this being to happen within the compaſs of a life, is good as an executory deviſe, and differs in nothing from the Duke of *Norfolk*'s caſe, ſave only that there it was by *proviſo*, and alſo upon the death of another perſon without iſſue then living; and here it is upon his own death, which makes no manner of difference.

Abr. Eq. 193, 194. Targett and Gant. *Vide* 2 Vern. 43. 195. The caſe of Peacock and Spooner, and 2 Vern. 668. Webb and Webb, Abr. Eq. 362. Fitzgib. 317, 320. 1 P. Wms. 432. pl. 121. 10 Mod. 403.

A man poſſeſſed of a term for 31 years deviſes it to his ſon *H.* during his minority, and if he attains to his age of 21 years, then to him during his life, if the term ſhall ſo long continue, and no longer, and after his death, to ſuch of his iſſue to whom he ſhall deviſe it; but if he die without iſſue, then to his other ſon *G.* for the reſidue of the term; *H.* afterwards died without iſſue, or without making any diſpoſition of the reſidue of the term; and the only queſtion was, whether by the words of this will the whole term did not veſt in *H.*? and it was decreed, that it did not; for the words *die without iſſue* have a twofold meaning, either without iſſue at the time of his death, or without iſſue, whenever the iſſue fails; and though in caſe of an inheritance, if lands are deviſed to one, and if he die without iſſue, the firſt deviſee takes an eſtate tail by implication, which ſhall go to his iſſue, and they ſhall take in a courſe of deſcent to all ſucceeding generations; yet, to make ſuch a conſtruction in the caſe of a term, which cannot come to the iſſue by deſcent, is unneceſſary; and therefore, in ſuch caſe the other conſtruction of the words, which is moſt natural and obvious

obvious, ſhall take place; and it ſhall be intended only, if he die without iſſue living at the time of his death; and, conſequently, the dying without iſſue, being confined within the compaſs of a life, hinders not the remainder over, but it may well take place by way of executory deviſe, according to former reſolutions.

[One deviſed money to be laid out in a purchaſe of freehold eſtates to be ſettled on his wife for life; and alſo gave his wife freehold and leaſehold eſtates for her uſe; and from and immediately after her deceaſe, he bequeathed the ſame, and every part thereof in the following manner, *viz.* to his ſon *R.* and *his iſſue lawfully begotten*, or to be begotten, *to be divided amongſt them as he thinks fit:* and if my ſaid ſon ſhall happen to die, without iſſue lawfully begotten, my will is, that as well my preſent freehold and leaſehold eſtates, as the eſtates hereby directed to be purchaſed, ſhall be ſold, and the money ariſing therefrom ſhall be equally divided between my brother *T. R.*'s children, my ſiſter *W.*'s children, and my ſiſter *P.*'s children. And I hereby order and direct, neither the eſtate directed to be purchaſed, nor any of my preſent freehold or leaſehold eſtates may be ſold or diſpoſed of during the life of my wife or my ſon. One queſtion was, Whether the deviſe to the brother and ſiſter's children was or was not too remote, as depending upon the ſon's dying without iſſue? And it was held to be a contingency with a double aſpect; in one event a gift to the children of the ſon, if he ſhould have any, and if he ſhould not have any child, that then the eſtate ſhould be ſold for the purpoſes of the will. That he did not mean the eſtate to go as an eſtate-tail, but that the children ſhould take diſtributively, in which caſe they muſt take as purchaſers, and the conſequence was that *R.* took only an eſtate for life. He had a power to divide, and it was ſufficient that the diviſion muſt take place at the death of *R.*, which was within the rules. Two events were provided for, *1ſt*, There being children of *Richard*, in which caſe they would take. *2dly*, There being no children, in which caſe the eſtates veſted in the perſons deſcribed. Hockley v. Mawbey, 3 Br. Ch. Rep. 82.

A teſtator deviſed a term to his brother *John* for life, then to ſuch perſon as he ſhould marry, for her jointure; and after her death to the heirs of the body of his brother *John*, *and the executors, adminiſtrators, and aſſigns* of ſuch heirs, during the reſidue of the term; and for default of ſuch iſſue of his brother *John*, then to *Henry Donne*; the limitation to *Henry* was held good; the words being taken to be heirs living at his death. Donne v. Merrifield, at the Rolls, 22d October 1730, cited in Ca. temp. Talb.

Where *C.*, having two nephews *A.* and *B.* deviſed the ſurplus of his perſonal eſtate to them, and if either of them ſhould die without children, then to the *ſurvivor*: It was held, that dying *without children* muſt in this caſe be taken to be dying without *children then living*; becauſe the immediate limitation over was to the *ſurviving* deviſee.—So, where *A.* deviſed portions to his four children, payable at their reſpective ages of 21 or marriage, and in caſe any of them ſhould die before the time of payment, or *without iſſue*, then his or their portion to go to the *ſurvivors or* 1 P. Wms. 534. Hughes v. Sayer. Chan. Prec. 528. Nicholls v. Skinner.

ſurvivor, and his heirs: it was held, this could not be a dying without iſſue generally, but ſo as the *ſurvivor* might take; which muſt be during the life of ſome or one of them, and ſo was good.

Pinbury v. Elkin, 1 P. Wms. 563. *Vide* Paine v. Stratton. 3 Br. P. C. 257. *et* Brooks v. Taylor, Moſel. 188.

And where the teſtator made his wife executrix, and gave her all his goods and chattels, provided that if ſhe ſhould die *without iſſue* by the teſtator, *then after* her deceaſe 80*l.* ſhould remain to the teſtator's brother; the words *then after* were taken to mean *immediately after*, and, conſequently, to reſtrain the dying without iſſue to the time of her death.

3 P. Wms. 258. Atkinſon v. Hutchinſon. *Vide* ſame point, 1 P. Wms. 663. Forth v. Chapman. Martin v. Long, Prec. Chan. 15. 2 Atk 642. Read v. Snell. *Vide* Fairfax v. Heron, *ſupra* S. P. as to freehold. 3 Atk. 396. Lampley v. Blower.

So, where a term was deviſed to *A.* for life, remainder to ſuch children as the teſtator ſhould leave at the time of his death, and if all ſuch children ſhould die without *leaving* any iſſue, then to *B.*: this was a good executory deviſe to *B.*, and the words "Without "*leaving* any iſſue" were underſtood to mean "*leaving any iſſue* at "the time of their deaths." Again, where one deviſed a perſonal eſtate, in truſt, to be ſettled on his daughter *or the heirs* of her body, but in caſe his ſaid daughter ſhould die *leaving* no heirs of her body, then over to others; Lord *Hardwicke* decreed the limitation over good, upon the contingency of the daughter's dying without iſſue *living* at her death; as he conſidered the word *living* as relating to that time. So in another caſe, where the teſtatrix gave to her two nieces *F.* and *L.* each one half of the produce of bank ſtock, and to *their iſſue*, and if either of them ſhould happen to die before the legacy became due to her, and leave no iſſue, the ſhare of her ſo dying ſhould go to the ſurvivor; the words *and leave no iſſue* were conſtrued "leave no iſſue *living* "at the time of her death."

Goodtitle Pagden, 2 Term Rep. 720.

So, where one poſſeſſed of premiſes for a term for years "gave "them to his grandſon *P.* ſon of *D.* and his wife, and the heirs "lawfully of him for ever, but in caſe he ſhould happen to die and "*leave* no lawful heir, then and in that caſe, he gave them after the "death of his ſaid grandſon *O.* to the next eldeſt ſon or heir of *D.* "and his wife; and ſo on to the next eldeſt ſon or heir, if the laſt "ſhould die without heirs;" *P.* took poſſeſſion and died without iſſue, and on his death the next eldeſt ſon of *D.*, and his wife brought an ejectment, and Lord *Kenyon*, without hearing the argument ſaid, that on conference with the reſt of the court, they were clearly of opinion, that the limitation over was good. This was a chattel intereſt limited to *P.* and the heirs lawful of him for ever, but in caſe he ſhould happen to die and leave no lawful heir, then over, *&c.* now it was apparent on the will, that the teſtator "by lawful heirs" meant "heirs of the body," and "leaving no lawful heir" muſt be confined to "leaving no iſſue "at the time of his death."

Longhead v. Phelps, 2 Bl. Rep. 704.

But the truſt of a term for raiſing portions on either of two contingencies, of which one is within the allowed limits, will be good *in that event.*

Thus, a term of 1000 years was created in a marriage ſettlement, upon truſt, "that *in caſe the ſettlor ſhould happen to die without*

without iſſue male of his body, on the body of his intended wife begotten, or if all the iſſue male between them ſhould happen to die without iſſue, and there ſhould be iſſue female of the marriage, which ſhould arrive reſpectively at the age or ages of eighteen years, or be married; then, from and after the death of the ſurvivor of the ſettlor and his wife without iſſue male, *or* in caſe at the death of the ſurvivor, there ſhould be iſſue male, *then* from and after the death of ſuch iſſue male, without iſſue, the truſtees ſhould raiſe 500*l.* for one daughter, 1000*l.* for two, and in caſe of three or more, ſhould aſſign the whole term to their uſe. There was iſſue of the marriage one ſon and four daughters, who all lived to eighteen, and were married. The father died, then the ſon died without iſſue. Afterwards the mother died, and then the four daughters entered, againſt whom an ejectment was brought by a deviſee of the ſon. And in ſupport of the ejectment it was argued, that the truſts of the term were void: being on too remote a contingency, *viz.* the dying of the iſſue of the marriage without iſſue generally. But the court were clear, that the firſt part of the contingency was good, *viz.* "in caſe the ſettlor and his wife died without *leaving* iſſue male;" and as that happened in fact to be the caſe, the court would not enter into the conſideration, how far the other branch of the contingency might have been ſupported, which could only come in queſtion, in caſe the ſon had ſurvived both his parents.

W. C. left and bequeathed, unto his daughter and only child, all his worldly ſubſtance, lands, ſtock, corn, debts, and houſehold goods, provided ſhe married by the conſent of his executors *therein mentioned*: but in caſe ſhe married without the conſent of his executors, ſhe was to have only twenty cows and a horſe for her whole fortune: and after naming *A.* and *B.* his executors, he appointed, that in caſe his ſaid daughter ſhould die *without iſſue*, all his ſaid ſubſtance ſhould *return back to his executors*, to be diſtributed as he ſhould thereafter direct.—And laſtly, in caſe his daughter ſhould marry without conſent, or die *without iſſue*, he appointed that all his ſaid ſubſtance, *&c.* ſhould return back *to his executors* to be *by them* diſtributed in manner following, *viz.* to his nephew *J. D.* 100*l.* to *H. G.* 50*l.* to each of his *executors aforeſaid* 50*l.* to his daughter twenty cows and a horſe only, and the remainder to be equally divided amongſt the children of his ſiſter *E. F.* Keily v. Fowler, 6 Br. P. C. 309.

The queſtion was, Whether the limitation over of the perſonal eſtate after the death of the teſtator's daughter *without iſſue* was good? The court of Chancery in *Ireland* held it was: and their decree was confirmed by the Houſe of Lords here, upon the opinion of the judges, that the bequeſt over was to take effect on the death of the daughter without *iſſue then living*.

H. directed that his perſonal eſtate ſhould be ſold, and turned into money, and put out at intereſt; that his wife *Ann* ſhould have 30*l.* a year out of the produce of it, and that, when and ſo ſoon as his only daughter and child *Ann* ſhould attain her age of 21 years, then his wife ſhould have 25*l. per annum* inſtead of 30*l.* Balguy v. Hamilton, Moſel. 186.

Then the will goes on, *Item*, I give and bequeath to my daughter *Ann*, all my perſonal eſtate whatſoever, ſhe paying the ſaid 30*l.* a year, and the legacies therein bequeathed, and I make my wife her guardian, and ſhe is to receive the reſidue of the intereſt, maintaining my daughter thereout; but if my ſaid daughter die before her age of 21 years, then my will is that my wife ſhall have 400*l.* and that on payment of the ſame, ſhe ſhall give a diſcharge for her ſaid annuity, and that then and immediately from and after my ſaid daughter's deceaſe "*without iſſue of her body.*" I give and deviſe all my perſonal eſtate to my brother *J. H.*, *he paying* the ſaid ſum of 400*l.* to my wife, if then living. The teſtator died, and *Ann*, the daughter, died an infant without iſſue, and then the wife died. And the only queſtion was, Whether the deviſe over to the brother was good, or whether the whole perſonal eſtate veſted in the daughter? *Et per cur.* A deviſe of perſonalty, after a dying without iſſue, is *certainly* void; and it is as certainly good after a dying without iſſue in a limited time; now the words of this will can bear no other conſtruction, but if the daughter die without iſſue before 21. Firſt, the whole eſtate is deviſed to the daughter, and the whole intereſt to the wife, part as an annuity for herſelf, and part for the daughter's maintenance. The firſt contingency is general, if ſhe (the daughter) die before 21 years of age the wife is to have 400*l.*, but who is to pay this 400*l.*? The brother; ſo that the latter words muſt have the ſame conſtruction, and the will is to this purpoſe, if my daughter die without iſſue before 21, my brother is to have the whole eſtate he paying my wife 400*l.* the wife is to have the 400*l.* if the daughter die under 21, and the brother being to pay it, if ſhe die without iſſue, the eſtate muſt come to him at the ſame time, as a fund out of which it is to be paid.

Lyde v. Lyde, 1 Term Rep. 593.

One poſſeſſed of premiſes for a term of years, gave them by will to his ſon *G. L.* for life, and after his deceaſe to *M.* his wife for life, and after the deceaſe of the ſurvivor, to the *children* of *G. L. ſhare and ſhare alike*; but if *G. L.* ſhould die "without iſſue of his "body," then to his ſon *R. L.* for life, and after his deceaſe to *N.* his wife, with divers limitations over; *M.* died, and then *R. L.*, and the queſtion was, whether the limitation to *N.* was good? And the court held, that it was; for here was no ſuch expreſs legal limitation as, if applied to a freehold, would create an eſtate-tail; and therefore they were at liberty to conſider the intention of the teſtator, and that was obvious.

Attorney-General v. Bayley, 2 Br. Ch. Rep. 553.

One ſeiſed in fee of certain eſtates, and alſo of part of a tenement called *A.*, and poſſeſſed of other parts of the ſame tenement called *A.* for a long term of years, made his will, and after deviſing ſo much of the eſtate as was freehold to truſtees, their heirs and aſſigns, and ſo much whereof he was poſſeſſed for a term of years to his executors, *&c.* declared that as *concerning thoſe parts called M.* and *B.* whereof he was poſſeſſed of a long term of years, his will was, that his brother *W. T.* ſhould have the uſe thereof, *&c.* for ſo many years of the term as ſhould expire in his life-time, and after his deceaſe, his will was, that his executors ſhould permit

permit all and every the child and children of the ſaid *W. T.* their executors, *&c.* reſpectively, to hold and enjoy the ſame for his and their proper uſe, during the remainder of the ſaid term, *in ſuch manner as the ſaid W. T. ſhould, by his will or deed in writing, &c. direct, and for* want of ſuch appointment, then equally, ſhare and ſhare alike, without benefit of ſurvivorſhip; but if it ſhould happen that the ſaid *W. T.* ſhould *die without iſſue*, in the lifetime of the ſaid *J. T.* and *T. T.* or either of them, then his will was, that the ſaid *J. T.* and *T. T.* if they both ſurvived the ſaid *W. T. dying without iſſue as aforeſaid*, ſhould equally have the benefit and advantage thereof for ſo many years of the term as ſhould expire in the lifetime of the ſaid *J. T.* and *T. T.*, and if only one of them ſhould happen to ſurvive the ſaid *W. T. dying without iſſue as aforeſaid*, or if both ſhould happen to ſurvive the ſaid *W. T.* ſo dying *without iſſue as aforeſaid*, and one of them ſhould happen to die before the other of them, leaving iſſue behind him, then the teſtator's will was, that ſuch ſurvivor ſhould have but one half of the benefit and profits of the ſaid leaſehold premiſes, and the other half ſhould go to be divided among all and every the child and children of him ſo dying, ſhare and ſhare alike, during ſo many years of the term as ſhould expire in the lifetime of the ſaid *J. T.* and *T. T.*, and if he ſo dying ſhould leave no iſſue behind him, the teſtator's will was, that the benefit thereof ſhould devolve upon the ſurvivor, for ſo many years of the term as ſhould expire in the lifetime of the ſurvivor, and after the deceaſe of the ſurvivor of them the ſaid *J. T.* and *T. T.* (in caſe they or the ſurvivor of them ſhould ſurvive the ſaid *W. T. dying without iſſue as aforeſaid*), the teſtator's will was, that all and every the child and children of the ſaid *J. T.* and *T. T.* (though one of them might or ſhould happen to die before the ſaid *W. T. dying without iſſue as aforeſaid*) and the executors, adminiſtrators and aſſigns of ſuch child and children ſhould have the ſaid leaſehold premiſes, ſhare and ſhare alike, for and during the remainder of the term, and "in default of ſuch iſſue," "*or if the ſaid W. T. ſhould happen "to ſurvive, and die without iſſue*," after the death of the ſaid *J. T.* and *T. T.*, then the teſtator's will was, that the ſaid leaſehold premiſes ſhould go to and be applied towards the benefit of *T.* new church and charity ſchool as aforeſaid. The teſtator died. *W. T.* died unmarried and without iſſue. *J. T.* and *T. T.* both died *in the lifetime* of *W. T.*, *T. T.* without iſſue, and *J. T.* leaving iſſue one daughter *M.* The queſtion was, Whether *W. T.* having ſurvived *J. T.* and *T. T.*, and died without iſſue, as in the laſt limitation mentioned, the premiſes, on his death, became ſubject to the charitable bequeſt, for the benefit of *T.* church and ſchool? The cauſe was firſt heard at the Rolls, when his Honour was of opinion, upon the conſtruction of the will, that the intereſt of the teſtator was not well diſpoſed of thereby in favour of the charity. From this decree the charity appealed.

Per Lord *Thurlowe* Chancellor, If a man gives an eſtate in general to *A.* for life, and adds, "but if he dies without iſſue, I then give it to *B.* *B.* has no immediate gift, *but only a contingent intereſt*

intereſt upon A.'s dying without iſſue; and it would counteract the intention of the teſtator, if *B.* took it immediately upon the death of *A.*, therefore *ex neceſſitate rei*, the true argument in both *real and chattel intereſts*, is, that in fact theſe words operate to an enlargement of the eſtate *for life*, for otherwiſe the iſſue of *A.* would not take at all, and *B.* would take the whole; and therefore the neceſſary implication muſt take effect, namely, that *A.* ſhould have an eſtate, which muſt devolve upon his iſſue. Upon that ground, the court has extended the eſtate beyond an eſtate for life, and in a freehold intereſt has deemed it an eſtate-tail, and in chattel intereſts an abſolute property; but *that* ariſes from the *neceſſity of the conſtruction.*

In this caſe after an expreſs eſtate for life to *W. T.* (ſo that he may take as a purchaſer) the teſtator proceeds, *&c.* (ſtating the limitations in the will); here, no ſuch neceſſity ariſes from the words "dying without iſſue," as the words are referable to dying without iſſue, *ſo provided* for. It is ſo well ſettled that no diſpute could ariſe. If the *T*'s had no intereſt, that they could take, it would go to the charity. In the events which have happened, this caſe reſults to the ordinary one I have ſtated, and the charity muſt have a decree. And the decree at the Rolls was reverſed.

Bigge v. Benſley, 1 Br. Ch. Rep. 190.

One bequeathed all his perſonal eſtate to his wife *F.* to hold to her, *her heirs, executors, adminiſtrators, and aſſigns* for ever, and appointed her ſole executrix, *but in caſe of the death* of *F. without iſſue*, then he gave the whole to the *eldeſt* ſon of his brother *R.* his heirs, executors, adminiſtrators, and aſſigns, and if there ſhould be *no ſuch ſon*, then to his ſaid brother *R.* The wife ſurvived the teſtator, and died without iſſue. And the queſtion was, Whether the deviſe over was valid? It was contended in ſupport of the deviſe over, that the "dying without iſſue" was not general, but controlled by the event of having no ſon, in which caſe the deviſe was in favour of *R.* himſelf; that therefore if the teſtator meant a dying without iſſue, indefinitely, it could not affect the ſon of a perſon then living, much leſs that perſon himſelf. Therefore the event muſt be decided on the death of *F.*, when if he, *R.* had a ſon, it would veſt abſolutely in that ſon, if not, it would veſt in *R.* *Et per* Lord *Thurlowe*, The firſt queſtion is, what, *abſtracted from little points and circumſtances*, would be the effect of the gift to *F.*? There was not a ſingle caſe, not even that of *Atkinſon* and *Hutchinſon*, which did not hold *that ſuch a limitation after theſe general words was too remote.* His lordſhip ſhould only notice *Dormer* v. *Beauclerk.* The general words were to be varied only *by circumſtances ariſing upon fair demonſtration.* To call dying without leaving iſſue, the natural ſenſe of dying without iſſue, was againſt all the caſes. In this caſe there was no circumſtance which had occurred in the others. In *Dormer* and *Beauclerk*, it was held, that the word *then* could not, and never did make the difference. It was merely a word of relation, not an adverb of time. Upon Lord *Hardwicke*'s authority, he muſt hold the word *then* did not make a difference. As to the gift to the brother,

Dormer

Dormer and *Beauclerk* was a ſtronger caſe as to that point. It was argued there, upon the circumſtance of the 5000*l.* being meant as a portion; that being a maintenance, and given after a dying without iſſue, it muſt mean dying without leaving iſſue.]

(L) Of void Deviſes: And herein,

1. Of deviſing what the Law already gives, or what the Policy of the Law will not admit.

ALthough the judges are favourable in their conſtruction of wills, that, if poſſible, the intention of the teſtator may prevail; yet, where the teſtator makes the ſame diſpoſition of his eſtate as the law would have done, had he been ſilent, or where his diſpoſition is made in ſuch general terms, that his intention is altogether doubtful and uncertain, and cannot be collected from the words of the will; or, where the teſtator is eſtabliſhing a ſettlement againſt the reaſon and policy of the law; in theſe caſes the judges have thought fit to reject the will.

Therefore if a deviſe be made to *J. S.* and his heirs, who is heir at law to the deviſor; this is a void deviſe, and the heir ſhall take by deſcent as his better title; for the deſcent ſtrengthens his title by taking away the entry of ſuch as may poſſibly have right to the eſtate, whereas if he claims only by deviſe, he is in by purchaſe. Roll. Abr. 626. Hob. 30. Plow. 545. Godb. 461.

So, if a man deviſes lands to his wife for life, remainder to *J. S.*, who is heir at law in fee; this is a void deviſe to *J. S.*, becauſe after the diſpoſition of the particular eſtate, the reverſion would have come to him by deſcent, as heir at law. 2 Leon. 101. Baſpole's caſe. Hob. 30. Roll. Abr. 626. Preſton and Holmes.

[*I. P.* ſeiſed of lands in fee, and having iſſue *R.*, *S.*, *I.*, and *M.*, ſons, and *N.* a daughter, deviſed to *S.*, *I.*, *M.*, and *N.*, 20*l.* to be paid to them when they attained the age of 21 years; and deviſed all his lands to *R.* his eldeſt ſon, to hold to him and his heirs, *upon condition he ſhould pay to his* (the teſtator's) *other children the ſaid ſums appointed unto them according to the intent of his will; and if he refuſed payment of any of the ſaid ſum or ſums of money, that then neither he nor his heirs ſhould have or enjoy the ſaid lands, any deviſe, title, deſcent, or intereſt to the contrary notwithſtanding; but that the ſaid ſons and daughter ſhould have it to them and their heirs.* It was holden, that the firſt deviſe to the ſon and his heirs in fee, being no more than what the law gave, was void. Haynſworth v. Pretty, Cro. El. 833. 916. Moor, 644. S. C.

One, ſeiſed in fee, deviſed lands to his wife for life, and after her deceaſe to his next heir at law, and to his or her heirs, provided ſuch heir ſhould pay 100*l.* to ſuch perſon or perſons as his wife, by will or other legal writing ſhould appoint, and that his lands ſhould ſtand charged with the ſaid 100*l.* The deviſor died, leaving a daughter who had one ſon, and died. The wife died without making any appointment to whom the 100*l.* ſhould be paid. The ſon of the daughter entered, and died without iſſue; and Clarke v. Smith, Com. Rep. 72. 1 Salk. 241. S. C.

and on a diſpute between the heir maternal of the ſon, and the heir paternal, the queſtion was, whether the ſon took by purchaſe under the will, or by deſcent? And it was reſolved by the whole court, that the heir took by deſcent, and not by the will; for it would be miſchievous, if every little legacy ſhould alter the courſe of deſcent, and thereupon the heir might plead to the obligation of his anceſtor, *riens per diſcent*.

Allam v. Heber, 2 Str. 1270. 1 Bl. Rep. 22. S. C.

So, where a teſtator deviſes lands to his heir for payment of debts, or charged with an annuity, the heir, notwithſtanding ſuch charge, is in by deſcent, for the tenure is not altered.]

Emerſon v. Inchbird, 1 Ld. Raym. 728.

3 Lev. 127. Hedger and Row.

A. ſeiſed of lands on the part of his mother, deviſes them to his executors for ſixteen years, for payment of his debts, and after deviſes them to his heir at law *ex parte maternâ*; this is a void deviſe to the heir at law; for though it was urged, to ſupport the deviſe, that if it obtained, the heir of the part of the father might in the end inherit, which he could never do if the deviſe be rejected; yet they adjudged the deviſe to be void, becauſe there is no alteration made in the tenure of the eſtate; nor is the quality thereof any wiſe altered; but whether the deviſee takes either by deſcent, or the will, it is a fee-ſimple, and it were but *actum agere* to make him take by will.

But where another eſtate is created by the will than would deſcend to the heir at law, or where the quality of the eſtate is altered by the deviſe, there, the diſpoſition by the will ſhall prevail, though it be made to the heir at law. Thus, where a man had iſſue a ſon and a daughter, and deviſed that his land ſhould deſcend to his ſon, and if he died without iſſue of his body, then the land to go over, *&c.*; the ſon by this will took an eſtate-tail, though heir at law to the deviſor, becauſe here is an eſtate-tail created by the will; whereas a fee-ſimple would have deſcended, which if the deviſee were allowed to take, it would make the remainder over void.

Hob. 29, 30. Cownden and Clerk. Moor, 860. Godolp. 461. Roll. Abr. 610.

So, where a man has iſſue only two daughters, and deviſes his lands to them and their heirs; this is a deviſe to the heir at law, (for ſo are the daughters,) and yet good, becauſe the deviſe makes them jointenants, in which ſurvivorſhip takes place; whereas had they taken by deſcent, they had been coparceners, and therefore the will altering the quality of the eſtate ought to prevail.

3 Lev. 127. Cro. Eliz. 431. 2 Sid. 53. 780. Packman and Cole.

A. deviſes his land to *B.* for life, the remainder to *C.* in tail, the remainder to the next heir male of the deviſor, and the heirs male of his body; *B.* and *C.* died without iſſue; the next heir of the deviſor was a daughter, and ſhe was adjudged to have the land by way of reverſion and deſcent; and though ſhe have a ſon born afterwards, he ſhall not take the land from her.

Hob. 33. Perk. 506.

Alſo, deviſes are rejected that are againſt the reaſon and policy of the law: hence, deviſes, as well as all other ſettlements, which tend to introduce a perpetuity, are void; for wills, though favourably expounded, are yet to be conſtrued according to the common rules of the courts of law and equity; therefore a deviſe to *J. S.* and

Co. Lit. 18. Dyer, 33. 3 Chan. Ca. 35. *vide ſupra* letter (I).

and his heirs, the remainder to *J. D.* and his heirs, is void, becauſe the law in no caſe will allow a limitation of a fee upon a fee, becauſe by the deviſe to *J. S.*, and his heirs, the deviſor has transferred the whole eſtate to him, and then the limitation over muſt be void: nor can this deviſe be good by way of future intereſt, or a remainder to veſt upon a contingency, becauſe no man can ſay when the heirs of *J. S.* will fail; and to allow the remainder to *J. D.*, to be good upon ſuch a diſtant contingency, is to perpetuate the eſtate in the family of *J. S.*, to preſerve a remainder in *J. D.*, which probably may never veſt.

[The Duke of *Marlborough* deviſed his real eſtates to truſtees, in truſt, for ſeveral perſons for life, with remainder to their firſt and other ſons in tail-male ſucceſſively; but directed his truſtees upon the birth of a ſon of each tenant for life, to revoke the uſes before limited to the reſpective ſons in tail-male, and to limit the premiſes to ſuch ſon for his life, with immediate remainders to the reſpective ſons of ſuch ſon in tail-male. It was holden, that this clauſe of revocation and re-ſettlement, was void, as tending to a perpetuity, and repugnant to the eſtate itſelf.] Spencer v. Duke of Marlborough, 5 Br. P. C. 592.

A. deviſed his manors, meſſuages, *&c.*, to the *Drapers* company, and their ſucceſſors, upon truſt to convey to *B.* for life, and to his firſt ſon, and all other his ſons for life, and to their iſſue male for life; and for want of ſuch iſſue to *J. S.*, for life, and to his iſſue male for life, *&c.*, and ſo to a great number of them for life, and ſo to convey *toties quoties*; and the court held this attempt to make a perpetual ſucceſſion of eſtates for life to be vain and impracticable; however, that there ought to be a ſtrict ſettlement made, and the intent of the teſtator followed as far as the rules of law will admit of, and therefore directed a ſettlement to be made, ſo that ſuch who were in being ſhould be only tenants for life: but where the limitation was to a ſon not in being, there he muſt be made tenant in tail-male. 2 Vern. 737. Humberſton and Humberſton decreed. [1 P. Wms. 332. S. C. Godolphin v. Godolphin, 1 Ver. 21. S P.]

[A teſtator, after other deviſes, gave his eſtates to his nephew *William Brown*, eldeſt ſon of his brother *R.*, and his aſſigns for life, remainder to his firſt and other ſons in ſtrict ſettlement, and for want of ſuch iſſue, then to the ſecond ſon of his ſaid brother for life, and after the death of the ſaid ſecond ſon of his ſaid brother *R.*, then to the firſt ſon of the body of ſuch ſecond ſon of his brother, then lawfully begotten, or to be begotten, and to the heirs male of the body of ſuch ſecond ſon lawfully to be begotten, and for default of ſuch iſſue, to the third, fourth, and fifth, and every other ſon and ſons of the ſaid ſecond ſon of the ſaid *R.* (according to their ſeniority), and to the heirs-male of the bodies of the ſaid third, fourth, fifth, and other ſons of the ſaid ſecond ſon of the ſaid *R.* lawfully to be begotten, the eldeſt, *&c.* to be preferred before the younger, *&c.* and for want of ſuch iſſue, then, *&c.* And the teſtator did declare, that the reaſon of his ſettling and limiting his eſtates as aforeſaid was, *becauſe he deſired to have the ſame continue in his name and blood*, ſo long as it ſhould pleaſe God to preſerve the ſame. The teſtator's brother had only *one* ſon *W.* born *in the teſtator's lifetime*, but he had a *ſecond* ſon *T.* born after the Chapman v. Brown, 3 Burr. 1626.

the teſtator's death, and in the lifetime of *W.* *W.* died without iſſue, and then the ſecond ſon entered and ſuffered a recovery. And the queſtion was, Whether *T.* the ſecond ſon, who was not born till after the death of the teſtator, took an eſtate-tail, or only an eſtate for life? And it was contended by thoſe who argued againſt the recovery, that *T.* the ſecond ſon was only entitled to an eſtate for life, for that though there was an ambiguity in wording the deviſe, to take place immediately after the death of *R.*'s ſecond ſon, it evidently aroſe from a line being inadvertently left out by the perſon tranſcribing the will. The deviſe immediately after the death of *R.*'s ſecond ſon, was "to the *firſt ſon* of the body of ſuch ſecond ſon, and to the heirs male of the body of ſuch;" thus far the tranſcriber copied right, but here he plainly omitted the following words, "firſt ſon lawfully to be begotten, and for want of ſuch iſſue, then to the ſecond ſon of the body of ſuch ſecond ſon of my ſaid brother *R.* lawfully to be begotten, and to the heirs male of the body of ſuch;" if theſe words had been inſerted, the clauſe they ſaid had been quite clear, ſenſible, and methodical. Theſe words they contended ought to be ſupplied on the evident intention. On the other ſide it was contended that, as the deviſe ſtood "to the *ſecond ſon* of *R.* for life; and after his deceaſe, to the firſt ſon of his body, and the heirs male of the body *of ſuch ſecond ſon*," it was unqueſtionably an eſtate-tail. But the court, conſiſting of Lord *Mansfield* and Mr. Juſtice *Wilmot*, the other judges being abſent, held, that *T.* the ſecond ſon took an eſtate-tail; that they could not inſert the limitations ſuppoſed to be left out, and as the will ſtood, there was no queſtion in the caſe. But they ſaid, if the omitted limitations could have been ſupplied by conſtruction, they thought the *unborn* ſon of an *unborn* ſon *could not have taken;* and that, *to effectuate the general intention of the teſtator*, the word "*ſon*" ſhould be conſtrued a word *of limitation*, and *an eſtate-tail* given to the ſecond ſon of *R.*

Nichol v. Nichol, 2 Bl. Rep. 1152.

A. deviſed all his real eſtates to truſtees to the uſe of the *ſecond ſon* of *B.* begotten or to be begotten during the life of ſuch ſecond ſon; and after the death of ſuch ſecond ſon, or in caſe he ſhould inherit his paternal eſtate by the death of his elder brother, then to *his ſecond ſon* lawfully to be begotten, and his heirs male; and for default of ſuch iſſue, to the third, fourth, and other ſon and ſons of the ſaid *B.* ſeverally and ſucceſſively, according to the priority of birth, and the heirs male of the body of ſuch third, fourth, and other ſons reſpectively: and in default of ſuch iſſue, to the ſame truſtees and their heirs, to the uſe of the eldeſt ſon of *C.* during his life, and the heirs male of his body, remainder to the ſecond ſon of *C.*, and the heirs male of ſuch ſecond ſon lawfully iſſuing, remainder to the uſe of the third, fourth, and other ſon and ſons of the ſaid *C.* ſeverally and ſucceſſively, *&c.* and to the heirs male of their reſpective bodies, and for default of ſuch iſſue, he deviſed all his freehold eſtates before mentioned to *D.* and his heirs for ever. He alſo gave and bequeathed all his cuſtomary land to the ſaid *D.*, and for default of ſuch iſſue, to the heirs

heirs male of the ſaid *D.*, and for default of ſuch iſſue to the cuſtomary heirs of the teſtator: the court certified unanimouſly that the eſtate veſted in the ſecond ſon of *B.* (when any ſuch ſhould be) by way of executory deviſe, and would in the mean time deſcend to the heir at law of the teſtator, and alſo that in order to effectuate the general intent of the deviſor, ſuch ſecond ſon would take an eſtate *to him and the heirs male of his body*, determinable on the acceſſion of the paternal eſtate.

Money was, previous to a marriage, covenanted to be laid out in the purchaſe of lands, to be ſettled to the uſe of *A.* for life, without impeachment of waſte, remainder to *B.* for life, in bar of dower, remainder to the uſe of the children of the marriage, *ſubject to ſuch powers, limitations, and proviſions* as *A.* by deed or will ſhould appoint, and for want of ſuch appointment, then as *B.* ſhould appoint, and in default of ſuch appointment, to the uſe of their children, and in default of iſſue, to *A.* in fee. *A.* had ſeveral children by *B.*, but two daughters ſurvived them. *A.* by his will, in execution of the power in the ſettlement, directed part of a ſum of money to be laid out in the purchaſe of eſtates, to be conveyed in truſt for his daughter *M. during her life*, for her ſeparate uſe, remainder to truſtees to preſerve contingent remainders, remainder to all and every the *child* and *children* of his daughter as tenants in common, with remainders over. And one queſtion on this part of the caſe was, whether the gift to *M.* for life, with remainder to her children, was a good execution of the power? And it was acknowledged that it was not a good execution *as to the children*, but was ſo far void; and then the queſtion was, whether if the appointment was bad on account of the exceſs, the whole ſhould be conſidered as unappointed. *His Honor* ſtopped the argument of this point, by aſking, whether it ſhould not go by *cy pres?* and cited the caſe of *Chapman* v. *Brown*, ſtated *ſupra* as an authority.]

Pitt v. Jackſon, 2 Br. Ch. Rep. 51.

The doctrine of *cy pres*, it ſeems, is not applicable, where the ſubject of a power is *perſonal eſtate*. Routledge v. Dorrell, 2 Ves. jun. 357.

A. deviſed all the reſt of his perſonal eſtate by leaſes, in truſt, or otherwiſe, to his three nephews *A.*, *B.*, and *C.*, and makes them executors, and wills, that they ſhall give bond to each other, that in caſe either die without iſſue of his body, to leave at their death all the ſaid chattels and perſonal eſtate to the ſurvivors and ſurvivor of them; and the bill was to have the ſaid bonds given, but was diſmiſſed, being an attempt to entail a perſonalty.

Abr. Eq. 207 Williams and Williams. A pecuniary legacy cannot be limited after a dying without iſſue. 1 Bur. Rep. 272.

[And that the limitation of a perſonal eſtate to one in tail veſts the whole in him is proved by many caſes.

Stratton v. Payne, 3 Br. P. C. 237. Pelham v. Gregory, 5 Br. P. C. 435. Duke of Montague v. Lord Beaulieu, 6 Br. P. C. 255.

Where one deviſed that all his money in the government funds ſhould be laid out in the purchaſe of lands, and ſettled on his eldeſt ſon *A.* and *the heirs male* of his body, remainder to the ſecond ſon *C.* and the heirs male of his body; and bequeathed the reſt of his perſonal eſtate to *A.* and *the heirs male of his body*, remainder

1 P. Wms. 290. Seale v. Seale, Pre. Chan. 421.

remainder over in the ſame manner; Lord Chancellor held, that the perſonal eſtate, (*viz.* the reſidue after what was to be laid out in purchaſe of lands,) could not be entailed, but the whole veſted in the eldeſt ſon.

Dod v. Dickinſon. Vin. vol. 8. p. 451. pl. 25.

So, where long Exchequer annuities for 99 years were given by will to truſtees for the reſidue of the term, *in truſt* for *E.* for ſo many years of the ſaid term as ſhe ſhould live, afterwards to the plaintiffs for ſo many years of the ſaid term as they or the ſurvivor of them ſhould live, and after the deceaſe of the ſurvivor *in truſt* for the *heirs of their bodies* lawfully begotten, for all the reſidue of the ſaid term, and for default of ſuch iſſue, in truſt for the defendant; Lord Chancellor *King* held the remainder over to be void, and that the whole veſted in the plaintiffs to whom the limitation was for life, with remainder to the heirs of their bodies; and accordingly the annuities were decreed to be ſold, and the money to be paid to the plaintiffs. In this caſe the deviſe was only *in truſt*, and yet the rule was the ſame.

1 Vez. 133. 154. Butterfield v. Butterfield.

So, where a teſtator by his will deviſed that 400*l.* ſhould be put out on good ſecurity for his ſon *T.* that he might have the *intereſt* of it for *his life, and for the lawful heirs of his body*, and if it ſhould ſo happen that he ſhould die without heirs, it ſhould go to his youngeſt ſon *J. B.* Lord *Hardwicke* decreed that the whole veſted in the firſt taker, and the limitation over was too remote.

Daw v. Pitt (ſince Earl of Chatham) and Weſtern, heard at the Rolls July 1766.

Again, *R. T.* by will gave the *profits and half-yearly dividends* of 4000*l.* capital bank ſtock to Sir *W. P.* during his life; together with the income and payments of ſix annuities payable at the Exchequer, to *receive the payments* during his life. And gave his dwelling-houſe in *London* (being leaſehold) and the uſe of all the furniture and houſehold linen therein, to *M. C.* during her life: and gave to *L. A. P.* (daughter of Sir *W. P.*) his dwelling-houſe and eſtate at *O.* and the *uſe* of all the goods, furniture, and linen there, together with all the cattle and cart horſes, and the utenſils in huſbandry, as well as ſome other eſtates and leaſehold houſes, *during the term of her natural life.* And after the death of *M. C.* he gave to *L. A. P.* his dwelling-houſe in *London*, and the uſe of all the goods therein during her life. And after the death of Sir *W. P.*, he gave to *L. A. P.* the *dividends* on the 4000*l.* bank ſtock, and all the *payments* growing due on the ſaid Exchequer annuities *during her life;* and after her deceaſe he gave, bequeathed, and deviſed all the afore-mentioned land, houſes, bank ſtock, and Exchequer annuities, to the *heirs male of her body* lawfully begotten for ever; together with all the furniture in both his houſes: and for *want of ſuch iſſue*, he gave and bequeathed all the ſaid reſpective eſtate, bank ſtock, and annuities unto *W. D.* for life, remainder to the heirs male of his body, remainder over.

Upon the death of *R. T.*, *L. A. P.* entered on the eſtates deviſed to her, ſuffered a recovery, and ſold the real eſtates: afterwards ſhe deviſed and bequeathed all her real and perſonal eſtate to the ſaid Sir *W. P.* (her father), his heirs, executors, and adminiſtrators. Her father ſurviving her, by his will, after giving ſeveral legacies, gave and deviſed all his real eſtates, and all the reſidue

ſidue of his perſonal eſtate (which reſidue included the leaſehold eſtates, furniture, bank ſtock, and annuities deviſed as above to *L. A. P.*) unto the defendant *W. P.* his heirs, executors, adminiſtrators, and aſſigns. After the death of Sir *W. P.* the plaintiff *W. D.* claimed the leaſehold eſtate, bank ſtock, and Exchequer annuities, by virtue of the remainder limited to him in the will of *R. T.* But the Maſter of the Rolls held the limitation over to *W. D.* to be void, and that the whole veſted in *L. A. P.*, and therefore diſmiſſed the plaintiff's bill.

But upon a re-hearing before the Lords Commiſſioners of the Great Seal, they reverſed the order of diſmiſſion, and decreed, that the plaintiff ſhould have the benefit of the ſaid leaſehold eſtates, bank ſtock, and Exchequer annuities during his life. Afterwards, however, upon an appeal to the Houſe of Lords, the Lords reverſed that decree, and thereby eſtabliſhed the deciſion of the Rolls. June 1770. *Vide* Earl Chatham v. Tothill, 6 Bro. Parl. Ca. 450. 1771.

Again, *A.* poſſeſſed of a conſiderable real and perſonal eſtate, (among other bequeſts) made one in the following words, "and further I hereby appoint my ſaid truſtees to lay out at intereſt, upon real and perſonal ſecurity, as they ſhall think proper, the ſum of 4000*l.* ſterling, part of my ſaid real and perſonal eſtate, and to make payment of the intereſt of the ſaid ſum of 4000*l.* only to *R. G.* the younger ſon of the ſaid *R. G.* during all the days of his natural life, and to make payment of the principal ſum itſelf to the heirs to be lawfully procreate of his body; but declaring that the above intereſt ſhall not be affectable by the debts or deeds of the ſaid *R. G.* (the ſon), and in the event of his death, without lawful iſſue of his body, or of his ſelling, aſſigning away, or otherwiſe diſpoſing of the above intereſt, or any part of it, my will is, that the ſaid ſum of 4000*l.* together with 1500*l.* ſterling further, making in all the ſum of 5500*l.* ſterling, ſhall pertain and belong to *J. H. W.*" One queſtion was, Whether the remainder over of the 4000*l.*, and the legacy of 1500*l.* after the death of *R. G.* (the ſon) without iſſue of his body, were not too remote? It was argued in ſupport of the limitation, that it was good, from the manifeſt intention of the teſtatrix, that it ſhould take place upon the event of (the ſon) *R. G.* dying without leaving lawful iſſue. But on the other ſide it was contended, that the 4000*l.* was an eſtate-tail in money executed in *R. G.* the firſt taker, and the caſes of *Butterfield* v. *Butterfield*, 1 *Vez.* 133. and *Daw* v. *Pitt*, *ſupra*, were cited, and it was ſaid, that the caſe was too ſtrong to admit of circumſtances of the intent of the teſtatrix to contradict it. And *per* Lord *Thurlowe*, With reſpect to the 4000*l.* perſonalty, the caſes of *Butterfield* v. *Butterfield* and *Daw* v. *Pitt* have confirmed the doctrine upon that ſubject, that it is too late now to argue upon the diſtinction of principal and intereſt, or to inſiſt upon circumſtances of the intent; the rule muſt take place with reſpect to the 1500*l. that* fell under the ſame objection. And his lordſhip decreed the remainder over too remote. Glover v. Strothoff, 2 Br. Ch. Rep. 33.

Again, where *S.* by his will gave as follows, "*Item*, I give and bequeath to *T. M. S.* during the term of his natural life, the intereſt Robinſon v. Fitzherbert, 2 Br. Ch. Rep. 127.

tereſt of 1000*l.* 3 *per cent.* conſol. bank annuities, to commence the day after my death, to be regularly paid from time to time, in ten days, or as ſoon as poſſible after the ſame becomes due: At his deceaſe it is to *devolve* to the *heir* of his body lawfully begotten, and in default of iſſue, I give and bequeath the ſame to the heirs of *A.* that ſhall be then living, in equal ſhares to be divided:" the Maſter of the Rolls held, that the legacy veſted abſolutely in *T. M. S.*

But where perſonalty is not ſo given, as that the words would create a clear tenancy in tail in land, the law is otherwiſe.

Wilſon v. Vanſittart, Ambl. 362.

Therefore where one, being poſſeſſed of a conſiderable perſonal eſtate, made his will in *India*, of his own hand-writing, and gave ſeveral legacies, and *inter alia*, to *the heirs* of his brother *R. W.* 300*l.*, and gave the reſidue of his eſtate to his brother *I. W.*, and to his heirs male, *equally to be divided among them, ſhare and ſhare alike;* three queſtions aroſe, firſt, Whether *I. W.* ſhould take the whole, and the words *equally to be divided*, be rejected? Secondly, Whether *I. W.* and his ſons ſhould take as tenants in common? Thirdly, Whether the father ſhould take for life, and after his death the reſidue ſhould go to all his ſons equally? The Lords Commiſſioners *Smythe* and *Bathurſt*, were clear of opinion that, according to the true conſtruction, the father ſhould take the whole for life, and then it ſhould go to his ſons equally.

Jacobs v. Amyatt, 4 Br. Ch. Rep. 542.

Again, *D.* being reſident in *Calcutta*, and poſſeſſed of *only* perſonal property, made her will, and after giving ſome legacies, gave all the reſt, reſidue, and remainder of her eſtate, both real and perſonal, unto *L.* to be placed at intereſt until her age of 21 years, or day of marriage, and then the whole thereof, together with the intereſt accumulating thereon, to be paid to and for her uſe, during her natural life, and from and immediately after her deceaſe, ſhe gave, deviſed, and bequeathed the ſame unto the heirs of her body lawfully begotten, *equally to be divided between them*, ſhare and ſhare alike; and in default of ſuch iſſue, or the death of the ſaid *L.* before her ſaid age of 21 yeats, or day of marriage, ſhe then gave, deviſed, and bequeathed the ſaid reſidue and remainder of her eſtate, unto her, the teſtatrix's brother. The queſtion was, Whether under this will *L.* took an eſtate for life or an abſolute intereſt in the perſonal property? And it was decreed at the Rolls that *L.* took only an eſtate for life, in the property in queſtion. And that decree was affirmed on appeal to the Chancellor.

Knight v. Ellis, 2 Br. Ch. Rep. 570.

And it hath been reſolved, that if the firſt eſtate for life be a truſt eſtate, and the remainder to the heirs of the body a legal eſtate, the latter will take effect; becauſe if ſuch limitation had been applied to land, it would not have created an eſtate-tail.]

2. By Incertainty in the Deſcription of the Thing deviſed.

Lev. 130. Sid. 191. Raym. 97. Bowman

Deviſes are void and rejected where the words of the will are ſo general and uncertain, that the teſtator's meaning cannot be collected from them; and therefore where a man by will, *gave all*

to

to his mother, all to his mother, it was adjudged that theſe general words did not carry the lands to the mother; for ſince the heir at law has a plain and uncontroverted title, unleſs the anceſtor diſinherits him, it were ſevere and unreaſonable to ſet him aſide, where ſuch intention of the teſtator is not clearly evident from the will; for that were to ſet up and prefer a dark and at beſt a doubtful title to a clear and certain one. and Milbank.

If one having lands in fee, and other lands for years, deviſes all his lands and tenements, the fee-ſimple lands only paſs: but if a man had leaſes for years only, and no fee-ſimple lands, by the deviſe of all his lands and tenements (*a*), the leaſes for years paſs, for otherwiſe the will would be merely void. Roſe v. Bartlett, Cro. Car. 293. (*a*) Day v. Trigg, 1 P. Wms. 286. S. P.

[A teſtator being ſeiſed in fee, and poſſeſſed by leaſe of lands in *D.*, deviſed all his lands in *D.* whereof he was ſeiſed, poſſeſſed of, or any ways intereſted in, to *A.* for life, remainder to *B.* in tail, remainder to *C.* for life, with power to make a jointure, remainder to truſtees to preſerve contingent remainders, *&c.* It was reſolved, that the leaſehold paſſed with the freehold, and that, by reaſon of the words *poſſeſſed of or intereſted in*, which properly refer to a leaſehold eſtate, and diſtinguiſh this caſe from that of *Roſe* v. *Bartlett*, *ſupra*, where theſe words are not to be found.] Addis v. Clement, 2 P. Wms. 456.

So, if a man being ſeiſed of a meſſuage in *A.*, and of a meſſuage and ſeveral lands in *B.*, deviſes to *J. S.* his houſe in *A.* with all other his lands, meadows, paſtures, with all and ſingular their appurtenances whatſoever in *B.*, yet the houſe in *B.* ſhall not paſs; for though by a feoffment or leaſe of lands in *D.* houſes ſhall paſs, becauſe to be taken moſt ſtrongly againſt the feoffor, *&c.* and the land paſſing, the houſe thereupon muſt alſo paſs; yet wills are to be taken according to the intention of the deviſor; and when he deviſes his houſe in *A.* and lands in *B.*, it cannot be preſumed that he would have more paſs than by the words is expreſſed. 2 And. 123.

If a man is ſeiſed of lands in a vill, and in *A.* and *B.*, two hamlets within the ſame vill, and deviſes all his lands in the vill, and in *A.*, and dies, no part of the land in *B.* ſhall paſs; for his naming one hamlet only, fully ſhews his intent, that the lands in the other ſhould not paſs. Dyer, 261.

But where a man having two ſeveral moieties of lands by purchaſe from the ſame perſon, one lying in *Kent*, and the other in *Eſſex*, deviſed all his moieties in *Kent;* it was held, that both paſſed, for the words being *all his moieties* they cannot be ſatisfied with one moiety only. Bulſt. 117. 2 Bulſt. 176. Hob. 173. *vide* Noy, 112. Cro. Eliz. 658.

If one ſeiſed of land, called *Hayes Land*, lying in two vills, viz. *A.* and *B.* deviſes all his land in *A.* called *Hayes Land*, to his youngeſt ſon and his heirs, and in another part wills, that if his ſaid ſon dies without iſſue, that his wife ſhall have *Hayes Land*, and dies, and the ſon dies without iſſue, the wife ſhall have only that part of *Hayes Land* which lies in *A.* becauſe no more was deviſed to the ſon: but *per Popham*, if the deviſe had been to the eldeſt ſon, and if he dies without iſſue, perhaps he ſhould have Cro. Eliz. 674.

had all, becauſe the eldeſt ſon had all, part by deviſe, and part by deſcent.

Roll. Abr. 613. Cro. Car. 447. *vide* Styl. 201.

If a man is ſeiſed in fee of two houſes in *D.* adjoining the one to the other, and the one is in the poſſeſſion of *A.* and the other in the poſſeſſion of *B.*, which is alſo the corner houſe in the ſtreet of the town; and he deviſes his corner houſe in the poſſeſſion of *A.* and *B.*; by theſe words, only the houſe which is in the poſſeſſion of *B.* ſhall paſs, which is the corner houſe, and not the other houſe which is in the poſſeſſion of *A.*, though it be next adjoining thereto; for his intent appears to be ſo.

2 Leon. 120. Throp and Thompſon.

A. ſold land to *B.*, but before a conveyance was executed, *B.* ſold the ſame lands to *C.*, and then *A.* conveyed to *C.*, and *C.* being thus ſeiſed, deviſed the land to his younger ſon in theſe words, *I bequeath to* R. *my ſon all my land which I purchaſed of* B., whereas in ſtrictneſs of law he purchaſed them from *A.*, who conveyed them to him; yet this was allowed to be a ſufficient deſcription of the land, and, conſequently, a good deviſe of it, becauſe the purchaſe was really made from *B.*, the money being paid to him.

Cro. Car. 129. Jon. 195. S. C.

If one deviſes his houſe wherein *J. S.* dwells, called *The White Swan in Old-ſtreet*, to *J. N. &c.* and dies, and at the time of his death and making the will *J. S.* occupied the entry only, and three of the upper rooms of the houſe, and others occupied the garden and other parts of the houſe; yet all the houſe paſſes; for the houſe imports the whole houſe, and the ſign of the *White Swan* makes it ſtill more certain.

Cro. Car. 57. 1 P. Wms. 603. [(*a*) But ſee the caſe of Doe v Martin, 2 Bl. Rep. 1148. where, in compliance with the manifeſt intent of the teſtator,

If a man is ſeiſed of a meſſuage and two acres of land in *A.*, and of two acres of meadow in *B.*, and hath uſed and occupied the two acres of meadow, being four miles diſtant from his ſaid houſe, together with his ſaid houſe and lands in *A.*, and deviſes the houſe *cum omnibus & ſingulis pertinentiis ſuis adinde ſpectan.* to *J. S.*, the two acres of meadow ſhall not paſs; for by the words *cum pertinentiis* lands paſs not (*a*), but ſuch thing only as may be properly appertaining; otherwiſe, if the words had been *cum terris pertinentibus*, for then the lands uſed therewith ſhould have paſſed.

land was holden to paſs with a houſe under the word appurtenances. And in the caſe of Gulliver v. Poyntz, 3 Wilſ. 141. under a deviſe of *meſſuages, with all houſes, barns, ſtables, ſtalls,* &c. *that ſtand upon, or belong to the ſaid meſſuages*, lands which were purchaſed with the meſſuages, and which, as well as the meſſuages, were in the teſtator's poſſeſſion at the time of making the will, were allowed to paſs.]

Chan. Ca. 262.

If *A.* deviſes ſeveral pecuniary legacies, and alſo ſome lands, and then deviſes all the reſt and reſidue of his money, goods, and chattels, and other eſtate whatſoever, to *J. S.* whom he makes executor, he having other lands, they ſhall paſs by the will.

Roll. Abr. 613.

But if a man ſeiſed in fee of three tenements, and poſſeſſed of divers goods, and of a leaſe for years, deviſes one tenement to one of his ſons, and another tenement to one of his daughters, and then adds, Item, *I make my two ſons executors of all my goods, moveable and immoveable, and all my lands, debts, duties, and demands;* by this clauſe, no eſtate in the three tenements of which the

the deviſor was ſeiſed in fee, paſſed to the executors by force of the words, *and all my lands;* becauſe that theſe words might well be ſatisfied by the leaſe for years of land which paſſed by it.

A. deviſed in the following manner: *I make my niece executrix of all my goods, lands, and chattels;* the teſtator had a real and perſonal eſtate, but no leaſes or intereſt for years in any lands whatſoever; and the queſtion was, Whether any, or what eſtate paſſed in the lands, by this deviſe? And my Lord Chancellor was clearly of opinion, that the real eſtate did not paſs by theſe words; and that the word *lands* was not (as objected) uſeleſs, and to be rejected, for that in all probability there might be rents in arrear of thoſe lands, which would paſs to the niece by her being made executrix. Abr. Eq. 209, 210. Piggot and Penrice, Pr. Ch. 471.

If *A.* deviſes certain lands to his youngeſt ſon in fee, and deviſes all his lands in *D.* to his wife for life: *Item*, I give to her for life the lands which I hold of *G. T.* *Item*, I give to her all the lands which I purchaſed of *J. S.* *Item*, I give my lands to my ſon *E.* and his heirs for ever; not only the lands purchaſed of *J. S.*, but alſo the reverſion of all the others paſs by theſe words. Skin. 130. pl. 5. Barrow and Gameam.

If *A.* being ſeiſed of the manor of *B.*, and of other lands in the county of *S.*, deviſes the manor of *B.* for ſix years, and part of the other lands to *J. S.* in fee; and then comes this clauſe, and the reſt of my lands in the county of *S.*, or elſewhere, I give to my brother, *&c.* by this deviſe he ſhall have the reverſion of the manor. Wheeler v. Walroon, Alien, 28. 3 Atk. 492. S. C. cited, and S. P.

A. ſeiſed in fee, deviſed a certain houſe by name to *J. S.* for life; and by another clauſe he deviſes to his wife, the better to enable her to pay his legacies, all his meſſuages, lands, tenements, and hereditaments, *not above diſpoſed of.* Adjudged, that by theſe words, the reverſion of the houſe deviſed to *J. S.* paſſed. 2 Vent. 285. Willow and Lydcot, adjudged upon a writ of error in the Exchequer-chamber.

Carth. 50. S. C. where it is ſaid to have been adjudged in King James II.'s time, that the reverſion did not paſs; but a note is added, that theſe were king James's judges, and that Mich. 1 W. & M. it was adjudged, that the reverſion paſſed; which judgment was affirmed in the Exchequer-chamber by all the judges; and the rather, becauſe it appeared that the heir at law had 20*l. per annum* deviſed to him; ſo that he being taken notice of, the intent was more apparent. *Vide* Lev. 212. S. P. adjudged, and 3 Mod. 228. which ſeems contrary, but has been denied to be law.

A. ſeiſed in fee, deviſed Black Acre to *B.* for life, and deviſed to C. all his lands not before deviſed, to be ſold, and the money to be divided between his younger children: the queſtion was, Whether the reverſion of Black Acre paſſed by the deviſe of all his lands not before deviſed? And it having been referred to the judges of the Common Pleas, they unanimouſly agreed and certified, that the reverſion was well deviſed. 2 Vern. 461. Rooke and Rooke, decreed accordingly. Pr. Ch 202. S. C.

[*A.* having deviſed a farm to *J. S.* for life, and after other legacies, deviſed all other his perſonal eſtate, lands, tenements, and hereditaments, not before deviſed, to the defendant; it was made a queſtion, Whether the reverſion of that farm paſſed by this general deviſe? *Per cur.*—The reverſion well paſſed.] Kingſman v. Kingſman, 2 Vern. 559.

A. by virtue of ſeveral ſettlements, being tenant in tail after poſſibility of iſſue extinct, of ſome lands, remainder in fee to truſtees, 2 Vern. 621. between Sir Litton

Strode and Lady Ruſſel, decreed by my Lord Chancellor, aſſiſted with the Maſter of the Rolls, Trevor, C. J. and J. Tracey.

truſtees, in truſt for him and his heirs, and as to ſome other lands, being tenant for life, remainder to his firſt and other ſons, remainder to truſtees in fee, in truſt for the right heirs of *B.*, whoſe heir *A.* was, and as to other lands, being tenant in tail, remainder to the right heirs of his father, whoſe heir he likewiſe was; and being likewiſe ſeiſed of a very conſiderable real eſtate of his own purchaſe, and poſſeſſed of a large perſonal eſtate, made his will, and deviſed ſome part of his lands to his wife for life, and gave ſeveral legacies, and having no iſſue, deviſed all other his lands, tenements, and hereditaments, *out of ſettlement*, to his nephew, provided he took on him his ſurname, ſubject to raiſe 4000 *l.* in caſe the teſtator left a daughter; and it was held, that all the eſtates thus ſettled paſſed by the will, notwithſtanding the words *out of ſettlement*, for the word *hereditament* comprehends a remainder or reverſion, as well as an eſtate in poſſeſſion.

Abr. Eq. 211. Cheſter and Cheſter, decreed by my Lord Chancellor, aſſiſted by Raym. C. J. Reynolds, C. B. and Price, J. 3 P. Wms. 56. S. C.

So, where *A.* being ſeiſed in fee of lands in *D.* upon the marriage of his eldeſt ſon, ſettled thoſe lands on him in tail male, remainder to his own right heirs; and being ſeiſed in fee in poſſeſſion of other lands in *M.*, *L.* and *N.*, deviſed all his meſſuages, lands, tenements, and hereditaments in *M.*, *L.*, *N.*, or *elſewhere*, not by him formerly ſettled, for the payment of his debts; and after debts paid, then to *J. S.* a ſecond ſon, and his heirs for ever, and died, and ſoon after the eldeſt ſon died (not having barred the remainder) without iſſue male, but left ſeveral daughters; it was held, *1ſt*, That the word *elſewhere* was a ſufficient deſcription of the lands in *D.*, though of greater value than thoſe in *M.*, *L.*, and *N.*; that it was of itſelf a ſignificant and expreſſive term; and the rather ſo in this caſe, becauſe there were no lands or outſkirts not particularly enumerated, to which it could be applied, but to thoſe in *D.* *2dly*, That the words *meſſuages*, *lands*, *tenements*, *and hereditaments*, were ſufficient to paſs the reverſion of the lands in *D.*, notwithſtanding the exception, or reſtrictive words *not formerly ſettled*.

Freeman v. Duke of Chandos, Cowp. 363.

[One deviſed all his eſtate, *&c.* in the counties of *G.* and *W.*, *and elſewhere in the kingdom of* England, to truſtees, ſubject to certain charges thereon, and limitations in his marriage ſettlement, in truſt to ſtand ſeiſed of the ſaid eſtates in *G.* and *W.*, or *elſewhere*, to certain uſes. His eſtates in *G.* and *W.* were his only eſtates charged or mentioned in his marriage ſettlement; but he was alſo entitled to the reverſion of certain eſtates in the counties of *O.* and *M.* It was holden, that this reverſion paſſed by the words, "*elſewhere in the kingdom of* England."

Atkyns v. Atkyns, Cowp. 808.

One ſeiſed for life, with remainder in tail to his firſt and other ſons, of a conſiderable eſtate in the county of *N.*, and being alſo ſeiſed in fee of the manor of *C.*, and a ſmall eſtate at *P.* in the county of *G.*, and entitled to the reverſion in fee of another eſtate in that county, after ſeveral eſtates-tail in different perſons, one of whom had a ſon aged eighteen years; deviſed "all that his manor "of *C.* *&c.*, and alſo all that his capital meſſuage, and all and every "his lands, tenements, and hereditaments whatſoever, ſituate and "being in or near *P.* or elſewhere in the ſaid county of *G.*, to his "executors,

" executors, in truſt to ſell, and to divide the money ariſing from " the ſale equally among his younger children," of whom he had three. It was reſolved, that this remote reverſion paſſed to the truſtees.

But notwithſtanding theſe caſes, general ſweeping words will not carry a reverſion, where the teſtator's intent manifeſtly appears to the contrary from the whole complexion of the will.] 200. S. C. 5 Br. P. C. 496. S. C. Roe v. Avis, 4 Term Rep. 605.

Strong v. Teat, 2 Burr. 912. 1 Bl. Rep.

If *A.* deviſes lands to *B.* in *D.*, *S.*, and *T.*, and all his lands elſewhere, and he hath a mortgage of lands, not lying in *D.*, *S.*, or *T.*, which is of more value than the lands in *D.*, *S.*, and *T.*, the mortgaged lands will not paſs, for he could not be thought to mean to comprehend lands of ſo much value, under the word *elſewhere*, which is like an *&c.* that comes in *currente calamo*.

2 Vent. 351. Sir Thomas Littleton's caſe, decreed; but the reporter ſays there were other circumſtances in the caſe, which ſhewed that it was not his intention that the mortgaged lands ſhould paſs; and Vern. 3. S. C. it appears, that there were ſome ſmall parcels of land not ſpecified, and of the ſame nature of thoſe deviſed; to which the court held the word *elſewhere* was applicable, and not to the mortgaged lands, which were of a different nature, and of greater value; and that the teſtator had charged the lands deviſed with a rent-charge of 80*l. per annum*, which he could never intend ſhould iſſue out of lands which were every day redeemable.

[Where a teſtator ſeiſed of lands in fee, and poſſeſſed of a term for years in *B.*, deviſed all his lands, tenements, and *real eſtate* whatſoever in *A.* and *B.*, or elſewhere, of which he was *any way ſeiſed or entitled to*, to *J. S.* and his heirs, and in a ſubſequent clauſe of his will diſpoſed of the reſt of his perſonal eſtate, and of all his *mortgages*, *bonds*, *ſpecialties*, *and credits*; it was adjudged, that the term did not paſs to *J. S.*]

Davis v. Gibbs, 3 P. Wms. 26.

By a general deviſe of all lands, tenements, and hereditaments, mortgages in fee, though forfeited, will not paſs; nor will they paſs by ſuch a general deviſe, though the equity of redemption is *after* the making of the will foreclоſed or releaſed.

2 Vern. 623.

A. having ſettled all his eſtate of inheritance upon his wife for life, for her jointure, makes his will, and thereby deviſes ſeveral pecuniary legacies to ſeveral perſons, and then ſays, all the reſt and reſidue of my eſtate, chattels real and perſonal, I give and deviſe to my wife, whom I make ſole executrix; and the only queſtion was, Whether by this deviſe the reverſion of the jointure lands paſſed to the wife? And my Lord Keeper, having taken time to conſider of it, delivered his opinion, that it did not, becauſe the precedent and ſubſequent words explain his intent, to carry only his perſonal eſtate; for in the firſt part of his will, having given only legacies, and no land whatſoever, the words all the reſt and reſidue of his eſtate are relative, and muſt be intended eſtate of the ſame nature with that he had before deviſed, which was only perſonal; for having before given no real eſtate, there could be no reſt or reſidue of that out of which he had given away none; then the words *chattels real and perſonal* explain the word *eſtate*, and ſhew what ſort of an eſtate he meant, and make the deviſe as if he had ſaid, all the reſt of my eſtate, whether chattels real or perſonal, *&c.* and ſo confine and reſtrain the extended ſenſe of the word *eſtate*.

Abr. Eq. 211, 212. Markant and Twiſden, Gilb. Eq. Rep. 30.

Ridout v. Pain, 3 Atk. 486.

[But where a teſtator deviſed to his wife, to whom he had before given life-eſtates in part of his lands, all the reſt, reſidue, and remainder of his goods, chattels, and perſonal eſtate, *together with his real eſtate, not therein before deviſed*, it was holden, that theſe words, *together with the real eſtate*, carried the land and inheritance; for though there are caſes where it has been doubted, whether the word *eſtate* joined to goods, *&c.* will carry the real eſtate, yet, when a teſtator ſays, *together with my real eſtate*, it puts it out of all doubt. In the caſe of *Markant* v. *Twiſden*, *ſupra*, the words were *chattels real and perſonal*; and chattels real are not called ſo, as being real eſtate, but becauſe they are extractions out of the real, as Lord Chief Juſtice *Holt* called them.]

3. By Incertainty in the Deſcription of the Perſon to take.

Abr. Eq. 212. (*a*) A deviſe to the eldeſt

If *A.* deviſes lands to the eldeſt ſon of *J. S.* by the name of *William*, when in truth his name was *Andrew*, the deviſe is (*a*) good.

ſon of *J. S.* is good, or to his ſecond or youngeſt; ſo is a deviſe to the wife of *J. S.* or though ſhe be called Em. or Emlyn, and to Robert Earl of, &c., though his name was Henry. Co. Lit. 3.—A deviſe to the ſtock, family, or houſe, is good, and it ſhall be intended of the heir. Hob. 33. Dy. 333. b. [Upon the ſame principle, if lands be deviſed to the *poſterity* of *A.*—the lineal heir, if there be any, ſhall take them under the word *poſterity*; but if *A.* die without iſſue, and there be no lineal heir of *A.*, the collateral heir of the whole blood ſhall take them. 2 Eq. Ca. Abr. 290-7.——And a deviſee may be deſcribed as the next of the name of the teſtator, and the next relation of his name, whether it be male or female, ſhall take as deviſee deſcribed thereby. Bon v. Smith, Cro. El. 532.——So, a deviſee may be deſcribed as next of kin. Thus it was adjudged, where one deviſed lands in tail, the remainder *to the next of kin of his name*, that his brother's daughter ſhould take by that deſcription. Jobſon's caſe, Cro. El. 576.——And neareſt relation of the name is likewiſe a good deſcription of a deviſee, and operates as *nomen collectivum*: and in theſe caſes where *nomina collectiva* are uſed to deſcribe the deviſee, the term uſed comprehends all the teſtator's family that are neareſt to him in the degree mentioned. Pyot v. Pyot, 1 Vez. 335.—— And if the deviſor explains who he means by neareſt relation, perſons may take under that deſcription who are not ſtrictly ſo circumſtanced in point of kindred.——As, if lands were deviſed to be divided between the neareſt relations of the teſtator; namely, the Greenwoods, the Everetts, and the Down; the Everetts it ſeems might take, though not in the ſame degree of relation as the Greenwoods and Downs, nor within the degree of neareſt relationſhip. Greenwood v. Greenwood, cited in 1 Br. Ch. Rep. 52.——If one, being married, make his will, and thereby deſcribe his deviſee by the term, neareſt relation, according to the ſtatute of diſtributions, his wife cannot take thereby; for ſhe is no relation to her huſband in the ſenſe in which that word is here uſed, becauſe it is transferred to a perſonal ſenſe, and as if he had ſaid kindred; and kindred, in the ſtatute, means kindred by blood only, and the wife is no relation by blood or affinity. The wife *non affinis eſt ſed cauſa affinitatis*; *affinis ab eodem ſtipite*. Davies v. Bailey, 1 Vez. 84. Worſley v. Johnſon, 3 Atk. 759. Skin. tit. Cognatio Parentela. Calvin's Lexicon.—— And there would be no difference in ſuch a caſe as that laſt mentioned, whether the terms uſed by the teſtator were, my relations generally, or, my own relations. In both caſes, relations by blood only are included. And if the reference to the ſtatute of diſtributions be omitted in ſuch a deviſe, the wife cannot even then take within the deſcription of a near relation. For, in the caſe of Thomas and Hale, Lord King determined, upon the authority of Lord Macclesfield, in the caſe of Brown and Brown, that the word "relations" ſhould be confined to ſuch relations as were within the ſtatute of diſtributions, becauſe of the uncertainty of the word relations. 2 Eq. Ca. Abr. 332. q. 368. Ca. temp. Talb. 251.]

Pitcairne v. Braiſe, *et al.* Finch. Chan. Rep 403. *et v. d.* Dalliſon, 78, 8. Owen, 35. Rivers's caſe, 1 Atk. 410.

[So, where one, having a reverſion in fee expectant on an eſtate tail, deviſed it to *William Pitcairne*, *eldeſt ſon* of *Charles Pitcairne*, in tail male, remainder over, and died; it was inſiſted, on a bill exhibited by the eldeſt ſon, to have the writings, and to receive the profits, *&c.* that the deviſee had no title, becauſe his name was not *William* but *Andrew*; but the court was of opinion that the plaintiff ſhould have relief: the reaſon of which was, that there were other words, *viz. eldeſt ſon* of, *&c.* ſufficient to point him out with certainty.

So,

So, where a deviſe was to *Margaret*, the daughter of *W. K.*, and her name was *Margery*, it was held that ſhe ſhould take thereby, *quia conſtat de perſona*, by the deſcription. Gynes v. Kemſley, 1 Freem. 293.

So, if one deviſe land to the wife of *J. S.*, and *J. S.* die, and ſhe take to huſband *J. D.*, and then the deviſor die, ſhe ſhall take the land; and yet ſhe is not the wife of *J. S.* when the deviſor dies, nor ſhall ſhe take it as his wife: but the intent is, that ſhe who *was* the wife of *J. S.* at the time of making the will ſhould have it, and the perſon is clear by the deſcription. 10 Mod. 371. 1 Vin. Abr. tit. Dev. T. B. Pl. 2. Plowd. 344.

Again, if a man had deviſed land to *Alexander Nowel*, dean of *St. Paul's*, and to the chapter there and their ſucceſſors, and *Alexander* had died, and a new dean had been made, and afterwards the deviſor had died, the land had veſted in the new dean and chapter; and yet it would not have veſted according to the words, but according to the intent; for the chief intent was to convey it to the dean and chapter and their ſucceſſors for ever, and the ſingle perſon of *Alexander Nowel* was not the principal cauſe, though it might have been one of the cauſes of the deviſe. Vin. Abr. tit. Corp. G. 6. pl. 11. tit. Dev. W. c. pl. 4. Plowd. 344.

Upon the ſame principle it was decreed by Lord *Sommers*, where one, his wife being *enſeint* with a child, (was taken ſick and made his will, and, thereby, deviſed that if his wife ſhould have a poſthumous daughter ſhe ſhould have 500 *l.*, *&c.*) had a daughter born, and afterwards died; that this daughter, though born in the life of her father, was a poſthumous child within the meaning of the will.] Jaggard v. Jaggard, Pre. Ch. 175.

If a man has iſſue two ſons, and deviſes his land to his ſon, without ſpecifying which he means, this is void for the uncertainty; for to conſtrue it a deviſe to the eldeſt, is to make it an impertinent deviſe, that being no more than *actum agere*; and to conſtrue it a deviſe to the youngeſt, ſeems ſtill more unreaſonable, becauſe that is to diſinherit the heir at law without an apparent intention of the teſtator to warrant it, and to ſet up a doubtful title in deſtruction of a clear one. Cro. Eliz. 742.

If a man has two ſons named *J.*, and deviſes to his ſon *J.* all his lands, this is a void deviſe for the uncertainty, unleſs it can be proved that the teſtator meant one of them in particular; by the elder ſon's being beyond ſea, probably dead, *&c.* for theſe circumſtances clear up the intent of the teſtator, and ſuch averment is (*a*) admitted, becauſe it is conſiſtent with the will; and the conſtruction and judgment thereon muſt be genuine, becauſe taken from the words of the will. 5 Co. 68.

(*a*) But for this *vide* head of Evidence.

If a man hath iſſue two ſons and two daughters, and deviſes his land to his wife for life, and that after her death the ſame ſhall remain to his iſſue; this is a void deviſe as to the remainder; for having ſeveral children, it is (*b*) uncertain what iſſue intended. Cro. Eliz. 742. Taylor and Sayer. (*b*) But *vide* Raym. 83. S. C. cited, and denied to be law; and that it ſhall go to the eldeſt ſon, for iſſue is *nomen collectivum*; and ſo is 6 Co. 17. 3 Lev. 433. and

If a man has iſſue eight daughters by three ſeveral venters, and one ſon, and deviſes his land to his youngeſt daughter, the remainder to his ſon in tail, the remainder to his two daughters by the Palm. 303. *vide* Styl. 240.

middle venter for life, the remainder *proximo de ſanguine* of the deviſor, and dies, and after the eldeſt daughter has iſſue, and dies, and after the ſon, and all the other daughters, except the two daughters by the middle venter, to whom it was given for life, die without iſſue, the iſſue of the eldeſt daughter ſhall have it.

Raym. 82. Bate and Amherſt, adjudged. If a man deviſes all his lands to one of his couſin *Nich. Amherſt*'s daughters, that ſhall marry a *Norton* within fifteen years, and dies, and *Nich. Amherſt* having three daughters, one of them marries a *Norton* within the fifteen years; this is a good deviſe to her notwithſtanding the uncertainty, and the law ſupplies the words, *who ſhall firſt marry*.

2 Vent. 363. If a man deviſes lands to *J. S.* in truſt for *A.* and the heirs of his body, remainder, to *B.* for life; and further wills that if *A.* die without iſſue, and *B.* be then deceaſed; then, and not otherwiſe, he gives the lands to *J. N.* and his heirs; though *A.* dies without iſſue, and *B.* ſurvives; yet, after the death of *B.*, *J. N.* ſhall take, for the words, if *B.* be then deceaſed, expreſs the teſtator's meaning, that *B.* ſhould be ſure to have it for life, and alſo ſhew when *J. N.* ſhould have it in poſſeſſion.

Vern. 362. Huckſtep and Matthews. *A.* deviſes lands to truſtees in fee, in truſt to pay debts and legacies, and after thoſe debts paid, then to ſell; and if any of the teſtator's name would buy, ſuch perſon to have the lands 200*l.* leſs than the value; one of the teſtator's name brings a bill for this benefit of pre-emption, but not till the teſtator had been dead twenty-five years; but the bill was diſmiſſed; for if two of the teſtator's name ſhould claim the benefit of the deviſe, who muſt have it?

2 Vern. 660. Trafford and Aſhton, decreed. *A.* deviſed lands to truſtees, in truſt for his daughter for life, remainder to the ſecond ſon of her body to be begotten in tail male, and ſo to every younger ſon; and in default of ſuch iſſue male, to her eldeſt daughter, and to the firſt ſon of her body, taking upon him the name and arms of the teſtator; and adds further, that he did not by his will deviſe the eſtate to the eldeſt ſon, becauſe that he expected that his daughter would marry ſo prudently, as that the eldeſt ſon would be provided for; the daughter married, and had iſſue a ſon, who died in twelve months after his birth; ſhe afterwards had another ſon born, after the death of the firſt; this ſecond muſt take according to the words of the will, though contrary to the intention of the teſtator.

Sid. 23. 51. Forſter and Ramſey. *A.*, *B.*, and *C.* being aliens and brothers, *A.* has iſſue a ſon, and *B.* and *C.* are naturalized, and *B.* purchaſes lands, and deviſes them to the heir of his brother *A.* and his heirs, and *B.* dies, leaving *A.* and his ſon; the deviſe is void for the uncertainty, who is intended thereby; for *A.* being an alien, can have no heir, or however being living, can have none during his life; but *per Glyn* Ch. Juſt. if it had been found that the ſon of *A.* was the reputed heir of *A.*, though *A.* was an alien, yet his ſon might have taken by this deviſe.

Hob. 29, 30. Cownden and Clerk, Moor, 860. S. C. A man had iſſue a ſon and a daughter, the daughter was married, and had iſſue two daughters; the father deviſed, that all his lands ſhould deſcend to his ſon, provided that if his ſon died without

out iſſue of his body, then my land to go to my right heirs male of my name and poſterity for ever; the ſon died without iſſue; and upon ejectment between the brother of the deviſor and the daughters, this was held a void deviſe, becauſe neither could claim under the deſcription of the will; not the brother, becauſe, though he was of his name, yet he was not his (*a*) heir; and though the daughters were his heirs, yet they were not of his name, and ſo not within the words of the will, and, conſequently, the limitation void for the uncertainty.

(*a*) This reſolution is founded on a rule laid down in the old books, viz. That he who taketh by deſcription or purchaſe as heir, muſt be heir general, or complete heir: for inſtance, if lands are deviſed to the heirs of *J. S.*, and *J. S.* is living at the death of the teſtator, the deviſe is void, for *non eſt hæres viventis*: ſo, if lands are deviſed to the right heirs male of *J. S.*, and the heir of *J. S.* is a female, the deviſe is void; or if the deviſe were to the heirs female, and the right heir had been a male, it would be void in the ſame manner; to which purpoſe *vide* Moor, 860. Co. Lit. 24. b. 2 Leon. 70. Dyer, 99. Hob. 33. 1 Co. Archer's caſe. 1 Co. 103. Shelly's caſe. [Ford v. Lord Oſſulſton, M. 7 Ann. B. R. Hargr. Co. Lit. 27. b. note. Dawes v. Ferrars, 2 P. Wms. 1. and Pr. Ch. 589. and Mr. Hargrave's notes in his Co. Lit. 24. b. 27. b. 164. a.] but notwithſtanding theſe authorities, this doctrine has been ſhaken by the following more modern reſolutions, in which it is held, that a ſpecial heir may take by purchaſe; and that a deſcription of a perſon by the name of heir, though not heir general, operating with the intention of the teſtator, is ſufficient to aſcertain the perſon to take. *Vide* Abr. Eq. 214, 215. Beaumont and Long. 2 Vern. 729. Newcomen and Barkham.

If a man deviſes lands to *A.* and his heirs, during the life of *B.*, in truſt for *B.*, and after the deceaſe of *B.* to the heirs male of the body of *B.* now living, *B.* having one ſon then living; by this deviſe a remainder is immediately veſted in the ſon, for the words *heirs male now living*, in a will, are a full deſcription of the ſon, who then was the heir apparent of *B.*, and known by the deviſor (who was his uncle and godfather) to be ſo.

2 Jon. 99. adjudged between James and Richardſon in B. R. but reverſed in the Exchequer-chamber; but the judgment of reverſal was reverſed in the Houſe of Lords. 2 Lev. 232. S. C. and *per* Levinz, this point was tried again upon a new ejectment; and like judgment given as at firſt in B. R. which was confirmed in the Exchequer-chamber, and likewiſe in the Houſe of Lords, Vent. 334. S. C. by the name of Burchet and Durdant. 2 Vent. 311. S. C. Raym. 330. S. C. 3 Keb. 32. S. C. Pollex. 457. S. C.

[*S.*, after deviſing hereditaments to truſtees for twenty-one years for the payment of debts, &c. ſettled the ſame on the firſt ſon of his body lawfully begotten, and the heirs male of the body of ſuch firſt ſon lawfully iſſuing, and, for default of ſuch iſſue, to his couſin *J. S.* for ninety-nine years, if he ſhould ſo long live, remainder to his firſt and other ſons in tail male, and, in default of ſuch iſſue, remainder to the *heirs* male of the body of the teſtator's aunt *E. L.* lawfully *begotten*, and, for default of ſuch iſſue, remainder to his own right heirs. The teſtator alſo gave a legacy to his ſaid aunt *E. L.*, *whereby he took notice, that ſhe was living, and that ſhe had three ſons*, *A.*, *B.*, and *C.*, to whom he gave a legacy of 500*l.* He likewiſe gave to *D. B.*, who was his heir at law, *an annuity out of the ſaid* hereditaments of 150*l. per annum*, and to *her* children 500*l.* a-piece. Afterwards the teſtator died without iſſue, as did alſo *J. S.*; upon which the queſtion was, Who was entitled to the teſtator's real eſtate, whether his heir at law *D. B.*, or *A.* the eldeſt ſon of the teſtator's aunt *E. L.*? And one objection taken to the claim of *A.* was, that *E. L.* his mother being living at the teſtator's death, there was no *heir* of *E. L.*, nor could be whilſt ſhe was living; and that *heir*, being a legal term, could be underſtood only

Darbiſon on dem. Long v. Beaumont, 1 P. Wms. 229. 1 Brown. Parl. Ca. 489.

only in a legal sense, unless some other word or words accompanying it should determine the sense otherwise, as *heir apparent*, or heir *now living*; and it was said, that the word *begotten* did not determine the sense to be special; because the word *begotten*, or to be begotten, had the same legal construction; and it did not appear that the devisor had any intention to confine the devise to the issue male of *E. L.* then living, much less to *A.* only, who would take as the heir described by this devise. But it was adjudged in the Exchequer, which judgment was afterwards reversed in the Exchequer-chamber, and that reversal reversed in the House of Peers, that *A.* was entitled under this devise: and the principal reasons upon which the court of Exchequer founded their judgment, and upon which the House of Lords affirmed it, were, because it was evident from the whole will, that he was the person *manifestly* designed to take by the appellation of the *heir* male of the body of the testator's aunt *E. L.* lawfully begotten, before the heir general of the testator, who was to take no more *than an annuity* so long as there should be issue male of his aunt; and then, although the word heir, in the strictest sense, signified one who had succeeded to a dead ancestor, yet, in a more general sense, it signified an heir apparent, which supposed the ancestor to be living. Then, when the testator also took notice, that *E. L.* the ancestor was living at that time, and gave her a legacy, he could not intend that the first son should take *strictly as* heir, which was impossible if *she* was living, but, as heir apparent he might intend him to take.

Goodright on dem. Brooking v. White, 2 Blackst. Rep. 1010.

Again, *B.* devised to *M.* his wife, *inter alia*, an annuity of 10*l.* *per annum* charged upon the estates in question for eighty years if she so long lived, on condition that she claimed no dower; and, after the decease of *M.* his wife, devised annuities of 40*s.* *per annum* each to his daughters *E. N.*, *M. T.*, and *A. H.* for ninety years, if they should respectively so long live; also to his daughter *M. W.*, the wife of *W.*, another annuity of 40*s.* *per annum* for seventy years, if she and the testator's only son *R. B.* should jointly so long live, the said term of seventy years to commence at the expiration of the term of two years thereafter given in the estates to his said daughter *M. W.*, and the death of *M.* his wife, and, subject to the same annuities, gave the estates to his daughter *M. W.* for two years from and after his decease, with remainder to *R. B.* his son for ninety-nine years if he so long lived, and subject to such ninety-nine years term, he devised the same to his son *R. B.* and his heirs male, and to the heirs of his daughter *M. W.* jointly and equally, to hold to the heirs male of *R. B.* lawfully begotten, and to the heirs of *M. W.* jointly and equally, and their heirs and assigns for ever; and, for want of heirs male lawfully begotten of the body of the said *R. B.* at the time of his decease, he devised the same, charged as aforesaid, *to the* HEIRS *and assigns* of the said *M. W.*, lawfully begotten of her body, to hold to the HEIRS *and assigns* of the said *M. W.* for ever. He then devised a leasehold house to his daughter *J. S.*, and made his daughter *M. W.* sole executrix and residuary devisee of all his

his perſonal and real eſtate. The teſtator died, leaving *M.* his widow, ſince deceaſed, *R. B.* his only ſon and heir, and five daughters, *viz.* *M.*, *I.*, *E.*, *A.*, and *M. W.*; and *R. B.* the ſon had, at the time the will was made, a ſon *R.* and two daughters; and *M. W.* the teſtator's daughter then had one ſon, and, after the teſtator's death, ſhe had another ſon, both living, and no other children. On the death of the teſtator, *M. W.* entered into the whole of the eſtate, and held the ſame for two years, after which *R. B.* the ſon entered, and held the whole during his life. *R. B.* died, leaving his only ſon *R.*; upon which *M. W.* entered into the whole of the eſtates: and, on an ejectment brought by *G.* on the demiſe of *R.*, ſon of *R. B.*, againſt *M. W.*, the queſtion was, Whether the plaintiff was entitled to recover? And it was contended, that *R.*'s deviſe to the heir of *M. W.* in the event that had happened was void; for, at the expiration of the particular eſtate by the death of *R.* the ſon, living the daughter *M. W.*, nobody could take as heir of *M. W.* for *nemo eſt hæres viventis.* But, by *De Grey*, Chief Juſtice, the queſtion is, Whether here is a *ſufficient deſcription* of the perſon to make the ſon of *M. W.* take as *her* heir *living the mother.* The intention of the teſtator is clear, that the ſame favour ſhould be extended to the heirs of *M. W.* as to the heirs male of the body of *R.* He took notice that the daughter was living, *by leaving her a term and a ſubſequent annuity*, and meant a preſent intereſt ſhould veſt in her heir, that was, her heir apparent, during her life. He therefore did not think the leſſor of the plaintiff was entitled to more than a moiety of the eſtates. *Gould*, *Blackſtone*, and *Nares*, Juſtices, were of the ſame opinion. *Blackſtone* thought that, as the teſtator had *varied* the tenure of *M. W.*'s annuity from that of the three other ſiſters, *their*'s depending on their own ſingle lives, and *her*'s on the joint lives of herſelf and her brother *R.*, it was plain the teſtator had in his contemplation that *ſhe might ſurvive* R., as, in fact, ſhe did; and, therefore, the word *heir* muſt be conſtrued as equivalent to *iſſue*, in order to make him take in her lifetime, agreeable to the intent of the teſtator.]

A. deviſed in this manner: I give to my eldeſt heir male, and his heirs male for ever, all my lands in ſuch a place; and if there be a female, ſhe to have 12 *l.* *per annum* as long as ſhe lives; the teſtator had two ſons, the eldeſt of which died in his lifetime, leaving iſſue; and it was adjudged, that the lands ſhould go to the ſecond ſon, and not to the daughter of the eldeſt, though ſhe was heir general. Abr. Eq. 214. Baker and Hall, adjudged in C. B. 1 Ld. Raym. 185. S. C. by the name of Baker v. Wall, Pr. Ch. 468. S. C. cited by Lord Chancellor.

J. S. deviſed to truſtees in truſt, after debts and legacies paid, to convey to *A.* his couſin, and the heirs male of his body, and for want of ſuch heirs male, then to the heirs male of the body of *B.* his great-grandfather, and for want of ſuch heirs male, to his own right heirs for ever, and gave to his ſiſter 2000 *l.* to be put out at intereſt during her life, ſhe to receive the intereſt, and after her death to her children, and died; and ſoon after *A.* died without iſſue, and *C.* being heir male of *B.* the teſtator's great-grandfather, but 2 Vern. 729. Newcomen and Barkham, and this matter well debated. [1 Eq. Abr. tit. Deviſes, 215. pl. 14. S. C. Pr. Ch. 442. 46.

S. C. by the name of Brown v. Barkham. On a bill of review brought before Lord

but not heir general, there being a daughter of an elder brother; the queſtion was between him and the teſtator's ſiſter, and the heir at law, who had the 2000 *l.* deviſed to her, Whether the deviſe was void, or not? and my Lord Chancellor held the deviſe good, and that *C.* ſhould take as a perſon ſufficiently deſcribed and intended by the teſtator.

Hardwicke, in November 1741, the decree in this caſe was affirmed, but according to a note of it in Hargr. Co. Lit. 27. b. his Lordſhip conſidered the caſe as an exception to the general rule. But the opinion of Lord Cowper has been ſince confirmed by a deciſion of the court of King's Bench on a caſe ſent by the court of Chancery. The queſtion aroſe on both a will and a deed, whether *A.* took by purchaſe under the deſcription of *heir-male of the body* of *B.* not being heir general? *B.* being in the deed the *grantor*, the court certified that *A.* took an eſtate-tail by *deſcent*, but they added in the certificate, that if a *third perſon* had been the grantor, they ſhould have thought that *A.* would have taken by *purchaſe* as heir male of the body of *B.*—And they alſo certified, that he did ſo take under the will. Wills v. Palmer, 5 Burr. 2615. And the ſame point was reſolved on a marriage ſettlement in the caſe of Evans v. Weſton, in the Exchequer, M. 1774, and H. 1775.]

[A deviſe is never conſtrued abſolutely void for uncertainty, but from neceſſity; for, if there be a poſſibility to reduce it to a certainty, the deviſe is good.

Ungly v. Peale, 2 Ld. Raym. 1312. 10 Mod. 103. 2 Eq. Ca. Abr. 358. 8 Vin. Abr. tit. Dev. D. Ca. 19. Note, This caſe was firſt adjudged in C. P. and that judgment afterwards affirmed on writ of error in K. B.

One ſeiſed in fee of a houſe at *Ludgate*, deviſed the ſame "to "*S.* and his brothers ſucceſſively for their lives," and then the teſtator, after mentioning another matter, went on and ſaid, "And as for my houſe at *Ludgate*, I do not leave it to *S.* nor his "brothers afore to be entered on and enjoyed till one month after "their marriages." *S.* at the time of making the will had two brothers, *R.* and *O.*; *S* was the eldeſt, *R.* the ſecond, and *O.* the third ſon; *R.* died in the lifetime of *S.* and *O.*; and the queſtion was, Whether this was a good deviſe, or void for uncertainty? And it was argued againſt the deviſe, firſt, that it was void for uncertainty, by reaſon of the word *ſucceſſively* not ſhewing which ſhould take firſt and which ſecond in ſucceſſion: ſecondly, that the condition in relation to marriage made it more uncertain; for, till marriage none could take; and ſuppoſe the ſecond brother had married, and neither of the other two, who muſt have taken? Certainly none of them; for, if he that was married ſhould take firſt, then that would overthrow the other conſtruction of *ſucceſſive*, that the oldeſt ought to take firſt, and then the ſecond, and then the third. *Sed per totam curiam*, the will was good and certain enough; for, being in the caſe of brothers, the common *law* was a guide to the expoſition of the word *ſucceſſive*, *viz.* that the eldeſt ſhould, after his marriage, enjoy it firſt for his life, then the ſecond, and then the third; and the court agreed, that the clauſe about marriage made no alteration in the expoſition of the will, but only added a reſtriction to the deviſe, which before was general; and, therefore, that if the ſecond ſon had married before the eldeſt, yet he could not have taken by this deviſe.]

4. By the Deviſee's dying in the Lifetime of the Deviſor.

Plow. Com. 345. Bret and Rigden, [Goodright

If a man deviſes lands to *A.* and his heirs, and *A.* dies in the lifetime of the deviſor, the heir of *A.* ſhall take nothing by the will, for the heirs of *A.* were not named as immediate takers, but

but only to expreſs the quantity of the eſtate that *A.* ſhould take. v. Wright, 1 Str. 25. and 1 P. Wms. 397. S. P. Warner v. White, Dougl. 344. and 1 Br. Ch. Rep. 219. note, S. P. Hodgſon v. Ambroſe, Dougl. 336. S. P. Doe v. Kett, 4 Term Rep. 601. And the law is the ſame in the deviſe of a copyhold, Buſby v. Greenſlate, 1 Str. 445. Duke of Marlborough v. Lord Godolphin, 2 Ver. 77. And that a new publication of the will after the death of *A.* would not make ſuch a deviſe good, ſee 4 Term Rep. 601. 2 Lev. 243. Sir T. Jon. 135. Sir T. Raym. 408. 1 Mod. 267. 2 Mod. 313. Pollex. 546. 1 Ventr. 341.]

If a man deviſes lands to *A.* his ſecond ſon, and to the heirs of his body, and after his death without iſſue, then to *B.* his third ſon in tail, *&c.* if *A.* hath iſſue and dies in the lifetime of the deviſor, and then the deviſor dies, *B.* ſhall have the lands preſently; for the deviſe to *A.* being void, it is as if it had never been made. Cro. Eliz. 422, 423.

If a man deviſes to *A.* and his heirs, to the uſe of *C.* and his heirs, and *C.* dies in the lifetime of the deviſor, his heir can take nothing; but the deviſe will be to the uſe of the deviſor and his heirs. Leon. 253. Cro. Eliz. 243. Hartop's caſe.

But if there be a deviſe to *A.* for life, remainder to *B.* in fee; though *A.* dies in the lifetime of the deviſor, *B.* ſhall take; or if *A.* refuſes, he ſhall take. Plow. 344. Cro. Eliz. 423. Co. 101. a.

If a man deviſes his lands to his wife for life, and after to his four daughters and heirs, equally to be divided between them, ſhare and ſhare alike, to hold to them and their heirs for ever; and one of the daughters dies, having iſſue a ſon, and then the deviſor dies, the will is void for a fourth part. 2 Sid. 53. 78. Packman and Cole.

So, if *A.* has iſſue two daughters *B.* and *C.*, and he deviſes ſome tithes and money to *B.*, and gives legacies to her children; but declares that ſhe having married without his conſent, ſhe ſhould have no part of his real eſtate, and deviſes his real eſtate to *C.* in tail, remainder to *B.* for life, and to her firſt, *&c.* and *C.* dies in the lifetime of the teſtator, leaving iſſue; though afterwards *A.* makes a codicil to his will, and deviſes ſome particular legacies out of his perſonal eſtate; yet as that does not amount to a republication of his will, *B.* muſt have rhe lands immediately after the death of the deviſor, though contrary to the intention of the deviſor, the authorities being ſo. 2 Vern. 722. Hutton and Simpſon. [Pr. Ch. 439. S. C. by the name of Sympſon v. Hornſby. Doe v. Kett, 4 Term Rep. 601.]

If a man deviſes lands to *A.* and *B.* and their heirs, and *A.* dies in the life of the deviſor, *B.* ſhall take the whole lands. Carter, 4, 5. Davis and Kemp.

*What circumſtances are neceſſary by the 32 *H.* 8. *c.* 1. and 34 and 35 *H.* 8. *c.* 5. and 29 *Car.* 2. *c.* 3., and what ſhall be a revocation and a new publication, *vide* tit. *Will.**

MVSEVM BRITANNICVM

Legacies.

In treating of Legacies, we ſhall conſider

(A) What a Legacy properly is. 337.

(B) Where a Legacy ſhall be ſaid to be well given: And herein,

1. What Words make a good Bequeſt.
2. What ſhall be a ſufficient Deſcription of the Perſon to take.
3. What ſhall be a ſufficient Deſcription of the Thing given, and what ſhall be ſaid to be bequeathed.

(C) What ſhall be an Ademption or Extinguiſhment of a Legacy. 354.

(D) Where a Legacy ſhall be preſumed to be a Satisfaction of a Debt or Duty owing from the Teſtator. 362.

(E) Of Legacies veſted or lapſed: And herein,

1. Where it ſhall be a lapſed Legacy by the Legatee's dying in the Lifetime of the Teſtator, and where in ſuch Caſe it ſhall veſt in another Perſon, to whom it is limited over. 307.
2. Where a Legacy ſhall be ſaid to be veſted or lapſed, being to be paid at a future Time, to which the Legatee did not arrive. 393.

(F) Of Conditional Legacies, and how far the Condition muſt be complied with, otherwiſe the Legacy will be forfeited.

(G) Of Specifick and Pecuniary Legacies, and the Difference between them. 425.

(H) Of abating, refunding, and giving Security for that Purpoſe.

(I) Of Reſiduary Legacies and Legatees.

(K) Of the Payment of Legacies: And herein,

1. What

1. What ſhall be a good Payment, and to whom to be made.

2. At what Time a Legacy is to be paid.

3. Where the Legatee ſhall have Intereſt, and Maintenance in the mean Time. 435.

(L) Of the Executors Aſſent to a Legacy.

(M) Legacies, in what Court, and how properly recoverable. 446.

(A) What a Legacy properly is.

A (a) Legacy is defined a gift or bequeſt of a (b) particular thing by teſtament, in which an executor is (c) named, or by a writing in nature thereof, called a codicil, in which no executor is named.

Swinb. 17. Godolph. 271. (a) The word *Deviſe* is ſpecially appropriated to a gift of lands, the word *legacy* to a gift of chattels, though both are uſed promiſcuouſly. Godolph. 271. (b) For if a man diſpoſe or transfer his whole right or eſtate upon another, this, according to the civil law, is called *hæreditas*, and he to whom it is transferred is termed *hæres*; but by our law he only is called *heir*, who ſucceeds to lands and tenements. Godolph. 271-2. (c) But though a writing in which a perſon expreſſes his mind to grant ſuch and ſuch things after his death, cannot be called a teſtament, unleſs an executor is named, yet it is of force and effect ſufficient to paſs what he therein declares, and adminiſtration ſhall be granted, with the ſaid writing or codicil annexed, to the next of kin, and ſuch adminiſtrator is obliged to obſerve the directions of ſuch writing, and pay the legacies as far as he has aſſets. *Vide* tit. Executors and Adminiſtrators.

A *donatio cauſâ mortis* is a gift *in præſenti*, to take effect *in futuro* after the party's death, and is in nature of a legacy, and waits upon the death of the teſtator, and is ambulatory and open till his death, and may therefore be revoked, as a will may, but has no dependance on the will; and therefore by a general revocation of all former wills ſeems not to be revoked, without added, and all gifts, legacies, &c. But if one juſt before his death give any money, or other goods, to another abſolutely, this is not a *donatio cauſâ mortis*, becauſe not revocable; otherwiſe, if he had ſaid, *This ſhall be yours, if I die*, or any thing to that purpoſe.

Swinb. 22. Prec. Chan. 269. 300. [In conſidering the doctrine of donations *mortis cauſâ*, one cannot help remarking how cloſely the deciſions of the courts of this country have followed the Imperial Conſtitutions. Bracton in treating of this ſubject uſes the very language of the Roman law. Lib. 2. c. 26. It ſeems therefore not to be altogether improper, or to be digreſſing too far from the limits of our work, to enter into a ſhort compariſon of the Imperial and Engliſh laws upon this ſubject.

A donation *mortis cauſâ* is deſcribed in the Inſtitutes, "*Cum quis ita donat, ut ſi quid humanitùs ei contigiſſet, haberet it, qui accipit; ſin autem ſupervixiſſet is, qui donavit, reciperet; vel, ſi eum donationis pœnituiſſet, aut prior deceſſerit is, cui donatum ſit.*" And in another part, "*Cum magis ſe quis velit habere, quam eum, cui donat, magiſque eum, cui donat, quam hæredem ſuum.*" So with us, a donation of this kind muſt have relation to the death of the donor, is perfected by his death, and until his death is merely conditional, liable to be defeated by the death of the donee in the lifetime of the donor, by the revocation of the donor; and as Bracton ſtates it, by the donor's recovery, or eſcape from the danger he apprehended himſelf to be in, and ſee acc. Lawſon v. Lawſon, 1 P. Wms. 441. but ſee Hill v. Chapman, 2 Br. Ch. Rep. 612. *ſemb. contr.* And as with us, if it be not made with reference to death, if it be to take effect preſently, if it be revocable, it is then, not a donation *mortis cauſâ*, but a donation *inter vivos*, and therefore cannot have place between huſband and wife; (and a prope donation *mortis cauſâ* may, like a legacy, paſs between perſons in that relation,) Tate v. Hilbert, 2 Vez. jun. 111. 4 Br. Ch. Rep. 286. S. C. Lawſon v. Lawſon, 1 P.

Wms. 441. Miller v. Miller, 3 P. Wms. 356.; ſo, by the Imperial law, "*Ubi ita donatur mortis* "*cauſâ, ut nullo caſu revocetur,* [MORS] (which muſt be ſupplied) *cauſa donandi magis eſt, quam mortis* "*cauſâ donatio; et ideo perinde haberi debet, atque alia quævis inter vivos donatio; ideoque inter viros et* "*uxores non valet.*" D. L. 39. tit. 6. l. 27.——By both laws a donation of this kind may be made by a perſon *in periculo mortis* not only from ſickneſs, but from whatſoever other cauſe. D. L. 39. tit. 6. l. 3, 4, 5, 6. Bract. Lib. 2. c. 26. And as by the Engliſh law, it is ſubject to the debts of the donor, and fraudulent as againſt creditors, Drury v. Smith, 1 P. Wms. 406. ſo by the Imperial law, "*Sicuti legata* "*non debentur, niſi deducto ære alieno, aliquid ſuperſit; nec mortis cauſâ donationes debebuntur; ſed infirman-*"*tur per æs alienum. Quare, ſi immodicum æs alienum interveniat, ex re mortis cauſâ ſibi donatâ nihil aliquis* "*conſequitur.* D. L. 35. tit. 2. l. 66. § 1. *Et ſi debitor conſilium creditorum fraudandorum non habu-*"*iſſet, avelli res mortis cauſâ ab eo donata debet. Nam cum legata ex teſtamento ejus qui ſolvendo non fuit,* "*omnimodo irrita ſint; poſſunt videri etiam donationes mortis cauſâ factæ reſciſſa debere, quia legatorum inſtar* "*obtinent.*" D. L. 39. tit. 6. l. 17.—— Whether, by the Imperial law, a delivery either actual or ſymbolical of the ſubject of the donation were abſolutely neceſſary, no where diſtinctly appears, and hath indeed been a matter of controverſy among civilians. Whether, by our law, an actual delivery *be in all caſes* requiſite, hath not yet been adjudged; in general, it certainly is ſo. Aſhton v. Dawſon, Sel. Ca. in Can. 14. Drury v. Smith, 1 P. Wms. 404. Hedges v. Hedges, Pr. Ch. 269. Ward v. Turner, 2 Vez. 441. And a mere ſymbolical delivery will clearly be of no effect; unleſs indeed the ſymbol be ſuch as enables the party to come at the poſſeſſion of the thing which it repreſents, ſuch as the key of a trunk which contains the thing given. Jones v. Selby, Pr. Ch. 300. 2 Vez. 443. Hence it hath been determined, that the delivery of a promiſſory note, not payable to bearer, Miller v. Miller, 3 P. Wms. 357. and of receipts for *S. S.* annuities, Ward v. Turner, 2 Vez. 439. is not a ſufficient delivery to effectuate a gift of this kind of the money due on the note or of the annuities, the property neither in the note nor in the ſtock, paſſing thereby; and yet the delivery of a bond, though a *choſe in action*, hath been holden to amount to a gift (*mortis cauſâ*) of the debt itſelf. Snellgrave v. Bailey, 3 Atk. 214. But ſee 3 P. Wms. *ubi ſupra.*—— That a donation *mortis cauſâ* was good without delivery, where it was evidenced by writing, was admitted by the Imperial law.—QUIDAM (which muſt be ſupplied) *avunculo ſuo debitori mortis cauſâ donaturus quæ debebat, ita ſcripſit.* TABULÆ, VEL CHIROGRAPHA TOT, UBICUNQUE SUNT, INANES ESSE; *neque eum ſolvere debere. Quæro, an hæredes, ſi pecuniam ab avunculo defuncti petant, exceptione doli mali tueri ſe poſſint? Marcellus reſpondit, poſſe: nimirum enim contra voluntatem defuncti hæres petit ab eo.* D. L. 39. tit. 6. l. 28. And with us in a late caſe, Lord Chancellor Loughborough, in ſpeaking on this ſubject is reported to have ſaid, "It is not neceſſary in this caſe to diſcuſs, whe-"ther delivery is neceſſary in all caſes. Perhaps, it might not be difficult to conceive that ſuch a gift might "be by deed or by writing. It is clear it could not be by mere parol; becauſe ſaying 'I *give*,' without an "act, does not transfer the property. So far I concur with the reaſoning of Lord Hardwicke, in Ward "v. Turner. It might be conſidered, if the caſe ſhould ariſe, whether there would be any objection to "a formal deed. I ſhould think it not within the juriſdiction of the eccleſiaſtical court, and that the "property ſo given is not to be poſſeſſed by the executor." Tate v. Hilbert, 2 Vez. jun. 120. And an inſtance of ſuch a gift by deed occurs in the caſe of Johnſon v. Smith, 1 Vez. 314. Indeed a deviſe of lands ſeems to be nothing elſe but a conveyance or diſpoſition *mortis cauſâ.* 1 Burr. 429.——A delivery to a third perſon to hold in truſt for the donee, to be given to him in the event of the donor's death, was allowed to be ſufficient by the Imperial law, D. L. 39. tit. 6. l. 8. § 2.; but it may be doubted, whether it would be ſo by our law, by reaſon of the maxim, *donatio perficitur poſſeſſione accipientis*, Jenk. 109. ca. 9. whence gifts with us have the ſemblance of contracts.—— To effectuate gifts of this kind the Emperor Juſtinian required the teſtimony of five witneſſes, Cod. Lib. 8. tit. 57. l. 4. a caution which hath been thought reaſonable, and in ſome degree followed by our own courts, Ward v. Turner, 2 Vez. 438.; though it muſt be admitted, that ſuch a gift has been ſupported upon the teſtimony of only one witneſs. Hill v. Chapman, 2 Br. Ch. Rep. 612.——By the Roman law, every thing was capable of being the ſubject of a donation *mortis cauſâ*; but by our law the neceſſity of delivery excludes all thoſe things, the property wherein does not or cannot paſs by delivery, 3 P. Wms. 357. 2 Vez. 436-7.; though, if, according to the inclination of Lord Loughborough's opinion, *ſupra*, ſuch a donation may be effectual by deed or writing without livery, it ſeems to follow, that even thoſe things which are of too complex a nature to paſs by delivery, ſuch as the whole, or reſidue of perſonal eſtate, may be ſo diſpoſed of.]

Cro. Jac. 345-6. 2 Bulſ. 207. Godb. 246. but *vide* now the ſtatute 29 Car. 2. c. 3. and tit. Wills and Teſtaments.

If one by his will in writing deviſe a certain legacy in money, and afterwards ſay to his executor, *I have by my will given ſuch particular legacies, I would have you increaſe the ſame to ſuch a ſum*, this by the civil law is termed *commiſſum fidei*, and a good legacy.

2 Leon. 119.

If a man covenants with *J. S.* to pay him 20 *l.*, and afterwards by will he deviſes to him 20 *l.* in diſcharge of the ſaid covenant, this is not a legacy ſuable in the ſpiritual court, but remains ſtill a debt, recoverable at common law.

But

But if *A.* covenants with *J. S.* that he will pay 20*l.* a-piece to *B.*, *C.*, and *D.*, and afterwards he deviſes 20*l.* a-piece to *B.*, *C.*, and *D.*, in diſcharge of this covenant, theſe are good legacies, and recoverable in the ſpiritual court, the covenant in this caſe being with a ſtranger, and therefore *B.*, *C.*, and *D.* have no remedy, but by applying as legatees. 2 Leon. 119. Davies and Percie's caſe; & *vide infra*, letter (M).

(B) Where a Legacy ſhall be ſaid to be well given: And herein,

1. What Words create a good Bequeſt.

HERE we muſt obſerve, that although in grants and deeds of gift the law requires a ſet form of words, yet in laſt wills and teſtaments, which are preſumed to be made at the time when the teſtator is *inops concilii*, the law regards chiefly the intention of the teſtator, and therefore any words, which manifeſt his intention to create or give a legacy, will be ſufficient for that purpoſe. Godolph. 281. 2 Vern. 467.

As, if a man by his will ſays, *I do give, bequeath, deviſe, order or appoint to be paid, given, or delivered*; or, *My will, pleaſure, or deſire is* (*a*), *that he ſhall have and receive, or keep or retain*; or, *I diſpoſe, or aſſign, or leave ſuch a thing to ſuch a one*; or, *Let ſuch a perſon have ſuch a thing*; theſe, or the like words, are ſufficient to create a good bequeſt. Godolph. 281.

[(*a*) If a teſtator *deſire* his executor to give another 200*l.* without preſcribing any time of payment, it is a good bequeſt. Breſt v. Offley, 1 Ch. Rep. 246. For where the property and the perſon are aſcertained, *recommendatory* bequeſts are conſidered as *imperative*. Harding v. Glyn, 1 Atk. 469. Richardſon v. Chapman, 1 Burn's E. L. tit. Biſhops, p. 220. 5 Br. P. C. 400. Earl of Bute v. Stuart, 5 Br. P. C. 534. Palmer v. Scribb, 2 Eq. Ca. Abr. 291. Harland v. Trigg, 1 Br. Ch. Rep. 142. Wynne v. Hawkins, *Id.* 179. Nowlan v. Nelligan, *Id.* 489. Pierſon v. Garnet, 2 Br. Ch. Rep. 45. 230. Malim v. Keighley, 2 Ves. jun. 333. 529.]

So, if the teſtator ſays, *I depute ſuch a thing to* A. B., or, *I aſſign ſuch a thing to* C. D.; theſe are good bequeſts or legacies. Godolph. 282. Where it is ſaid, that a legacy may be given by ſigns, becks, or nods, by the head, hands, or eyes, or by ſhewing a pleaſed or diſpleaſed countenance, or by other motion of the body; becauſe the law regards more the meaning and intention, than the words of the teſtator. Godolph. 282-3.

So, if a man by will gives 100*l.* beſides the cloak, *&c.*; this is a good bequeſt of the cloak, *&c.* as well as of the 100*l.* Godolph. 282.

So, if a man ſays, *Out of the* 100*l. which I bequeathed* A. *I give* B. 50*l.*; this a good bequeſt of the 50*l.* to *B.*, becauſe only a falſe demonſtration in an immaterial circumſtance, which ſhall not vitiate the legacy; but in this caſe *A.* takes nothing; for words of diminution ſhall never be conſtrued to give a legacy by implication. Godolph. 282.

But if the demonſtration be totally falſe, as if the teſtator ſays, *I bequeath to* A. *the* 100*l. which I have in my cheſt*, and there is not any money in the cheſt, the legacy is void. Godolph. 282.

If the teſtator ſays thus, *If my ſon* A. *marries* B., *let not my executor give him* 100*l.*; theſe words, on *A.*'s not marrying *B.*, are ſaid to be ſufficient to give him the 100*l.* Godolph. 283.

Godolph. 284. If a legacy be given by the teſtator to the ſon of one who is indebted to him, and the teſtator add theſe words, *I ſhould or would leave him more, if his father had paid me what he owes me*, it is held, that if afterwards that ſon happens to be his father's executor, he is by theſe words freed from that debt, which his father owed the teſtator.

2 Vern. 467. If there be a deviſe of a perſonal thing to *A.* for life, directing him at his death to give it to *B.*; this amounts to a deviſe of the uſe of it only to *A.* for life, remainder to *B.*

Nowlan v. Nelligan, 1 Br. Ch. Rep. 489. [A teſtator made a teſtamentary paper in the following words: "I give and deviſe unto my loving wife *H. N.* all my real and "perſonal eſtate; I make no proviſion expreſsly for my dear "daughter (the plaintiff), knowing that it is my dear wife's happineſs, as well as mine, to ſee her comfortably provided for; "but in caſe of death happening to my ſaid wife, in that caſe, I "hereby requeſt my friends *S.* and *H.* to take care of, and manage to the beſt advantage, for my lovely daughter *H. N.*, all "and whatſoever I may die poſſeſſed of." The executors proved this teſtamentary paper, and got in the perſonal eſtate of the teſtator, to the amount of 7,947*l.* 10*s.*, with which they purchaſed 11,000*l.* 4 *per cent.* annuities. On a bill filed by the daughter, praying, that the whole of theſe annuities might be transferred, and ſecured to the uſe of the plaintiff, ſubject to the life-eſtate of her mother, and be declared to belong, ſubject to ſuch life-intereſt, to the plaintiff, Lord *Thurlowe* directed the whole fund to be transferred to the Accountant-general, the whole annual produce to be paid to the defendants (the mother and her ſecond huſband) ſo long as they ſhould continue to maintain the plaintiff, with liberty to her to apply, if they ſhould diſcontinue ſuch maintenance.]

2 Vern. 181. Robinſon v. Duſgate; *& vide* Hob. 9. *A.* deviſes his land to *B.* in fee, paying 400*l.* whereof 200*l.* to be at the diſpoſal of his wife, in and by her laſt will and teſtament, to whom ſhe ſhall think fit to give the ſame; theſe words veſt an abſolute intereſt in the wife, ſo that though ſhe dies inteſtate, her adminiſtrator ſhall have the 200*l.*

2 Vern. 513. Thomas and Thomas. If a man gives legacies to his children, to be paid at twenty-one or marriage, and if any of them die before twenty-one or marriage, the legacy of ſuch child to be diſpoſed of to two or more of the children then living, in ſuch manner as his wife (whom he makes executrix) ſhall think fit, and one of the children dies under age, and unmarried, the mother (*a*) may appoint ſuch legacy to any one of the other children, and it will be good.

(*a*) But if an executor has a general power to diſtribute a ſum of money amongſt children at diſcretion, and he makes an unreaſonable or indiſcreet diſpoſition, it will be controlled in a court of equity. 2 Vern. 513. ——As, where a man having two daughters, one by a former wife, and another by a ſecond wife, deviſed his eſtate to his wife, to be diſtributed between his daughters as his wife ſhould think fit, and ſhe having given 1000*l.* to her own daughter, and but 100*l.* to the other, the court decreed an equal diſtribution. Vern. 355. Cragrave and Perroſt; *& vide* 2 Vern. 421. S. P. [Alexander v. Alexander, 2 Vez. 640. Menzey v. Walker, Ca. temp. Talb. 72. S. P.]

2 Chan. Ca. 198. Martin and Clerk. If a man deviſe 40*l.* to be paid *J. S.*, by him to be diſpoſed of in ſuch manner as the teſtator ſhould, by a private note, acquaint him

him with, and die without ſuch appointment, this is ſaid to be a good bequeſt to the party.

But it has been held, if *A.* by will gives a houſe at *F.* to *B.* his wife for life, and declares that he will diſpoſe of the goods and furniture in that houſe, after the death of *B.*, by a codicil, and makes *B.* reſiduary legatee of all the *reſidue of his perſonal eſtate whatſoever not before diſpoſed of, or reſerved to be diſpoſed of by his codicil*, then makes two codicils, but takes no notice of the goods and furniture in the houſe at *F.*, and makes his wife one of his executors, that the wife ſhould not have the abſolute intereſt in the goods and furniture in the houſe at *F.*, but that it ſhould be diſtributed after her death as an undiſpoſed intereſt, and ſhe to have her widow's part thereof only. 3 P. Wms. 40. Trin. 1730. Davers and Dewes & al. decreed.

If one deviſe his land for payment of his debts and legacies, and deviſe 400 *l.* a-piece to two of his ſiſters, and to his third as much as his executor ſhall think fit; the third ſhall have 400 *l.* alſo, and be made equal to her other ſiſters, if the eſtate will hold out. 2 Vern. 153. Wareham and Brown.

2. What ſhall be a ſufficient Deſcription of the Perſon to take.

It ſeems agreed, that if a man deviſes legacies to all his children and grandchildren, that this extends only to thoſe who were *in eſſe* at the time when the will was made, for then the will ſpeaks, and none born after are to be let in, unleſs there had been future words in the will, *to all his children or grandchildren which ſhould be born or be living at his death.* Dyer, 177. Co. Lit. 112. b. Preced. Chan. 470. 1 P. Wms. 340. 2 Vez. 84.

But in 2 Vern. 105. where a man deviſed 20 *l.* a-piece to all the children of his ſiſter; it is there ſaid to have been decreed, that a child born after the will, and before the death of the teſtator, ſhould take, the word *children* comprehending all.

[A reſidue of perſonal eſtate was bequeathed to the teſtator's brother *H.* and *all* his children, to be divided amongſt them, ſhare and ſhare alike: *H.* had ſeveral children; the teſtator dies; and ſix months afterwards another child is born. Lord *Talbot* held, that this child could not take. Webb v. Webb, Hil. 1735, cited in 1 Vez. 112.

A teſtator bequeathed 2000 *l.* to all the children of his nephew *J. H.*, who ſhould be living at the death of *A.*; and afterwards bequeathed the moiety of the reſidue of the perſonal eſtate to all the children of *J. H.*, payable at 21 or marriage. The queſtion was, Whether children born after the death of the teſtator could take? And the court were of opinion that as to the 2000 *l.* they ſhould, if born before the death of *A.*, upon the particular words of the will; but as to the reſidue, thoſe only who were living at the death of the teſtator could take. Hale v. Hale, 6 Geo. 2. cited *ibid.*

A teſtatrix deviſed lands to truſtees in truſt to ſell for payment of her debts, and gave all the reſidue ariſing by ſuch ſale, and all her perſonal eſtate among all the children reſpectively, male or female, of her brother and ſiſter *H.* They had only four children at the time of making the will, and after the death of the teſtatrix, another was born. Lord C. B. *Parker*, ſitting for Lord Chancellor, held, that this after-born child was not entitled to any ſhare under the will. Heath v. Heath, 2 Atk. 121.

Coleman v. Seymour, 1 Vez. 209.

A teſtator gave a legacy of 3000*l.* to his daughter *J.* wife of *C.* for the uſe of her younger children, to be by her diſtributed among them in ſuch manner, ſhares, and proportions, as ſhe ſhould think fit; and if no appointment ſhould be made by her, then equally to be divided between her younger children, and to ſurvive, if any of the children died under age or unmarried. The queſtion was, Whether the legacy ſhould be for thoſe younger children only, whom the teſtator's daughter had at that time by that huſband; or, whether the younger children by any future huſband ſhould alſo take? By Lord *Hardwicke*, As to any children that may be born of a ſecond marriage, they could not be intended: for the daughter having four children by *C.* at the making of the will, if after his death ſhe married a ſecond huſband, having a great eſtate ſettled on the eldeſt ſon of that marriage, that ſon within the deſcription of a younger child would be contrary to the intent. But the words could not take in the children born ſubſequent to the making or death of the teſtator, being a preſent legacy. It might be different had he given it to her for life, and afterwards to her younger children; becauſe then it would be contingent, and a deviſe over: but here it is preſent; and the ſame as if he had ſaid, equally to be divided, unleſs ſhe appoints; being a veſted intereſt and immediate gift to them, ſubject to the power of variation given to the mother. Nor does the clauſe of ſurvivorſhip make any difference, being ſtill veſted. This legacy then, both in the intent and words, is preſent to them, and not to be extended to thoſe born after his death; and it can only mean children living at the making of the will; or, at fartheſt, at the death of the teſtator.

Horſley v. Chaloner, 2 Vez. 83.

W. H. bequeathed 200*l.* to the younger child of his ſon *W.*, or, if more than one, then to ſuch younger children, equally to be divided, and to be paid at their reſpective ages of 21, and if any die before 21, then to ſurvive to the others; and for want of ſuch younger child or children, or their not attaining 21, then the 200*l.* to go to the eldeſt child of his ſon *W.*, to be paid at 21. Two of the daughters were born in the life of their grandfather, and both came of age; and the queſtion was, Whether a daughter born after the teſtator's death ſhould be let in for a third equally with them? And the Maſter of the Rolls held, that ſhe ſhould not, for that in this caſe, the proviſion was expreſsly appointed to be paid at 21, and therefore it muſt be conſtrued to be veſted in thoſe living at the death of the teſtator, and cannot go farther.

Iſaac v. Iſaac, Ambl. 348.

A teſtator, after ſeveral legacies, gave to the children of his niece *A. I.* the remainder and reſidue of his eſtate, which he directed to be paid into a bank or ſtock, and the intereſt to be paid yearly for ſuch learning as that ſum would defray, and at the age of 20 years to be divided equally between them, and if ſhe had only one child, it ſhould have the whole; but if his niece had no children, the intereſt was to be paid to her or her huſband during the term of ſeven years, and then the whole ſum was to be delivered to her or her huſband. *A. I.* had four children living at

at the death of the teſtator, and after his death, had a fifth child born. Lord *Camden* was clear of opinion, that the intereſt veſted at the death of the teſtator, being given *per verba de præſenti*; and that the after-born child was excluded.

A teſtator deviſed all his goods and chattels to *J. C.* and *J. H.* to be ſold to pay his debts, and the overplus (if any) to be employed to the beſt uſe of their children begotten by the teſtator's daughters *M. C.* and *E. H.* equally to be divided between them. The Chancellor held, that the diviſion was to take place at the teſtator's death, and therefore that all children born in the lifetime of the teſtator took, but not thoſe born after his death. Roberts v. Higman, 1 Br. Ch. Rep. 532. note.

E. P. gave her real eſtates to truſtees for 500 years, upon truſt, for raiſing 200*l.* for better ſecuring her debts and other purpoſes, with remainder to truſtees for 1000 years, in truſt, to repay the 200*l.* and raiſe annuities, and ſubject to the terms ſhe gave the eſtate to *all and every the child and children* of her brother *T. G.* and the heirs of the body and bodies of ſuch child or children, as tenants in common, if more than one, in equal proportions; and in caſe of failure of iſſue of the bodies of ſuch child or children whoſe iſſue ſhould ſo fail, to every the remaining child or children of the ſaid *T. G.* and to the heirs of the body and bodies of all and every ſuch child and children, if more than one, to take as tenants in common; and if there ſhould be a failure of iſſue of all ſuch children, or if there ſhould be but one ſuch child, then to ſuch remaining or only child; in default of ſuch iſſue, to her brother *T. G.* for life, with remainders over. And ſhe directed the remainder of her perſonal eſtate to be placed at intereſt, and ſubject to annuities, ſhe gave it to all and every the child and children of her brother *T. G.* who ſhould live to attain 21, ſuch children, if more than one, to take equally, if only one, then ſuch only child; and if there ſhould be no ſuch children, or none who ſhould attain 21, then ſhe deſired her perſonal eſtate, and the rents and profits of her real eſtate, to be diſtributed amongſt her next of kin. *T. G.* had two children, *R.* and *E.*, born before the death of the teſtatrix, and three children, *S.*, *T.*, and *E.*, born after her death. A bill was brought by the daughter of *S.*, one of the after-born children, who died before 21, claiming the benefit of her mother's ſuppoſed ſhare of the real eſtate of the teſtatrix, as heir of the body of her mother. Lord *Thurlowe* was of opinion, that there was no point of time in this caſe to which the words, *all and every the child and children of* T. G. could be confined, except the death of the teſtatrix, and therefore determined, that the plaintiff's mother *S.*, who was born after the death of the teſtatrix, could have no ſhare. Singleton v. Singleton, 1 Br. Ch. Rep. 542. note.

G. L. bequeathed to his wife *M. L.* the reſidue of his real and perſonal eſtate for life; and after her death, he gave the ſame to the children of Mr. *John Ayton* and his wife *Jane*, to be equally divided between them the ſaid *Jane Ayton*'s children, and not any children of any other marriage by either party. At the death of the teſtator and his widow, *J. A.*, *S. A.*, and *M. A.* (ſince dead) were the only children of *John* and *Jane Ayton*, then born; but Ayton v. Ayton, *ibid.*

they had afterwards three other children. Sir *L. Kenyon* declared, that the intereſt in the reſidue of the teſtator's perſonal eſtate veſted abſolutely in the three children of *John* and *Jane Ayton*, who came into *eſſe* during the life of *M. L.*, and that thoſe born after were not entitled to a ſhare.

Hughes v. Hughes, 3 Fr. Ch. Rep. 352.

A teſtator diſpoſed of a reſidue upon truſt to apply the rents and profits of his houſes in, *&c.* and the dividends of his money in the publick funds, and all other his perſonal eſtate for the maintenance and education of all the children of his three daughters, until the youngeſt of ſuch children ſhould attain 21; and in caſe of the death of any of them before the youngeſt ſhould attain 21, who ſhould have been married, and ſhould have at his or her deceaſe a child or children, he directed, that ſuch child or children ſhould be entitled to the ſame ſhare which their deceaſed parents would have received in caſe they had reſpectively lived till the youngeſt of ſuch child or children ſhould have attained 21; and when ſuch youngeſt child ſhould have attained 21, then teſtator gave one full and proportionable ſhare of the capital thereof, to the proper uſe of ſuch his ſaid grandchildren as ſhould be then living, and the child or children of ſuch as ſhould be dead. The queſtion was, Whether the plaintiffs, who were the children of teſtator's three daughters born at the time of his deceaſe, were to take excluſively of the defendants, who were born after his death? Lord *Thurlowe* held, that the giſt was confined to the death of the teſtator.

Viner v. Francis, 2 Br. Ch. Rep. 658.

A teſtator gave a legacy to the children of his *late ſiſter M. C.* At the date of the will, there were three children of *M. C.* living, but one of them afterwards died in the lifetime of the teſtator. It was contended, that one-third of the legacy given to the children of *M. C.* lapſed into the reſidue. But the Maſter of the Rolls, Sir *R. P. Arden*, was of opinion, that by the words children of *M. C.* were meant ſuch perſons as ſhould be children at the death of the teſtator, though *M. C.* was dead at the date of the will, and decreed accordingly.

Haughton v. Harriſon, 2 Atk. 329.

T. H. gave a legacy of 500*l.* to be paid to his grandſon *T. P.*, the ſon of *M. P.*, if he lived to be 21, and in caſe he ſhould die before, then to the other child or children of his daughter, equally, arriving at ſuch age. *T. P.* the grandſon died under the age of 21 years, and there being no child or children of *M. P.* living at the teſtator's death, it was inſiſted, that the 500*l.* ought not to be raiſed for after-born children, but ſunk into the *reſiduum* of the teſtator's eſtate for the benefit of the reſiduary legatee. But by Lord *Hardwicke*—It is plain the grandchildren born after the teſtator's death are entitled, for as they were not *in eſſe* in his lifetime, the teſtator muſt have had in his view future children of his daughter.

Maddiſon v. Andrew, 1 Ves. 57.

A teſtator gave a legacy of 300*l.* to the children of his ſiſter *S.* to be paid by his executor, and equally divided, ſhare and ſhare alike, at their reſpective ages of 21 or marriage, with intereſt at 4 *per cent.*, and failing the ſhare of any, to the ſurvivors; and failing the ſhare of all, to his ſiſter *G.* The queſtion was, In whom

whom this legacy ſhould veſt, whether in the only child of *S.* alive at the making of the will, or alſo in thoſe ſince born or to be born? Lord *Hardwicke* thought it was meant for the benefit of all the children *S.* ſhould have; for the teſtator knowing ſhe had but one then, has yet given it to children, and has pointed out ſurvivors; and gives it over to another branch of the family; which he could not mean, till all failed.

A woman deviſed to the ſon and two daughters of her nephew *F. E.* 10*l.* a-piece by name; then gives 300*l.* to *E. P.* to be paid at her age of 21, or marriage; and intereſt in the mean time for her maintenance and education: but if ſhe died before 21 or marriage, then to the younger children of her nephew *F. E.*, equally to be divided between them. Some of the younger children were born before, ſome after the making of the will, and ſome after the death of the teſtatrix. Lord *Hardwicke* thought, that the teſtatrix meant that the legacy ſhould be divided when it veſted, and therefore ſhould go to ſuch as ſhould be younger children at the death of *E. P.* before 21 or marriage. Elliſon v. Airey, 1 Ves. 111.

W. A. deviſed his real eſtate to truſtees and their heirs to the uſe of *H.* his daughter, for life, with remainder to the heirs of her body; and after her deceaſe without iſſue, in truſt to ſell, and to divide the money equally between all and every the children of his ſiſter *E.* the wife of *B.*, and of his ſiſter *M.* the wife of *J.*, at their reſpective ages of 21. The ſiſters had each of them ſeveral children born in the lifetime of the teſtator; and *E.* had a daughter born about eleven months after the teſtator's death, but in the lifetime of *H.* his daughter, who afterwards died without iſſue. The queſtion was, Whether ſuch after-born daughter was entitled to a ſhare of the money? And Sir *Tho. Clarke*, Maſter of the Rolls, ſeemed very clearly of opinion, that ſhe was entitled. He obſerved, that all caſes of this kind depend upon their own peculiar circumſtances: that this is the caſe of a truſt, where the court will be more liberal in making a conſtruction, than in the caſe of a legal eſtate: that as the children are not named, there does not appear to be any predilection: that the teſtator deſcribes his ſiſters as being then wives: that the words uſed are as general as poſſible, *viz.* all and every the children: and that this is to be conſidered as a deviſe of money, and nothing could veſt at the teſtator's death, but it is a diſpoſition of a remote intereſt, after the death of *H.* without iſſue. Bartlett v. Holliſter, Ambl. 334. 1 Br. Ch. Rep. 530. note, S. C.

A teſtator deviſed the reſidue of all his real and perſonal eſtate to truſtees for the uſe of the heirs male of *J. A.*; in default of ſuch iſſue, to the uſe of the heirs male of *R. A.*; and in default of ſuch iſſue male, to the uſe of all and every the grandchildren of *J. A.* and *S. M.* as tenants in common. By a codicil of the ſame date with the will, he directed the truſtees to pay the intereſt and produce of his real and perſonal eſtate to his wife *S. A.* and to the ſaid *J. A.* and *S. M.* during their lives, with ſurvivorſhip. Eight grandchildren were alive at the date of the will: a ninth was born before the teſtator died: twelve more were born after his deceaſe; and all in the lifetime of *R. A.*, who died without iſſue. Baldwin v. Karver, Cowp. 309.

iſſue. It was holden, that as the twenty-one grandchildren were all alive at the death of *R. A.*, all were equally entitled.

Attorney-General v. Criſpin, Ambl. 386.

A teſtatrix, having given by her will ſeveral annuities, gave, after the deceaſe of the annuitants, 50*l.* each, to the children of *D. R.*—*D. R.* had then ſeven children, and he had alſo a daughter born after the death of the teſtatrix, but in the lifetime of the ſurviving annuitant. Lord *Thurlowe* decreed, that this after-born child muſt be let in to take.

Congreve v. Congreve, 1 Br. Ch. Rep. 530. N. B. Lord Thurlowe ſays, that this caſe ſeems a very ſtrange determination; becauſe when the firſt child attained twenty-one, the diviſion muſt be made. 3 Br. Ch. Rep. 355.

A. N. deviſed her real eſtate to truſtees, upon truſt to permit her nephew *T. C.* to receive the rents for his life, and after his death to ſell the eſtate, and divide the money among all and every the child and children of *T. C.* at the age of 21. She alſo gave her perſonal eſtate to the ſame truſtees, in truſt to divide the ſame between all the children of her ſaid nephew at the age of 21; ſhe directed her nephew to maintain the children out of the rents and profits, and gave the truſtees power to apply any part of the intereſt of the perſonal eſtate for the maintenance of the children. The queſtion being, Whether a child born after the death of the teſtatrix was entitled to a ſhare of her eſtate? Sir *T. Sewell* held that ſhe was: he ſaid that this is the caſe of a truſt; that there is nothing to confine it to children born in the lifetime of the teſtatrix, and the intereſt is a future one. Here is no direction what is to become of the intereſt of the perſonal eſtate; but there is a direction to apply any part for maintenance. This is a ſtrong addition to the caſe of *Bartlett* v. *Holliſter (ſupra)*; the perſonal is immediately the property of the children, though not immediately given to them; if it were a power to apply, the intereſt would be unneceſſary. The children are to have the intereſt with the principal, except what is applied under the power.

Deviſme v. Mello, 1 Br. Ch. Rep. 537.

S. D. gave 5000*l.* to purchaſe ſtock, the intereſt to *M.* for life, then to the teſtator's brother *W. D.*, at his deceaſe, to the teſtator's godſon *S.*; *and at his deceaſe, if before he is of age, to be divided among his brothers equally.* *S.* the teſtator's godſon died in the lifetime of his father *W. D.* and in the lifetime of the teſtator, leaving at the time of his death two brothers, who were the two only ſons of *W. D.* at the date of the will, and at the time, of the teſtator; but he had another ſon *A. D.* born ſome time afterwards. Lord *Thurlowe* was of opinion, that he was obliged to ſay the words in the bequeſt of 5000*l.* to the brothers of *S.* were not confined to thoſe who were his brothers at the time of making the will: that the teſtator muſt have had in contemplation other ſons coming into being; that his intention appeared to be to make an aggregate deſcription of a part of the family of *W.* by the name of brothers of *S.* as if he had uſed the words male children of *W.*; that he made uſe of the word *brothers* merely by relation to the antecedent, the name of *S.* uſed in the former part of the bequeſt, and that he could not otherwiſe have deſcribed the ſons of *W.* but by a circumlocution. He therefore declared that *A.*, being born before the time of the diſtribution of the fund, was entitled to a ſhare of the 5000*l.*

A teſtator

A teſtator gave to the children of his ſiſter *J. G.* wife of *T. G.* 350*l.* with intereſt for the ſame, to be paid them reſpectively in equal ſhares and proportions as they ſhould reſpectively attain 21; and in caſe any of them ſhould die under 21, then their ſhare ſhould go to the ſurvivors and ſurvivor. At the death of the teſtator, *J. G.* had two children, the plaintiffs; ſhe had afterwards another child: the plaintiffs were both infants; and the court was of opinion, that the youngeſt child, being born during the infancy of the other two, though after the death of the teſtator, might be entitled to a ſhare.] Gilmore v. Severn, 1 Br. Ch. Rep. 582.

If a man deviſe the ſurplus of his eſtate to his grandchildren living at his death, grandchildren born after his deceaſe ſhall not take it; for if he had ſo intended it, he would not have reſtrained it to children living at his death. 2 Vern. 710. Muſgrave v. Parry.

[A teſtator left 20,000*l.* to his executors, in truſt to diſpoſe thereof in ſuch proportions, *&c.* as they ſhould think fit, amongſt ſuch of the teſtator's relations as ſhould not be worth 2000*l.*, and ſhould apply within two years after his (the teſtator's) death. A claim was made on behalf of a child born after the death of the teſtator, who was of conſanguinity; but ſuch child, though *in ventre ſa mere* at the teſtator's death, was holden not to be within the deſcription. Bennett v. Honywood, Ambl. 708.

So, it was determined by Sir *L. Kenyon*, when Maſter of the Rolls, that a child, *in ventre ſa mere*, ſhould not take under a bequeſt to the children of *A.* living at the death of the teſtator. But in a ſubſequent caſe of a ſimilar deviſe, Lord *Thurlowe* ſaid, that though he admitted the child not to be within the ſtrict meaning of the words; yet, the ſolid ground of conſtruction is to conſider whether ſuch a child is not within the intention of the teſtator to provide for all the children of *A.*? His lordſhip added, he would talk to his Honour on the ſubject, and if he perſiſted in his opinion, the queſtion muſt go to law. It is to be preſumed that his Honour did perſiſt in his opinion, for the queſtion did go to law, and the court of Common Pleas determined in favour of the poſthumous child. Cooper v. Forbes, 2 Br. Ch. Rep. 63. Clarke v. Blake, *Id.* 320. 2 H. Bl. 399. and 2 Vez. jun. 673.

One deviſed the ſurplus of his eſtate to his children and grandchildren. It was holden, that a grandchild *in ventre ſa mere* at the teſtator's death ſhould not take; but it was at the ſame time ſaid, that if a deviſe were to my children and grandchildren living *at my death*, a child *in ventre ſa mere* might, in ſuch caſe, be ſo far regarded as to be looked upon as living. Northey v. Strange, 1 P. Wms. 341. That a poſthumous child is within a proviſion in a ſettlement for ſuch children of the marriage as ſhould be living at the death of the father; ſee Miller v. Turner, 1 Vez. 85. Beale v. Beale, 1 P. Wms. 244.

So, where one deviſed his eſtate, *in caſe he ſhould leave no ſon at the time of his death, to* F. H., and died leaving his wife *privement enſient* with a ſon; this poſthumous ſon was adjudged to be a ſon living at the death of *F. H.*, and therefore the deviſe to *F. H.* did not take place.] Burdet v. Hopegood, 1 P. Wms. 486.

If one deviſe the ſurplus of his perſonal eſtate to the children of *A.* and *B.*, and neither of them have a child at the time of making the will, or the death of the teſtator, the deviſe is executory, and ſhall 2 Vern. 405. Weld and Bradbury.

(a) See *ace.* Northey v. Strange, 3 P. Wms. 343.

ſhall extend to any children that *A.* and *B.* ſhall afterwards have; and the children of each ſhall take *per capita*, and not *per ſtirpes* (*a*), they claiming in their own right, and not as repreſenting their parents.

Blackler v. Webb, 2 P. Wms. 383.

[A teſtator bequeathed the ſurplus of his perſonal eſtate equally to his ſon *James* and to his ſon *Peter*'s children, to his daughter *Traverſe* and to his daughter *Webb*'s children, and his daughter *Man*. At the making of the will the teſtator's ſon *Peter* was dead, leaving ſeveral children, the teſtator's daughter *Webb* was living, but her huſband was in low circumſtances, and had been twice a bankrupt, and therefore the teſtator by his will made ſome proviſion for her ſeparate uſe. The queſtion was, How theſe children and grandchildren ſhould take, whether *per ſtirpes* or *per capita?* Lord *King* at firſt ſeemed inclinable that the grandchildren ſhould take *per ſtirpes* only; yet at length he decreed, that the teſtator's ſon *James*, and the children of the teſtator's deceaſed ſon *Peter* and his daughter *Traverſe*, and the children of his daughter *Webb*, and his daughter *Man*, (being in all fourteen in number,) ſhould each of them take *per capita*, as if all the grandchildren had been named by their reſpective names; and that the grandchildren could not take according to the ſtatute, or in alluſion thereto, foraſmuch as the teſtator's daughter *Webb* was living, and ſo her children could not repreſent her; and to determine that the grandchildren ſhould take *per ſtirpes* would be to go too much out of the will, and contrary to the words, when the meaning of the teſtator might be according to the words, and that meaning a reaſonable and ſenſible one.

Thomas v. Hole, Ca. temp. Talb. 251. The word *equally* applied to the next of kin, and relations under the ſtatute of diſtributions, cauſes a diviſion *per capita*, Phillips v. Garth, 3 Br. Ch. Rep. 64. Butler v. Stratton, *Id.* 367. for though the ſtatute furniſhes the rule as to the objects of the bequeſt, yet it does not determine in what proportions thoſe objects ſhall take; that muſt depend upon the directions of the teſtator. Green v. Howard, 1 Br. Ch. Rep. 31. Rayner v. Mowbray, 3 Br. Ch. Rep. 234.

One *Hole* bequeathed 500*l.* to the relations of *E. H.*, to be divided *equally* between them. Although this bequeſt is confined to ſuch relations as would take by the ſtatute of diſtributions; yet Lord *King* determined, that, as the teſtator had directed the 500*l.* to be divided *equally* between them, he could not direct an unequal diſtribution, and accordingly decreed them to take *per capita*.]

2 Vern. 106. If *A.* deviſe 1500*l.* in truſt for the children of *B.*, and *B.* have only one child, and ſeveral grandchildren, the child only ſhall take, and the grandchildren ſhall not come in for ſhares; but if *B.* had not a child living, the grandchildren might have taken by the name of children.

2 Vern. 431. Nevil and Nevil, decreed. If a legacy of 500*l.* is given to the eldeſt ſon of *A.* to be begotten, to place him out apprentice, and *A.* has a ſon born after the teſtator's death, the legacy ſhall be paid him though not born in the teſtator's life, and though it was given to him for a particular purpoſe.

2 Chan. Rep. 1. Bretton v. If money is deviſed to younger children, where there are divers daughters, and a ſon, who by birth is a younger child, but is heir at law

law to a conſiderable eſtate of inheritance, he ſhall not be conſidered as a younger child, ſo as to take by the deviſe (*a*). Bretton.

[(*a*) So, on the contrary, an eldeſt daughter, where there has been a ſon, or where the eſtate by a ſettlement goes all to a remainder-man, has, in equity, been deemed a younger child. Beale v. Beale, 1 P. Wms. 244. And even *an eldeſt ſon unprovided for* has been conſidered as a younger child. Duke v. Doidge, 2 Vez. 203. note. For the court will indulge this latitude of conſtruction in caſes of portions, for the ſake of providing for all branches of the family. Chadwick v. Doleman, 2 Vern. 525. Heneage v. Hunlocke, 2 Atk. 456. Lord Teynham v. Webb, 2 Vez. 198. But the ſame conſtruction is not applicable in other caſes. Lord Teynham v. Webb, *ubi ſupra*. Hall v. Hewer, Ambl. 203.]

A man by will deviſed all his goods in ſuch a houſe to *G.* for life, and after his deceaſe to the heir of *J. S.*, and the point was, whether he that was heir of *J. S.* ſhould take theſe goods as deviſee, and the ſaid goods to go to his executors, although ſuch heir die in the lifetime of *G.*, or whether he who was heir to *J. S.* at the time of *G.*'s death ſhould have them; and though it was urged that thoſe goods were only the furniture of the capital houſe, yet my Lord Chancellor was of opinion, that they abſolutely veſt in him that was heir of *J. S.* at the time of the death of *J. S.*, and decreed accordingly. Vern. 35. Danvers v. Earl of Clarendon.

The Duke of *Bolton*, by will, deviſed in theſe words, *viz.* Item, *I give and bequeath unto ſuch of my ſervants, as ſhall be living with me at the time of my death, one year's wages; per* Lord Keeper, ſtewards of courts, and ſuch as are not obliged to ſpend their whole time with their maſter, but may alſo ſerve any other maſter, are not ſervants within the intention of the will; but I will not narrow it to ſuch ſervants only as lived in the teſtator's houſe, or had diet from him. 2 Vern. 546.

[A teſtatrix gave and bequeathed unto the *two* ſervants that ſhould live with her at the time of her death 100 *l.* new *S. S.* ſtock, to be equally divided between them. In fact, the teſtatrix had but two at the time of making the will; and afterwards took another, who lived with her at the time of her death. Adjudged, that this third ſervant was entitled to an equal ſhare with the other two. Sleech v. Thorington, 2 Vez. 560.

So, where the teſtator gave to the three children of his ſiſter 50 *l.* each; the ſiſter had *four* children, and they were all let in. Tomkins v. Tomkins, (cited) 2 Vez. 564.

A teſtatrix gave the reſidue of 3 *per cent.* annuities in truſt to pay the ſame unto and between the *two daughters* of *T. S.*, in equal ſhares and proportions during their lives, and if *either* of them ſhould die, then to pay the whole to the ſurvivor during life; and in caſe *both* ſhould depart this life, then the whole was to fall into the reſidue. The Maſter of the Rolls, Sir *L. Kenyon*, yielding to the authority of the caſes, but not the reaſoning of them, felt himſelf compelled to declare, that all the daughters ſhould take.] Stebbing v. Walker, 2 Br. Ch. Rep. 85.

A. gave legacies of 15 *l.* a-piece to each of his relations of his father and mother's ſide, and gave the ſurplus of his perſonal eſtate to *B.*, and made *C.* his executor; the executor paid 15 *l.* to the teſtator's couſin-german, and 15 *l.* a-piece to her four children; and the court allowed the payment to the children, and would not 2 Vern. 381. Jones and Beale. See Ambl. 640.

not reſtrain the deviſe to the relations within the ſtatute of diſtributions.

Preced. Chan. 401. Roach v. Hammond. [So, Carr v. Bedford, 2 Br. Ch. Rep. 77. Anon. 1 P. Wms. 327. Thomas v. Hole, Ca. temp. Talb. 251. Harding v. Glyn, 1 Atk. 469.

But notwithſtanding this caſe, it ſeems the eſtabliſhed doctrine of the court of Chancery, to make the ſtatute of diſtributions the rule and meaſure of ſuch general deviſe; as where *A.* deviſed all his real and perſonal eſtate for the uſe of his relations, without ſpecifying any in particular, or uſing any other words; it was agreed to be the rule of the court, in the conſtruction of ſuch deviſes to relations, that thoſe, who by the ſtatute of diſtributions would be entitled to the perſonal eſtate in caſe he died inteſtate, ſhould, upon ſuch general deviſes, be let into the ſame proportions only; and my Lord Chancellor ſaid, he thought it the beſt meaſure for ſetting bounds to ſuch general words, and that it had been often ruled accordingly.

Attorney-General v. Buckland, (cited) Ambl. 71. Edge v. Saliſbury, Ambl. 70. Whithorne v. Harris, 2 Vez. 527. Croſsley v. Clare, Ambl. 397. Iſaac v. Defriez, *Id.* 595. Widmore v. Woodroffe, *Id.* 636. Green v. Howard, 1 Br. Ch. Rep. 31. Hands v. Hands, (cited) 3 Br. Ch. Rep. 69. Phillips v. Garth, *Id.* 64. Rayner v. Mowbray, *Id.* 234. And the rule will be the ſame, though the word "*poor*" be prefixed to "relations." Brunſden v. Woolredge, Ambl. 507. Iſaac v. Defrieze, *Id.* 595. Widmore v. Woodroffe, *Id.* 636. But if the bequeſt be to the teſtator's deſcendants, or to the deſcendants of *A.*, the neceſſity of referring to the ſtatute of diſtributions does not ariſe, for ſuch deſcendants are capable of being aſcertained. Croſsley v. Clare, Ambl. 397. Butler v. Stratton, 3 Br. Ch. Rep. 367. And we have ſeen above, that where the court does reſort to the ſtatute of diſtributions for the purpoſe of limiting the objects of the bequeſt to relations, it does not conſider itſelf bound to adopt the proportions preſcribed by the ſtatute; but diſtributes *per capita*, and in ſuch ſhares as any particular expreſſions of the bequeſt may call for. Carr v. Bedford, 2 Ch. Rep. 77. Griffith v. Jones, *Id.* 179. Thomas v. Hale, Ca. temp. Talb. 251. Green v. Howard, 1 Br. Ch. Rep. 31.]

3. What ſhall be a ſufficient Deſcription of the Thing given, and what ſhall be ſaid to be bequeathed.

Godolph. 272. (*a*) But in another place he ſays, that this rule muſt be underſtood as the teſtator

Godolphin ſays, that in order to find out the teſtator's meaning, with reſpect to the things he intended to give away, it is neceſſary chiefly to regard the (*a*) time when the will is made; for it is a preſumption of law that the teſtator's mind was not altered, unleſs it otherwiſe appear by ſufficient evidence; therefore, ſays he, if a father bequeath to his ſon (who is a ſtudent) all his books, and afterwards buy other books, the books ſo bought paſs not.

makes uſe of words in the preſent tenſe or future tenſe; and that if it be doubtful, whether they refer to the time paſt or the time to come, they ſhall be underſtood to relate unto the time that is to come; and that therefore if a man deviſe his corn indefinitely, it ſhall be underſtood all ſuch as he hath at the time of his death. Godolph. 274. [The rule muſt certainly depend upon the particular expreſſion of the bequeſt, as where the teſtator gives a ſpecifick thing as being then in his poſſeſſion, and which in its nature is not fluctuating, and he gives it by a particular appellation. Thus, if he bequeaths the leaſes which he now has, or all the horſes now in his ſtable, or the arrears of an annuity now due, in ſuch caſes, ſubſequent leaſes, or after-purchaſed horſes, or arrears afterwards accrued due will not paſs. 1 P. Wms. 597. Attorney-General v. Bury, 1 Eq. Ca. Abr. 201. Baugh v. Read, 1 Vez. jun. 260.]

Swinb. 418. Salk. 237. pl. 16. & *vide* tit. Deviſes, letters (B) and (H).

But it ſeems clear, both by our law and the civil law, that a deviſe of all a man's perſonal eſtate paſſes whatever he died poſſeſſed of, and not that only which he had at the time of making his will; for the perſonal eſtate being tranſient and fleeting, and, from the neceſſity of dealing and traffick, liable to daily alterations; if the contrary reſolution ſhould prevail, it would put men under the difficulty of making a new will every day, and create the greateſt perplexity imaginable.

Alſo, it hath been determined in Chancery, that if a man deviſes to his wife all his perſonal eſtate, at a place called *W.*, all his perſonal eſtate, as coaches, horſes, *&c.* there at the time of his death, ſhall paſs, though not there at the time of making the will, the perſonal eſtate being fluctuating and varying until the time of the teſtator's death. 2 Vern. 688.

If a man deviſe his houſe, and all his goods and furniture therein, to his wife for life, and after her deceaſe, to his ſon *R.* and his heirs, except his pictures, which he gives to his ſons *A.* and *B.*, and he has pictures in boxes as well as thoſe hung up in the houſe, and likewiſe pictures at his death, which he had not at the time of making his will; and it is proved in the cauſe that he had ſkill in pictures, and frequently bought pictures and ſold them again; the exception of the pictures ſhall extend as well to the pictures hung up as furniture as to thoſe in boxes, and as well to thoſe in the houſe at the time of the will, as to thoſe bought in after the will made. 2 Vern. 538. Gayre and Gayre.

But where a man deviſed to his niece all his goods, chattels, houſehold-ſtuff, furniture, and other things, which then were or ſhould be in his houſe at the time of his death; and ſome time after died, leaving about 265 *l.* in ready money in the houſe; it was decreed, that this ready money did not paſs, for by the words *other things*, ſhall be intended things of like nature and ſpecies of thoſe before mentioned. Abr. Eq. 201. Trafford and Berrige. [See *acc.* Cook v. Oakley, 1 P. Wms. 302. Timewell v. Perkins, 2 Atk. 103. Cornforth v. Boon, 2 Vez. 279. Cavendiſh v. Cavendiſh, 1 Br. Ch. Rep. 467.]

[Colonel *Coddrington* deviſed to *All Souls* College in *Oxford* in theſe words, *viz. I deviſe my library of books, now in the cuſtody of Mr.* Carſwell, *to* All Souls *College in* Oxford; and in the ſame will he deviſed to the College 4000 *l.* more to augment their library. The teſtator afterwards bought ſeveral books of value, which were placed in the ſaid library. It was decreed, that the after-bought books ſhould paſs; the word *now* not relating to the books which were in the library at the time of making the will, but merely pointing out where the library was. All Souls College v. Coddrington, 1 P. Wms. 597.

General *Guiſe*, by his will, gave all his pictures, drawings, and prints to *Chriſt Church* College in *Oxford*, to be kept, and none of them to be ſold, they being a good collection. He lived ſeveral years afterwards, and after making his will, parted with ſome of the pictures, and acquired above one hundred new ones. Lord *Camden* ſaid, he was clear, that the pictures which the General added to his collection after making his will paſſed by the deviſe to *Chriſt Church* College, upon this principle, that the perſonal eſtate is conſidered as fluctuating. It would be ſo in caſe of a deviſe of all a man's perſonal eſtate generally. The ſame rule holds in caſe of a deviſe of the whole of any ſpecies of his perſonal eſtate. Caſes have gone ſo far as to extend the rule to the deviſe of a flock of ſheep. The caſe of *All Souls College* v. *Coddrington* confirms this rule. The caſe of *Gayre* v. *Gayre* is in point. Dean of Chriſt-church v. Barrow, Ambl. 641.

A teſtator bequeathed his wife 1200 *l.* in money, and all the goods and chattels, *&c.* in and belonging to his houſe in *N.*, in which Anon. Pr. Ch. 8. But if there be

nothing in a will demonſtrating an intention to reſtrict the general import of the words "goods and chattels," money, if not an extraordinary ſum, and juſt received, will paſs. Chapman v. Hart, 1 Ves. 273.

which houſe there was 400 *l.* in money; and the queſtion was, Whether this 400 *l.* ſhould paſs by the will? The court held, that it ſhould not; for 400 *l.* is a conſiderable ſum, and the teſtator could not be ſuppoſed to be ignorant of its being in the houſe: therefore, had he intended to paſs it, he would not have couched it under general words, but would at firſt have given his wife 1600 *l.*

Woolcombe v. Woolcombe, 3 P. Wms. 112.

There was a bequeſt of all the teſtator's houſehold goods, and other goods; and there was alſo a bequeſt of the reſidue; which bequeſt of the reſidue would have been fruſtrated, had the words "other goods" been held to carry all the perſonal eſtate. The court therefore held, that the words "other goods" muſt be intended to ſignify things of the like nature with houſehold goods.]

2 Vern. 747. Gilb. Eq. Rep. 172. decreed between the Earl and Counteſs of Shafteſbury.

If *J. S.* bequeaths all his houſehold goods and furniture which ſhould be in his houſe at *R.* at his death to his wife, and afterwards going beyond ſea, his ſteward gets the head landlord of the houſe to accept of a ſurrender of the leaſe of the houſe, and removes the goods to another houſe, and writes an account of this to *J. S.*, who approves of it, the goods will not paſs by the will to the wife: otherwiſe, if they had been removed by fraud to defeat the legacy, or by any tortious act without the privity of the teſtator.

2 Vern. 739. decreed between the Duke of Beaufort and Lord Dundonald.

So, if a man bequeaths to his ſon the furniture of his houſe at *D.*, and two years afterwards orders goods which he had bought in *London* to be carried to his houſe in *D.*, and agrees with carriers for that purpoſe, but dies before the goods are removed from *London*, theſe goods ſhall not paſs by the will as part of the furniture of the houſe at *D.*

[Lord Hardwicke alluding to this caſe ſays, "there was very little oppoſition, being between a mother and a ſon, "and I lay no ſtreſs upon it." 3 Atk. 202.]

Chan. Ca. 16. Lee and Hale.

If a man who has debts due to him by bond, and who is likewiſe poſſeſſed of a term for years, bequeaths one moiety of his perſonal eſtate to his wife, and afterwards ſeveral legacies to other perſons, and the reſidue to *J. S.*, the wife ſhall have one complete moiety, if the other is ſufficient to pay the debts, and ſhe ſhall have a moiety of the leaſe, though it was objected that a leaſe was not uſually reckoned perſonal eſtate.

Portman v. Willis, Cro. Eliz. 387. But ſee Godolph. 392. 7.

If a man poſſeſſed of a leaſe for years bequeaths ſeveral legacies of plate and other goods to ſeveral perſons, and after deviſes all the reſidue of his goods to his wife, his debts and legacies being paid, and makes her ſole executrix; by this will, the leaſe paſſes to her as legatee; for though by a grant of *omnia bona* a leaſe paſſes not, yet, by the civil law, *bona* including all chattels, and this being a legacy, the judges of the common law in this caſe ought to be guided by that law.

2 Chan. Rep. 190.

If a man bequeaths 1200 *l.* to *J. S.*, and by general words gives all his goods, chattels, and houſehold-ſtuff in and about his houſe to the ſaid *J. S.*, money in the houſe will not paſs, he having a particular legacy deviſed to him.

[A bequeſt

[A bequeſt of all the teſtator's goods has been holden to paſs a bond, unleſs there be ſome words in the will which demonſtrate an intent to the contrary (*a*). But bonds, as a ſpecies of choſes in action, not admitting of locality, will not paſs under a bequeſt of goods and chattels in a particular place (*b*). Neither will debts due by bond paſs under a bequeſt of all the teſtator's moveable goods (*c*).

Anon. 1 P. Wms. 267. Ryall v. Rolle, 1 Atk. 180; 1 Ves. 362. S. C. (*a*) Woolcombe v. Woolcombe, 3 P. Wms. 112. note in Cox's Ed. (*b*) Chapman v. Hart, 1 Ves. 271. Moore v. Moore, 1 Br. Ch. Rep. 127. Green v. Symonds, *Id.* 129. note. (*c*) Sparke v. Denne, Sir W. Jones, 225.

Plate (*d*) and jewels will not paſs by a bequeſt of utenſils, but (*e*) by a bequeſt of houſehold goods plate will paſs.

(*d*) Dyer, 59. (*e*) Lilcot v. Compton, 2 Vern. 638. [This was formerly denied, Jeſſon v. Eſſington, Pr. Ch. 207. but it ſeems now ſettled, agreeably to this caſe of Lilcot v. Compton, that plate will ſo paſs, where it appears, that the teſtator was in the habit of uſing plate, or was of a rank in life which rendered it an article ſuitable to his domeſtick eſtabliſhment. Maſters v. Maſters, 1 P. Wms. 425. Nicholls v. Oſborn, 2 P. Wms. 419. Snelſon v. Corbet, 3 Atk. 369. Kelly v. Pawlett, Ambl. 605. S. C.]

If a teſtator miſcalculate a reſidue, or a debt which he bequeaths, the real reſidue or debt will nevertheleſs paſs.]

Danvers v. Manning, 2 Br. Ch. Rep. 18. Williams v. Williams, *Id.* 87.

If a nobleman poſſeſſed of a collar of SS, and of a garter of gold, and a buckle annexed to his bonnet, and many other buttons of gold and precious ſtones annexed to his robes, and of many other chains, bracelets, and rings of gold and precious ſtones, bequeath all his jewels to his wife, and die, the garter and collar of SS paſs not, becauſe they are not properly jewels, but enſigns of honour and ſtate; and the buckle in his bonnet and buttons paſs not, becauſe annexed to his robes; but all the other chains, rings, bracelets, and jewels paſs.

Owen, 124. Earl of Northumberland's caſe, S. C. cited in Style, 289.

J. S. by will deviſes thus: *Item*, my will and pleaſure is, that the furniture and pictures in my houſes at *A.*, *B.*, and *C.* ſhall always remain there, and not in the power of my executors to diſpoſe of, but ſhall go with my ſaid houſes to ſuch of my grandchildren as ſhall be in the poſſeſſion thereof, and then appoints that the plate gilt with gold, belonging to his chapel at *A.*, together with the ornaments thereof, ſhould remain to the perpetual uſe of the ſaid chapel, and makes *D.* executor, to whom he gives all his perſonal eſtate, except what is before bequeathed, of what nature or kind ſoever, for his own proper uſe; and the queſtion was, if the plate the teſtator conſtantly uſed, and removed with him when he went from one houſe to another, ſhould go to the executor by the laſt clauſe, or belong to the houſes under the word *furniture?* And my Lord Keeper was of opinion, that furniture in a large ſenſe takes in plate, but not here, becauſe he diſtinguiſhes the chapel plate from the furniture; and the plate of ordinary uſe that was carried with him could no more be ſaid the furniture of one houſe than of the others, and he meant only the particular furniture of each houſe; ſo the plate went to his executors, and was liable to plaintiffs who were creditors.

Abr. Eq. 200. Mich. 1705. Franklin and Earl of Burlington. 2 Vern. 502. S. C. ill reported. Pre. Ch. 251. S. C.

[A library will not paſs under the deſcription of furniture.]

Bridgeman v. Dove, Ambl. 603. 3 Atk. 201. Kelly v. Powlett,

Abr. Eq. 201. Moſeley, 47. S.C. S. P. Hunt and Berkley.

If a man deviſes his ſilver tea-kettle and lamp, with the appurtenances, nothing ſhall paſs but the kettle and lamp, and the box wherein the lamp was placed, and not the ſilver tea-pot, milk-pot, tongs, ſtrainer, or caniſters.

2 Chan. Ca. 198. Martin and Clerk.

If a man deviſes 40 *l.* to be paid to *J. S.*, by him to be diſpoſed of in ſuch manner as the teſtator ſhould by a private note acquaint him with, and dies without ſuch appointment, this is a good bequeſt to the party.

(C) What ſhall be an Ademption or Extinguiſhment of a Legacy.

Swinb. 522. 526.

Swinburne diſtinguiſhes between the ademption and tranſlation of a legacy: the firſt, he ſays, is the taking away a legacy which was before bequeathed, which may be done by an expreſs revocation thereof, or it may be done ſecretly and by implication, as by giving away, or voluntarily alienating the thing deviſed. Tranſlation of a legacy is the beſtowing of the ſame upon another, which is likewiſe an ademption; and therefore there may be an ademption without a tranſlation, but there can be no tranſlation without an ademption.

Swinb. 522.

The ademption of a legacy is no more to be preſumed than the revocation of the teſtament, unleſs it be proved; and therefore if the teſtator bequeath all the corn in his barn, and live after the making of his will till the corn is ſpent, and other corn be put in the place thereof, this ſpending of the corn is no ademption of the legacy, and therefore the legatee ſhall have ſuch corn as is found in the barn when the teſtator dieth, unleſs the corn found in the barn at the death of the teſtator be greater in quantity than was the corn at the time of the will made; for ſo much is due, but not a greater quantity than was the firſt.

Swinb. 522.

So, if the teſtator bequeath a ſhip, and afterwards, by piecemeal, repair and renew the ſame, ſo that there remain nothing of the old ſhip but only the bottom tree, here is no ademption of the legacy, but the legatee may recover the whole ſhip.

Swinb. 523, 524.

If a man bequeath a houſe, which afterwards he voluntarily pulls down, or which is blown down by the wind, or is conſumed by fire, and afterwards he erect a new houſe where the old houſe ſtood; *Swinburne* is of opinion, that the legatee in neither of theſe caſes can have the new houſe; it being a general rule of the civil law, that a houſe bequeathed being deſtroyed, if the teſtator build another in the ſame place, the legacy is extinguiſhed, unleſs the meaning of the teſtator were otherwiſe.

Swinb. 523.

But if the teſtator bequeath an houſe, and afterwards, by piecemeal, repair the ſame, ſo that there is no part of the old matter or ſtuff remaining, the will of the teſtator is not hereby preſumed to be changed; and therefore the legatee may recover the houſe ſo repaired, for it is deemed to be the ſame houſe ſtill in law.

Swinb. 524.

Alſo, if the teſtator, being conſtrained by neceſſity, as for the payment of his debts, ſupplying himſelf or his family with food and

and neceſſaries, &c. alienate the thing bequeathed; this is no ademption of the legacy, and therefore is the executor bound to redeem the ſame, or to pay the juſt value to the legatee.

So, if the thing bequeathed be not fully alienated, as if it be pledged or pawned, the legacy is not thereby extinguiſhed; and therefore the executor in this caſe is bound to redeem the ſame, and to reſtore it to the legatee, or to pay the price thereof, if he ſuffer it to be forfeited. Swinb. 525.

If a legacy be given to one perſon, and afterwards in the (a) ſame will the ſame thing be given to another, this is not an ademption of the legacy as to the firſt perſon, for the utmoſt conſtancy ſhall be preſumed in the teſtator, till the contrary appears; and therefore in this caſe they ſhall divide the legacy between them. Swinb. 528.

(a) So, if, by teſtament, he had given it to one perſon, and, by codicil, to another, this would be no ademption, unleſs it appeared the teſtator's intention that it ſhould be ſo, as if he had ſaid, *that which I did bequeath to* A. *I give* B., theſe or the like words wholly take away the legacy. Swinb. 529.

If a man bequeath a legacy in theſe words, *viz. I give to my niece* A. 500l. *which my ſiſter* B. *hath now in her hands of mine, as by bond appears;* and after the money be paid, and ten years after payment thereof the teſtator die, yet the legacy is good, though the ſecurity is altered; for by the words, no more is intended, but that the legacy ſhould be as ſure as he could make it. Raym. 335. Pawlett's caſe.

Again, a man deviſed in the following manner, *viz. I give and deviſe to* A. *my good and only uncle, the ſum of* 500 *l.* that is to ſay, that bond and judgment he gave me for 400 *l.* and 100 *l.* in money, and made his wife executrix, and deſired her to be kind and aſſiſting to his uncle, that he might live as became a gentleman; the uncle ſome time after ſold an eſtate, and with the money paid off 320 *l.*, and took up the bond, and had the judgment vacated, and gave a new bond for the remaining 80 *l.*, and ſome time after the teſtator died, and the uncle having notice of this will, brought his bill for this legacy of 500 *l.* For the executrix it was inſiſted, that this was a ſpecifick legacy of that particular bond and judgment, and they being cancelled and altered before the teſtator's death, it was an ademption of the legacy as to ſo much: and beſides, they urged, that this payment of the 320 *l.* amounted to a releaſe, ſo that he could only be entitled to the reſidue. On the other ſide it was inſiſted, that the diverſity (b) is where the money is voluntarily paid in by the perſon who owes it, and where the teſtator ſues for and recovers it: in the firſt caſe, the legacy continues ſtill good, becauſe the money only comes home to the perſonal eſtate; but in the other caſe, the teſtator ſuing for it, ſhews that he intended to make it his own, and therefore would not leave it to the legatee to recover; and the juſtice of the uncle ought not to prevent the affection of the nephew; and no alteration of his intention appeared. My Lord Keeper was clear of the ſame opinion, and decreed the 80 *l.* bond to be delivered up, and the reſidue of the legacy to be paid. Abr. Eq. 302. Orme and Smith. 2 Vern. 631. S. C.

[(b) Lord Camden, in ſpeaking of this caſe of Orme v. Smith, ſays, "the payment was clearly voluntary. The counſel laid hold of the diſtinction between a voluntary and compulſory payment, but the court does not appear to have decreed upon the diſtinction." But in Crockat v. Crockat, 2 P. Wms. 164. and Rider v. Wager, *Id.* 328. the diſtinction is taken notice of by the court. And in Partridge v. Partridge, Ca. temp. Talb. 326. it is recognized by Lord Talbot, and in Lawſon v. Stitch, 1 Atk. 508. by Lord Hardwicke. At the ſame time it muſt be obſerved, that the decree of the court is founded upon other points in every

of theſe caſes. In Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 467, Lord Macclesfield overruled the diſtinction, and the ſame was done by Lord King in Ford v. Fleming, *infra*. In Aſhton v. Aſhton, 3 P. Wms. 386, Lord Talbot declares his idea, that the diſtinction has no weight in it. Its exiſtence is denied by Lord Camden in Attorney-General v. Perkin, Ambl. 566; and that opinion is adopted by Lord Thurlowe, in Aſhburner v. Macguire, 2 Br. Ch. Rep. 109. Other judges admit the diſtinction, but not as a rule of determination in all caſes. They conſider the teſtator's calling for payment not to be *of itſelf* ſufficient evidence of an intention to adeem, (and ademption muſt always depend upon intention,) but at the ſame time they regard it as a queſtionable act requiring explanation. Drinkwater v. Falconer, 2 Vez. 623. Hambling v. Liſter, Ambl. 401. Coleman v. Coleman, 2 Vez. jun. 639.]

Crockat v. Crockat, 2 P. Wms. 164.

[A teſtator gave his ſiſter *S. C.* 550*l.* which was then in Mr. *E.*'s hands, and died ſoon after the making of his will. It appeared, that the teſtator, before the making of his will, had left in Mr. *E.*'s hands 550*l.*, for which Mr. *E.* had given a note to the teſtator, payable to him or order, and the teſtator had, before the making of the will, drawn ſome bills on *E.* ordering him to pay ſeveral ſums of money, which, in all, had reduced the 550*l.* to 430*l.* The teſtator had left aſſets for the payment of all his legacies, including the whole legacy of 550*l.* to his ſiſter *S. C.* It was inſiſted, that *S. C.* ſhould have no more than 430*l.* of her legacy of 550*l.* there being no more than 430*l.* left in Mr. *E.*'s hands. But the Maſter of the Rolls held, that ſhe ſhould have the whole 550*l.* legacy. Theſe payments out of the 550*l.* in the hands of Mr. *E.* having been all ordered by the teſtator before the making of the will, this cannot be ſaid to be an ademption of the legacy, but is an expreſs indication of the teſtator's intention, that as the note for the full ſum of 550*l.* was ſtill ſtanding out, notwithſtanding he had ordered the payment in part of the note, yet he renounced all thoſe payments, and willed that the whole 550*l.* ſhould be the legacy which he gave to his ſiſter *S. C.* His Honour therefore decreed the plaintiff *S. C.* the whole 550*l.* note, and intereſt from the time of filing the bill.

Rider v. Wager, *Id.* 328.

A. having a debt due to him from *D.* bequeathed 500*l.* part thereof to *B.* the ſecond ſon of *D.*, and the reſidue thereof to the younger children of *D.* to remain in *D.*'s hands until the children ſhould be capable of receiving it; the ſhare of any of them dying before ſuch time to go to the ſurvivors or ſurvivor. *A.* calls in, and receives the whole debt in his lifetime; and *B.* dies in the lifetime of *A.* Then *A.* died in the lifetime of the younger children. Lord *King* ſaid, that it could not be intended the ſurvivor ſhould take, unleſs *B.* the legatee ſhould have ſurvived the teſtator, ſo that the right to the legacy became veſted in him; but that *B.* dying in the lifetime of the teſtator, as nothing could ever veſt in him, ſo neither could it ſurvive from him. His Lordſhip admitted, that where a deviſe is to *A.* for life, remainder to *B.*, and *A.* dies in the teſtator's lifetime, *B.* ſhall take preſently; or if a deviſe be to *A.* and *B.*, and *A.* die in the teſtator's lifetime, and then the teſtator die, there, *B.* ſhall have the whole; for theſe caſes ſeem to be within the plain intent of the teſtator: but that, in the principal caſe, it was quite a ſtrain to ſupport a legacy given out of a fund which the teſtator had by his own voluntary act put an end to; for which reaſon he declared, that theſe legacies to the younger children were extinct, and ſhould not be made good.

A. be-

A. bequeathed 1000*l.* capital *S. S.* ſtock to *B.* At the time of making his will he had 1800*l.* of ſuch ſtock, and afterwards by ſale reduced it to 200*l.*, but afterwards increaſed it to 1600*l.*, and died. Between the making of his will and his death, the act took place which changed three-fourths of the capital *S. S.* ſtock into annuities. Lord *Talbot* held, that this legacy was not adeemed or impaired either by the ſale or the act of parliament. Not by the former, for all caſes of ademption ariſe from a ſuppoſed alteration of the intention of the teſtator; and if the ſelling out of the ſtock is an evidence to preſume an alteration of ſuch intention, his buying in again is as ſtrong an evidence of his intention that the legatee ſhould have it again. It was not the particular ſtock he was poſſeſſed of that he gave; but the deviſe was only deſcribing the nature of the thing he gave, of which he had ſufficient to anſwer ſuch legacy at the time of his death. If the teſtator after ſuch legacy ſells out part, and dies, ſuch ſale would afterwards be looked upon as an ademption *pro tanto*. If he deviſes ſo much ſtock, and at the time of ſuch deviſe has not any ſuch ſtock, it is a direction to the executor to procure ſo much for the legatee. It would be very hard in this caſe to conſider the ſelling as an ademption, becauſe he might ſell out for ſome particular purpoſe, and as ſoon as that purpoſe was anſwered he might buy in again.—It was not affected by the act of parliament, for it would be extremely hard to ſay, that this alteration of ſtock by parliament ſhould work an ademption, when it cannot be preſumed the teſtator's intent was particularly aſked, or that he concurred or agreed to ſuch law in any other manner than what every other perſon is ſuppoſed to do. His Lordſhip added, If an obligee were to deviſe a legacy of 1000*l.* ſecured by bond from *A. B.*, and he ſhould afterwards compel *A. B.* by due courſe of law to pay it him, this would be an ademption of the legacy; but it was never thought, if *A. B.* ſhould pay in the money voluntarily, it would be an ademption, becauſe the obligee is bound to receive it.

Partridge v. Partridge, Ca. temp. Talb. 226.

Bronſdon v. Winter, Ambl. 57. S. P.

A. and *B.* (afterwards Counteſs of *Suffolk*, and ſince deceaſed) were each indebted to *J. S.* in 2000*l.* ſecured by bonds. *J. S.* bequeaths theſe two ſums of 2000*l.* and 2000*l.*, and all intereſt due for the ſame to her grand-daughter *C.*, and deviſes away the ſurplus of her eſtate, with a proviſo, "that in caſe all or any "part of theſe ſums ſhould be paid in before the teſtatrix's death, "then ſhe gives to the ſaid *C.* 4000*l.* or ſo much money as the "principal money ſo paid in ſhould amount unto, as the caſe "ſhould fall out." Afterwards, the teſtatrix in her lifetime, releaſed to *A.* the 2000 . due upon his bond without having received any part of the money, and died; and *C.* died inteſtate; upon which the ſaid *A.*, who was her brother, adminiſtered to her, and demanded the 2000*l.* releaſed to himſelf upon his bond, and alſo the 2000*l.* due upon *B.*'s bond. With reſpect to the former (the only one material to notice in this part) it was objected, that the releaſe of the bond to *A.* was a revocation, or ademption of the legacy *pro tanto*, it being the voluntary act of the teſtator. But

Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 461.

by Lord *Parker*, the teſtatrix intends by this will (amongſt other things) to make a proviſion of 4000*l.* for her grand-daughter *C.*; and though ſhe has ſhewn her kindneſs to her grandſon (one of theſe bonds being given by him for 2000*l.*), yet this noways imports an alteration or diminution of her kindneſs to her grand-daughter. I cannot approve of the diverſity, that if the teſtator gives away a debt by his will, and afterwards calls it in, this muſt be a revocation; *ſecus*, if it be paid in to the teſtator unaſked for; for ſuppoſe the teſtator called in that debt, fearing it might be loſt, and not liking the ſecurity; is there any reaſon that this ſhould deprive the legatee of his legacy? And the caſe of *Orme* and *Smith* proves that the teſtator's receiving in the debt is no revocation or ademption of the legacy. As to the matter of the releaſe, that ſurely implies payment and ſatisfaction of a debt, being tantamount to the teſtator's receiving it, and giving it back again; and in the preſent caſe, it is the ſame, as if the will had ſaid, *if theſe debts be paid or diſcharged.*]

Abr. Eq. 302. Ford and Fleming, [2 P. Wms. 469. S. C. 2 Str. 823. S. C.]

One by will deviſed thus: *Item, I give and bequeath to my grand-daughter* Mary Ford *(the plaintiff) the ſum of* 40 l. *being part of a debt due and owing to me for rent from* G. M. *ſhe allowing what charges ſhall be expended in getting the ſame. Item, I give and bequeath unto my grandſons* A. *and* B. *the reſt and reſidue of what is due and owing to me from the ſaid* G. M. *which is about* 40 l. *to be equally divided between them, they allowing charges as aforeſaid.* Afterwards the teſtator received the whole debt owing for rent from *G. M.*, and for the plaintiff it was inſiſted, that there was a difference between a ſpecifick and a pecuniary legacy; that though the diſpoſing of a ſpecifick legacy might be an ademption of it, yet this being a pecuniary legacy, the paying of the money to the teſtator would not be a loſs of it. On the other ſide it was inſiſted, that there was a difference between a voluntary and compulſory payment, that though the firſt was no ademption, yet the ſecond was, and that the teſtator obliged *G. M.* to pay in the money. But my Lord Chancellor was of opinion, that there was no foundation for the difference taken in the books between a voluntary and compulſory payment, for the latter might be with an intent to ſecure the legacy at all events, and decreed the plaintiff the 40*l.* legacy.

Attorney-General v. Parkin, Ambl. 566.

[A teſtator enumerates mortgages, bonds, and notes due to him; and gives out of the intereſt an annuity to *A.* for life, and after her death, directs the ſecurities to be veſted in truſtees for charitable uſes. After the making of the will ſome of the ſecurities are paid off, (whether voluntarily, or not, did not appear,) and new ones taken. Lord *Camden* held, that this was a money legacy, a bequeſt of ſo much money as was equal to the money owing to the teſtator on the ſeveral ſecurities: that where the intention of the teſtator was to give a money legacy, there could be no reaſon to ſupport the diſtinction between a voluntary and a compulſory payment; and that therefore the receipt of the money on the ſecurities could not be conſtrued to be an ademption of it.

E. being

E. being entitled to 840*l.* lent upon mortgage in truſtees' names, bequeathed to the plaintiff 100*l.* to be paid by the truſtees out of the mortgage money, as ſoon as the ſame ſhould be received; and gave him 100*l.* more to be paid out of the ſaid mortgage, when the ſame ſhould be received. After making the will, there being a conſiderable arrear of intereſt upon the mortgage, and the principal and intereſt amounting to 1250*l.*, the teſtatrix agreed to a compoſition, and accepted 1000*l.* for the whole that was due; and within a ſhort time afterwards laid out the money which ſhe ſo received upon other ſecurities. On a bill by the plaintiff to be paid his legacy out of the aſſets, the queſtion was, Whether the receiving of the mortgage money was an ademption? The Maſter of the Rolls ſaid, that (to be ſure) an alienation of a legacy, if there is nothing elſe in the caſe, is an ademption, and equity will not ſet it up again: that the inference he drew from the caſes was, that there muſt be an indication of change of mind to work an ademption. A debt given ſpecifically, and called in, and no account appearing why it was called in, is an ademption; but if any account is given, it is otherwiſe. It is the intention that governs. It was ſo in the *Roman* law. *Juſt. Inſt.* 2. 20. 12. The receiving of the money in the preſent caſe is accounted for: the debt was increaſed from 840*l.* to 1250*l.*, it was in ſo much danger, that the teſtatrix took 1000*l.* for it. He did not agree, he ſaid, to the diſtinction taken in ſome of the caſes between voluntary payment and being called in, as laid down *generally:* at the ſame time he did not go ſo far as Lord *Talbot*, in *Aſhton* and *Aſhton*, 3 *P. Wms.* 384., and ſay, that the calling in a debt by the teſtator is not an ademption, becauſe it might be from an apprehenſion of ſuch debt being in danger; but if there is proof that it was called in for any other reaſon than an intention to adeem, he thought it not an ademption. His Honour therefore decreed the legacy and intereſt to be paid to the plaintiff out of the money which was received in, and laid out on other ſecurities. Hambling v. Liſter, Ambl. 401.

A. bequeathed a moiety of two-thirds of the reſidue of his *South Sea* ſtock, *India*, Bank, and Orphan ſtock, leaſes, *Eaſt India*, and *South Sea* bonds, mortgages, and other his perſonal eſtate to *B.*, who, before he received his legacy, made his will, and deviſed this moiety to truſtees, to ſell and pay 200*l.* thereout to *C.*, and the reſidue of the money to *D.* Afterwards *B.* and the legatee of the other moiety came to an account with the executor of *A.*, and their ſhares are ſet out and received, and the ſtock and bonds are allotted to *B.*, who ſells part of them in his lifetime, without keeping an account of the produce. It was decreed, that this was an ademption of the legacy to *D. pro tanto.* But the bare receipt of his ſhare by *B.* it was ſaid, was no ademption, for it did not ſhew any change of his mind, but was done in concert with the other legatee, to aſcertain their moieties, and prevent ſurvivorſhip. Birch v. Baker, Moſ. 373.

One partner by his will gives to his partners one-ninth of one-twelfth of the profits reſerved to him by the terms of the deed of co-part- Backwell v. Child, Ambl. 260

co-partnerſhip. He afterwards, on the expiration of the partnerſhip, enters into freſh articles with the ſame partners, under which they take a greater intereſt than they had under the former articles. Lord *Hardwicke* held, that the renewal of the articles was no ademption.

Aſhburner v. Macguire, 2 Br. Ch. Rep. 108.

A teſtator bequeathed *(inter alia)* as follows: "*Item*, I bequeath to my ſiſter *J. A.* the intereſt ariſing from her huſband "*W. A.*'s bond to me for principal 3500*l.* ſterling during her life, "independent of her preſent, or any future huſband, amounting "to 175*l.* ſterling *per annum*. *Item*, I bequeath the principal of "the ſaid bond, on the deceaſe of my ſaid ſiſter *J. A.* to her four "daughters (naming them) to be equally divided among them or "the ſurvivors of them. *Item*, I bequeath to Mr. *W. B.* my "capital ſtock of 1000*l.* in the *India* Company's ſtock." *W. A.* the debtor became a bankrupt after the making of the will, and in the teſtator's lifetime, and the teſtator proved his debt under the commiſſion, and received a dividend thereon. After the teſtator's death, another dividend was made to the bankrupt's creditors. The teſtator, at the time of making his will, was poſſeſſed of 1000*l. E. I.* ſtock, and no more; but ſold out the whole of it before his death. Lord *Thurlowe* held, that the bond was given as a ſpecifick legacy; that the receiving the dividend upon it under the commiſſion was no ademption of it, and directed that the bond ſhould be delivered up to the legatees, that they might receive the dividend not received by the teſtator, and whatſoever elſe might be thereafter payable out of the bankrupt's eſtate in reſpect of that debt. But as to the legacy to *W. B.* he held, that that was clearly adeemed: that it was a ſpecifick legacy, and the teſtator having ſold the ſtock after making the will, it was as if it had never exiſted.

Badrick v. Stevens, 3 Br. Ch. Rep. 431.

A teſtatrix bequeathed ſeveral ſums of money to different perſons, to be paid within three months after her deceaſe out of a bond-debt due to her; the obligor in the bond, who was one of the legatees, paid the debt with intereſt and took up the bond in the lifetime of the teſtatrix; but whether voluntarily, or upon demand, did not appear. The legacies were holden to be adeemed by this payment.

Savile v. Blacket, 1 P. Wms. 777.

Sir *E. B.* by his will gave to his two daughters 2000*l.* a-piece, to be paid in the manner therein mentioned, that is, 500*l.* part thereof he directed to be charged upon, and raiſed out of premiſes compriſed in his marriage ſettlement, on which he declared by his will he had power to charge 1000*l.* The teſtator had joined with his ſon in a recovery of theſe premiſes, and had thereby (according to the opinion of the court, on a queſtion raiſed in the cauſe) extinguiſhed his power to charge. Lord *Macclesfield*, upon the hearing, for further directions, notwithſtanding theſe ſums had been charged on a fund which failed, decreed them to be paid out of the teſtator's perſonal eſtate.

Coleman v. Coleman, 2 Ves. jun. 639.

A. by his will gave the intereſt of a bill of exchange for the ſum of 1500*l.* on the *Eaſt India* Company to his wife for life, and directed, that after her death the bill ſhould be ſold, and the money

money arising thereby divided between his nephews and nieces, with benefit of ſurvivorſhip. After making his will, the teſtator received from the *E. I.* Company the ſaid ſum of 1500*l.* due on the ſaid bill, and he lent it upon perſonal ſecurity. Some time after he called in 100*l.* which he lent to *J. H.*, who became inſolvent. The remaining 1400*l.* remained due at the death of the teſtator from the perſon to whom it was lent. It appeared that this bill conſtituted the bulk of the teſtator's fortune. The payment of the bill was decreed to be no ademption.]

If teſtator bequeath 100*l.* to a man, and in the ſame teſtament give him 100*l.* without taking notice of the firſt 100*l.*, the ſecond diſpoſition is underſtood to be but a repetition of the former, and all but one legacy, unleſs it appears that the teſtator intended him 200*l.* in all. Swinb. 530. Greenwood v. Greenwood, 1 Br. Ch. Rep. 30, note.

[But if two legacies of equal ſums are given to the ſame perſon, the one by the will, the other by a codicil, the ſecond bequeſt is conſtrued *primâ facie*, a duplication. Ridges v. Morriſon, 1 Br. Ch. Rep. 389.

Though this difference between the legacies being in the ſame will, and being one in the will, the other in a codicil, is mentioned as a ſtrange diſtinction by Mr. J. Aſton, in his learned argument in Hooley v. Hatton, 1 Br. Ch. Rep. 390. note. Yet he ſeems afterwards to admit it as ſettled. But notwithſtanding the legacies are in different inſtruments, yet if they be not given ſimply, but for a reaſon expreſſed, which reaſon is the ſame both in the will and codicil, it denotes the intention of giving but one bequeſt, and ſuch intention muſt prevail. Duke of St. Alban's v. Beauclerk, 2 Atk. 640. 1 Br. Ch. Rep. 392, note. On the other hand, if the wording of the gift in the codicil be varied from that in the will, and mark the legatee as an object of the teſtator's peculiar favour, this corroborates the *primâ facie* preſumption of law, that the latter ſhould be an additional legacy. 1 Br. Ch. Rep. 393. And this ſeems to hold where there is but one inſtrument. 2 Br. Ch. Rep. 528.

So, if the ſums in the will and codicil be unequal, whether the latter be the greater or the ſmaller of the two, they ſhall be taken accumulatively. Maſters v. Maſters, 1 P. Wms. 423. Curry v. Pile, 2 Br. Ch. Rep. 225.

Extrinſick evidence of intention may be taken into the account in theſe caſes; for the ambiguity of preſumption, whether a legatee ſhall have two legacies, does not ariſe ſimply from the conſtruction of words; but is a preſumption *donec probetur in contrarium*. 2 Br. Ch. Rep. 526-7. Hence an increaſe of fortune to the teſtator after the making of the will, and before the date of the codicil, has been conſidered as a circumſtance that he intended additional bounties. 1 P. Wms, 424.

So, where a teſtator bequeathed 300*l.* to be paid to the child he ſhould have at his death, and if he ſhould have none, then to his ſiſter; and afterwards, having three children born, he gave by a codicil 200*l.* to each of them, to be paid at their reſpective ages of 21 years; it was decreed, that the latter bequeſt being without words ſignifying the ſame to be for their portions, or any thing either to revoke or affirm the former gift, it ſhould be taken by way of accumulation, and the children ſhould equally divide both legacies. Pit v. Pidgeon, 1 Ch. Ca. 301.

But where a teſtator having made a codicil containing ſeveral legacies, afterwards made a ſecond preciſely to the ſame effect, with the addition of only one pecuniary legacy, his intention was thought to appear, that there ſhould be but one codicil, and the latter only was decreed to ſtand.] Coote v. Boyd, 2 Br. Ch. Rep. 521.

A. deviſes to his younger ſon 750*l.* and afterwards buys him a cornet of horſe's commiſſion, and paid 650*l.* for it; and it was proved to be intended this 650*l.* ſhould be diſcounted out of the legacy, and that he would ſtrike ſo much out of his will as ſoon Preced. Chan. 263. Hoſkins and Hoſkins.

as the accounts came from *London* to him, but he died before they came, without altering his will; and it was held, that this money paid for the commiſſion ſhould go in diminution of the legacy, and be taken in payment and ſatisfaction for ſo much.

2 Vern. 115. Jenkins and Powel, and there the caſe of Elken ſum deviſed.

If *A.* by will deviſe 200*l.* to his daughter, and afterwards on her marriage gives her more than that ſum, this is an extinguiſhment of the legacy.

Head cited, where payment in the teſtator's lifetime was adjudged a ſatisfaction of the like

Vern. 95. Huſbands v. Huſbands.

So, where the teſtator directed that 400*l.* ſhould be laid out in finiſhing a houſe which he was building; and lived after the making of the will, to expend a greater ſum in that ſervice; it was decreed againſt the heir at law, that this was an extinguiſhment and ſatisfaction of the 400*l.* although the houſe was not completely finiſhed at the teſtator's death.

(D) Where a Legacy ſhall be preſumed to be a Satisfaction of a Debt or Duty owing from the Teſtator.

Abr. Eq. 203. Salk. 155. pl. 5. 2 Salk. 508. 2 Vern. 177. 258. 298.

THE intention of the teſtator being the prevailing rule to go by in the conſtruction of wills, it has been from thence eſtabliſhed as doctrine, that wherever a perſon, by his will, gives a legacy as great or greater than the debt he owes to the legatee, that ſuch legacy ſhould be a ſatisfaction of the debt, on the preſumption that a man muſt be intended juſt before he is bountiful, and that his intent is to pay a debt, and not to give a legacy.

2 Vern. 111. Bloyes and Bloyes cited to have been adjudged.

As, where a man by marriage ſettlement provides 400*l.* for daughters, and having two daughters, by will gives them 200*l.* a-piece for their portions, without taking notice of the ſettlement; it was held, that the 200*l.* a-piece ſhould be a ſatisfaction of the portion by the ſettlement.

2 Vern. 498. Preced. Chan. 240. S. C. Brown v. Dawſon.

So, where a man had prevailed on his wife to join in ſelling 7*l.* 10*s.* *per ann.* of her jointure, and after 6*l.* 10*s.* *per ann.* more, and having given two ſeveral notes, that his executor ſhould pay her the ſaid two ſeveral ſums during life, he after makes his will, and thereby gives her 14*l.* *per ann.* during life, out of certain lands; this was held to be a ſatisfaction of the notes.

Preced. Chan. 138. Bromley v. Jeffereys.

So, where one ſettles his eſtate on truſtees, to be ſold for payment of his debts, with power of revocation; then he marries a daughter, gives her a portion, and covenants that the huſband ſhall have the eſtate 1500*l.* cheaper than any other; after he, by will, revokes the ſettlement, gives the huſband 1500*l.*, and dies; this legacy was held to be in ſatisfaction of the 1500*l.* ſecured by the ſettlement.

Bruen v. Bruen, 2 Vern. 439.

[So, where a term was created by a marriage ſettlement to raiſe 3000*l.* for daughters' portions, within 12 months after the death of

of the ſurvivor of huſband and wife, and there being one daughter, the father deviſed the truſt eſtate to make good his wife's jointure, and to raiſe 3000*l.* for his daughter's portion; it was holden, that the will ſhould be taken as relative to the ſettlement, and conſtrued for the better ſecuring the 3000*l.* by the ſettlement, and not as another deviſe of 3000*l.*

So, where a teſtator bequeathed 1000*l.* a-piece to each of his five daughters, and after legacies paid, gave the ſurplus of his lands equally amongſt his five daughters, and afterwards gave 1000*l.* portion with one of them in marriage, ſhe was excluded from the 1000*l.* intended by the will. Elken Head's caſe, cited in 2 Vern. 257.

J. S. ſettled his eſtate on himſelf for life, remainder to his firſt *&c.* ſon in tail male, with a proviſo, that if *B.* his ſon ſhould die without iſſue male, and leave a daughter, the truſtees ſhould raiſe out of part of the premiſes 5000*l.*, to be paid to ſuch daughter within a year after her marriage, or at her age of twenty-one, which ſhould firſt happen. *B.* on his marriage ſettled the ſaid eſtate (including the premiſes charged with the 5000*l.*) on himſelf for life, remainder to his firſt *&c.* ſon in tail male, remainder to truſtees for 200 years, in truſt to raiſe 8000*l.* for daughters' portions (if no iſſue male), payable at eighteen (*a*), if then married, or at any time after, when married. *B.* having no iſſue male, deviſed all his lands to *C.* in tail male, chargeable with his legacies, and bequeathed to *E.* his daughter for her portion 8000*l.* *viz.* 4000*l.*, part of it to be paid at her age of 18 years, and 4000*l.* reſidue thereof, within a year after marriage, or in all events at 21; and bequeathed to her 120*l.* *per ann.* until 18, and afterwards 200*l.* *per ann.* for her life. *E.* the daughter brought her bill for the recovery of all thoſe ſums of 5000*l.*, 8000*l.*, and 8000*l.*, inſiſting that none of them being given in ſatisfaction of the other, and it being the caſe of an heir at law, and theſe ſums payable at different times, ſome leſs beneficial than others, therefore all theſe portions, or at leaſt the 5000*l.* given by the grandfather, and the 8000*l.* given by the father, ſhould be paid her: but Lord *Harcourt* decreed, that ſhe ſhould have but one 8000*l.*, but that, when of age, ſhe might elect which of the portions ſhe pleaſed.] Copley v. Copley, 1 P. Wms. 147.

(*a*) The time of payment does not appear in Reg. Lib. though much inſiſted upon in argument.

So, if *A.* by marriage articles, agrees to leave his wife 800*l.* and her jewels, *&c.* but it is declared, that, notwithſtanding the articles, ſhe ſhould not be debarred of any thing he ſhould give her by will; and *A.* by will makes a diſpoſition of his whole eſtate among his children, *&c.* and gives his wife 1000*l.* The wife muſt waive the articles, or the will, for ſhe cannot have both; for his making a diſpoſition of the whole eſtate, ſhews that he intended that every part ſhould be performed. 2 Vern. 555. Herne v. Herne.

So, where a child, entitled by his father's marriage articles to a ſhare of his father's perſonal eſtate, had a legacy given to him by the will of his father; it was held, that, if he will have the legacy, he muſt waive the benefit of the articles. 2 Vern. 556.

So, where a freeman of *London* made his will, and deviſed legacies to his children more than their orphanage parts would amount to, without taking any notice whatſoever of the cuſtom; Trin. 1729, Nicholls v. Nicholls.

it

it was held by the Maſter of the Rolls, that theſe legacies ſhould be a ſatisfaction of their orphanage ſhares, to which they were entitled by the cuſtom in the nature of a debt; and that the legacies ſhould not come out of the teſtamentary or dead man's part, becauſe it is held in this court, that they ſhall not take both by the will and the cuſtom too; but where ſuch legacies are leſs than their orphanage ſhares, whether they ſhall be *pro tanto* a ſatisfaction, he was in great doubt, and ſent it to the city to certify, though he ſeemed rather to think they ſhould in that caſe take both, eſpecially, if none of the deviſees in the will were thereby diſappointed.

Johnſon v. Smith, 1 Vez. 314.

[*J. S.* by deed-poll aſſigned all his ſecurities to the value of 7000 *l.* to a natural daughter, but afterwards treats them as his own, not having delivered the deed to her. About ſix months before he died, he executed and delivered to her a bond for 10,000 *l.* payable in three months after his deceaſe. He afterwards made his will, and deviſed to her his real eſtate, provided ſhe married *W. J.*, but in caſe of her refuſal, he gave it to *W. J.* He likewiſe bequeathed her all his perſonal eſtate, and made her executrix. She refuſed to marry *W. J.* It was decreed, that the daughter was not entitled to the benefit of the deed of aſſignment and the bond, but muſt make her election.

Baugh v. Reed, 3 Br. Ch. Rep. 192.

The teſtator *James Reed* the elder had ſix children, *James*, *Sarah*, *Mary*, *William*, *Thomas*, and *Charlotte*, who were entitled under the will of their grandfather, upon their attaining their reſpective ages of 23 years, to two ſums of 5000 *l.* each, which had been paid into the Bank under an order of the court of Chancery, and laid out in the purchaſe of 11,315 *l.* 8 *s.* 4 *d.*, 3 *per cent.* Bank annuities, which being divided into ſix parts, came to 1885 *l.* 18 *s.*, and a fraction of a penny each. Such of the children as had attained their ages of 23 before the teſtator made his will, *viz.* *James*, *Sarah* (now *Sarah Jones*), and *Mary* (late *Fydell* deceaſed), had applied for their ſhares, which had been transferred to them; and *James Reed*, the eldeſt ſon, transferred his ſixth, the 4th *September* 1783, to the teſtator his father; *Sarah*, the eldeſt daughter, on the 8th *February* 1784, executed a power to the houſe of *Eſcot*, *Reed*, and Co., for transferring her ſixth of the ſaid ſtock; but the ſame was a general power to accept, receive dividends, and transfer, not naming to whom. The daughter *Mary* and her huſband *R. Fydell*, by their marriage articles, dated 24th *March* 1784, covenanted, that her ſixth ſhould become the property of her father; and in *April* following, it was transferred into his name. *William* the next ſon, 4th *Auguſt* 1784, transferred his ſixth into the name of his father. On the 30th of *July* 1784, the teſtator (being then poſſeſſed of 32,771 *l.* 16 *s.* 2 *d.* Bank 3 *per cents.*) made his will, and (*inter al.*) gave to truſtees three ſums of 8114 *l.* 1 *s.* 11 *d.* in the ſame ſtock, part of the capital therein, in truſt for his ſon *Thomas*, and his daughters *Sarah* and *Charlotte*, and their reſpective children and grandchildren. The queſtion was, Whether the 1885 *l.* 18 *s.* which continued to ſtand in the name of *Sarah* (now Mrs. *Jones*) was her property, or the property

property of her father? As to which a great deal of evidence was read, particularly that of *James* her brother, who ſwore, that the power of attorney was given for the purpoſe of a transfer to the father, which had not been made by miſtake, but he had received the intereſt till his father's death, and carried it to his account. On the contrary, evidence was read to ſhew, that at the time Mrs. *Jones* executed the power of attorney, ſhe was very ill, and ſcarcely knew what ſhe did, and that ſhe received no conſideration for it. Under all theſe circumſtances it was inſiſted, that Mr. and Mrs. *Jones* muſt elect between the ſum of 1885 *l.* 18 *s.* and the legacy. But Lord Chancellor ſaid, he thought the evidence was not ſatisfactory to drive Mr. and Mrs. *Jones* to an election. He thought it not ſufficient to enable him to pronounce, that the teſtator did not mean ſhe ſhould have both.

R. S. Byde having iſſue by a former wife one ſon, upon marrying a ſecond wife, ſettled lands on himſelf and his wife for their lives, remainder to truſtees to ſell the ſame to his ſon, by the former marriage for 5000 *l.* for a proviſion for the children by the ſecond marriage. Afterwards, having three children, and his wife being enſeint, he, by will, gave 1000 *l.* to each of the three children of the ſecond marriage by name, and 1000 *l.* to the child, of which the wife was enſient, and charged his lands with theſe portions. After his death, the ſon paid the 1000 *l.* portions, and accepted the purchaſe, and the wife dying, after her deceaſe, the plaintiff, the only ſurviving child of the marriage, filed a bill to have the purchaſe completed, and to be paid the 5000 *l.* over and above his portion under the will. Lord *Northington* thought the teſtator meant to give each child an election, and that by accepting the legacies, they had made their election to take under the will, and therefore diſmiſſed the bill without coſts.

Byde v. Byde, 1 Br. Ch. Rep. 309. note.

Sir *E. Seymour* and Mr. *Webb*, the paternal and maternal grandfathers of the plaintiff, upon the marriage of the plaintiff's father, entered into articles of agreement, dated *March* 2, 1716, whereby Sir *E. S.* agreed to ſettle the eſtates at *B.* on the plaintiff's father, chargeable with the following portions for younger children, namely, 4000 *l.* each for one or two, or 12,000 *l.* equally to be divided between three or more children, payable at 21 or marriage, which ſhould firſt happen after the death of the father. Beſides this, he agreed to advance 1600 *l.* to be laid out in lands as an additional jointure for plaintiff's mother.—Sir *E. S.* died in 1740, whereupon plaintiff's father, the laſt Duke of *Somerſet*, took under the marriage articles; and he alſo died in 1757, leaving the plaintiff, his eldeſt ſon, and the defendants, his widow and younger children. But plaintiff's father by his will made freſh proviſion for every branch of his family, and bequeathed to his three younger ſons 5000 *l.* each, and to his daughters the third part of his *W.* eſtate, or 8000 *l.* in lieu thereof, with croſs bequeſts between his ſons and daughters, in caſe of any of them dying under age, and charging the whole upon his eſtates at large, which he deviſed to the plaintiff, his eldeſt ſon, with remainders over to his younger ſons, ſucceſſively in tail male. The plaintiff filed his bill, praying, among

Duke of Somerſet v. Ducheſs of Somerſet, 1 Br. Ch. Rep. 309. note.

among other things, that his younger brothers and ſiſter's huſband might elect to take under the articles or will. And the Lord Chancellor directed them to make their election.

Hartop v. Whitmore, 1 P. Wms. 681.

J. W. by his will (he having at the time of making it four ſons and ten daughters) deviſed conſiderable real eſtates to each of his ſons, and to every one of his daughters (except *F.* the eldeſt, to whom he had given a full portion on her marriage, and his daughter *D.*, on whoſe portion the queſtion aroſe, and his daughter *D.*, who had diſobliged him by turning Roman catholick) he gave the ſum of 500 *l.*, if they married with their mother's conſent; otherwiſe, but 300 *l.* a-piece. He then gave his wife the reſidue of his perſonal eſtate in truſt for the performance of his will. He then gave his daughter *D.* 300 *l.*, if ſhe ſhould be living at her age of 23 years, and unmarried, or married by and with her ſaid mother's full conſent firſt had and obtained in writing; but if married when it was thereby appointed to be paid her, and that without her mother's full conſent as aforeſaid, then and in ſuch caſe he gave her 200 *l.* only, and that to be paid at her age of 23 years; and he appointed *S. W.* his wife ſole executrix. It appeared, that at the time of making the will *S. W.* was under her father's diſpleaſure, and then in *London* with a milliner, but upon one *T. Y.*'s paying his addreſſes to her, the father and mother were informed of it by a Mr. *F.* by letter; that they thereupon offered to give 200 *l.* as a portion, and no more; that *Y.* for ſome time refuſed to marry her without a larger portion, but they were afterwards married without the conſent of father or mother. Afterwards, upon *Y.*'s applying to the father for *D.*'s portion, the father offered him 200 *l.*, and the mother at that time ſaid, that if ſhe ſurvived her huſband, and had it in her power, ſhe would add another 100 *l.* *Y.* would not then accept the 200 *l.*, but afterwards wrote a letter to the father for it, who thereupon paid it to *F.* for the uſe of *Y.*, and took a receipt for it from *F.* The teſtator lived two years afterwards, without revoking or altering his will. *Y.* became a bankrupt, and his aſſignee brought a bill againſt *S. W.* the executrix, and *Y.* and his wife for the legacy of 300 *l.* By Lord Chancellor *Parker.*—If a father gives a daughter a portion by his will, and afterwards gives to the ſame daughter a portion in marriage, this, by the laws of all other nations as well as of *Great Britain*, is a revocation of the portion given by the will; for it will not be intended, unleſs proved, that the father deſigned two portions to one child. And as to his having lived ſo long after giving the portion to his child on her marriage, without ever revoking that part of his will, there could be no need for the father to revoke that legacy which he before had done by giving the portion in his lifetime, ſince that would be but revoking the ſame will twice. And this demand is the harder, inaſmuch as it is made by the aſſignee of the commiſſioners of bankruptcy againſt the huſband, ſo that the wife, whoſe portion this is ſaid to be, would be never the better for it.

Ward v. Lant, Pr. Ch. 182.

J. S. had four daughters, *A.*, *B.*, *C.*, and *D.*, and by his will deviſed to *A.* 1000 *l.*, and by the ſame will deviſed to them 1500 *l.* a-piece

a-piece for their portions, which ſeveral ſums of 1500*l.* were to be raiſed out of a real eſtate deviſed by his will for that purpoſe. *A.* married in the teſtator's lifetime, and he gave her 4000*l.* portion. By Lord Keeper *Wright.*—This 4000*l.* portion muſt be taken to be a ſatisfaction of the 1500*l.* given *A.* by the will for her portion, and a revocation of the will *pro tanto:* but as to the 1000*l.*, that being a general legacy, *A.* muſt have that, notwithſtanding the 4000*l.* given her for her portion.]

But though the caſes on this head have prevailed thus far on the circumſtances attending them, and the (*a*) intention of the teſtator, yet, as a legacy is a mere gratuity, it is to receive the moſt favourable conſtruction; and therefore, if it be leſs than the ſum due, payable on a (*b*) contingency or future day, on theſe and the like circumſtances it will be conſtrued an additional bounty, and not a ſatisfaction.

(*a*) That in all theſe caſes the intention of the party ought to be the rule. Salk. 508.

(*b*) Though the contingency does actually happen, and the legacy thereby becomes due, yet it ſhall not go in ſatisfaction of the debt, becauſe a debt which is certain ſhall not be merged or loſt by an uncertain and contingent recompence; for whatever is to be a ſatisfaction of a debt ought to be ſo in its creation, and at the very time it is given, which ſuch contingent proviſion is not. Preced. Chan. 295.

As, if *A.* give a bond to *B.* her ſervant, to pay her 20*l.* *per ann.* quarterly, for her life, free from taxes; and by will, without taking notice of the bond, gives 20*l.* *per ann.* for her life, payable half-yearly, but not ſaid free of taxes; *B.* ſhall have both the annuities, for that, by the will, not being ſo advantageous as the firſt, cannot be preſumed a ſatisfaction.

2 Vern. 478. Atkinſon v. Webb. Preced. Chan. 236. S. C. and the reaſons there given, becauſe the ſecond annuity being payable half-yearly, and charged on land, by which it will be liable to taxes, cannot be ſo advantageous.

So, where *A.* on his marriage covenanted to purchaſe and ſettle a jointure of 20*l.* *per ann.* on his intended wife, and if he died before ſuch purchaſe or ſettlement made, ſhe ſhould have 300*l.* out of his eſtate for her own uſe, the marriage was had, and the huſband died before any ſuch ſettlement was made; but by his will he deviſed to his wife 330*l.* for her life, with power to diſpoſe of 30*l.* part thereof, at her death; it was held, 1. That ſhe had a right to 300*l.* and intereſt, and that the executor could not now be at liberty to ſettle 20*l.* *per ann.* as the teſtator might have done. 2. That ſhe ſhould have the 330*l.* as an additional bounty and proviſion for the wife.

2 Vern. 505. Perry v. Perry.

[In the marriage ſettlement of *J. B.* the father, there was a proviſion of 8000*l.* for younger children, with a proviſo that if the father ſhould in his lifetime, or at the time of his death, give to any of his daughters or younger ſons ſo entitled to portions or proviſions under that truſt, money or lands, for or in advancement in marriage, or otherwiſe, the value thereof ſhould be deducted from the portion, unleſs he ſhould by writing declare the contrary. *J. B.* the father, by his will, gave a ſum of 4000*l.* in the funds to his wife for life, and after her deceaſe to his ſecond ſon *J. B.* jun. and alſo gave him the reſidue of his perſonal eſtate, and made him executor of his will.—It appeared from the Maſter's report, that the reſidue was conſiderably greater than the 8000*l.* charged upon the

Rickman v. Morgan, 1 Br. Ch. Rep. 63. 2 Br. Ch. Rep. 394. S. C.

the eſtate by the ſettlement. Lord *Thurlowe* decreed, that it was a ſatisfaction of the portion.

Deveſe v. Pontet, Nov. 15, 1785, Finch's Ed. of Pr. Ch. 240. note.

Felix Deveſe in 1768, covenanted by marriage articles, that in caſe *B.*, his then intended wife ſhould ſurvive him, and there ſhould be no iſſue of the marriage, that his heirs, executors, or adminiſtrators, ſhould, within nine months after his death, pay her 800 *l.* to be for her own proper uſe and benefit, and at her own diſpoſal; but in caſe there ſhould be any child or children born of the ſaid marriage, that the intereſt thereof ſhould be paid to her for her life, and after her deceaſe that the principal ſhould be paid or divided to and among ſuch child or children, *&c.* *F. D.* in 1781 made his will; and thereby (*inter al.*) after bequeathing ſeveral ſpecifick articles to his wife *B.* directed, that all the debts due to the buſineſs which he then carried on ſhould be collected as ſoon as poſſible; that the ſtock in trade and houſehold goods ſhould be valued, and the money that ſhould be in the publick funds, and the produce of all being collected, he deſired that it ſhould be divided into equal ſhares; the one *to be the property of his dear beloved wife* B., *for her to be diſpoſed of as ſhe pleaſed*; the other to be devolved to his dear beloved brother *P. D.* (ſince deceaſed), appointing him his heir general. The teſtator died ſome time after without iſſue. A bill being filed by the widow of *P. D.* againſt the teſtator's widow, and other neceſſary parties, the queſtion was, Whether the diſpoſition under the will ſhould be held as a performance or ſatisfaction of the covenant in the marriage articles? The Maſter of the Rolls held, that it was not a ſatisfaction, there being no expreſs evidence, or even a ſtrong preſumption, that the teſtator intended it as ſuch, and it having been repeatedly ruled that an aliquot part of a reſidue ſhall not be deemed a ſatisfaction.

Broughton v Errington, 7 Br. P. C. 12.

A., previouſly to his marriage, covenanted to ſecure to his wife an annuity of 1000 *l.* a-year, iſſuing out of lands, for her jointure and in bar of dower. He afterwards by his will deviſed to his wife certain parts of his real and perſonal eſtate, of conſiderable value. It was holden, that ſhe was entitled both to the eſtates deviſed, and to her annuity, and that the one was not to be intended to be a ſatisfaction for the other.

Chaplin v. Chaplin, 3 P. Wms. 245.

In a ſettlement, a term was created for raiſing 10,000 *l.* for daughters' portions, with a proviſo, that if the father by deed or will ſhould give or leave the ſum of 10,000 *l.* to his ſaid daughters, it ſhould be a ſatisfaction. The father leaves lands to the daughters of the value of 10,000 *l.* Adjudged to be no ſatisfaction.

Chancey's caſe, 1 P. Wms. 408. S. C. by the name of Chancy v. Wootton, Sel. Caſ. Ch. 44. (*a*) So, Cranmer's caſe, 2 Salk. Fowler v,

A. being indebted to his maid-ſervant, who lived with him for a conſiderable time, gave her a bond for 100 *l.* as for wages, and afterwards by will gives her 500 *l.*, which was mentioned in the will to be for her long and faithful ſervices. The Maſter of the Rolls obſerved, that the bond was *for ſervice*, and the 500 *l.* legacy alſo *for ſervice*, ſo that it is a greater reward and ſatisfaction for the ſame thing; and ſo decreed. But he held clearly, that ſuch a legacy is not a ſatisfaction for ſervice done to the teſtator after the making of the will (*a*). But this decree was

afterwards

afterwards reverſed by Lord *King*; for that the teſtator had by the expreſs words of his will directed, that all his debts and legacies ſhould be paid; and as this bond was then a debt, and the 500*l.* a legacy, it was as ſtrong as if he had directed that both the bond and legacy ſhould be paid: that when the teſtator gave a bond for the arrears of wages, it was the ſame thing as paying them; and as, if he had actually paid them, and had afterwards given the legacy of 500*l.*, the executor could not have fetched back the 500*l.*, and made the defendant refund, ſo neither ſhould the bond in this caſe be ſatisfied by the legacy. His Lordſhip added, that the executor did not himſelf take this 500*l.* legacy to be a ſatisfaction of the bond, as appeared by his having voluntarily paid the 100*l.* He therefore decreed the ſervant both her debt and legacy. Fowler, 3 P. Wms. 355. Thomas v. Bennet, 2 P. Wms. 343.

A. on his marriage gave a bond to his wife's truſtee in the penalty of 4000*l.*, conditioned, that if he at any time within four months ſhould ſettle and aſſure freehold lands of 100*l.* *per annum* on his wife for her life, or if his heirs, executors, or adminiſtrators ſhould, within the ſpace of four months after his death, pay unto his ſaid wife 2000*l.*, then the bond ſhould be void. The huſband, ſoon after the marriage, made his will, deviſing thereby freehold and copyhold lands of 88*l.* *per annum* to his loving wife and her heirs, having ſurrendered all his copyhold to the uſe of his will, and died within four months after the marriage. The wife claimed to retain theſe lands of 88*l.* *per annum*, and as her huſband had not ſettled the 100*l.* *per annum* for her life, ſhe alſo inſiſted that ſhe was at liberty to elect the 2000*l.* out of his aſſets. The Maſter of the Rolls decreed, that this 88*l.* *per annum* ſhould not be taken in part of the 100*l.* *per annum*; but only as a benevolence: and this decree was, on an appeal, affirmed by Lord Chancellor *King*. Eaſtwood v. Vinke, 2 P. Wms. 613.

A. had two daughters, *M.* and *N.* A legacy of 100*l.* was left to *M.* by *J. S.*, and another of 50*l.* by *W. R.*, and both legacies were in the father's hands as executor of *J. S.* and *W. R.* Afterwards *A.* by will, by virtue of a power, charges his lands with 2000*l.*, and alſo left *M.* and *N.* 250*l.* a-piece. Adjudged, that this was not a ſatisfaction of the legacies. Meredith v. Wynn, Pr. Ch. 314.

R. S. borrowed of his wife 100*l.* which ſhe had ſaved out of the money allowed her for houſekeeping, and by his will gave her a pecuniary legacy of 30*l.*, and alſo 40*l.* a-year during the life of her mother, and all his houſehold-goods for her life, and gave the reſidue of his eſtate to her three ſiſters. In a croſs bill brought by the widow for the 100*l.* and the legacies, the executors inſiſted, that the legacies and annuity ſhould be looked upon as a ſatisfaction of the debt. But Lord *Talbot* held, that the 30*l.* could not be a ſatisfaction, becauſe a leſs ſum; and as to the ſpecifick things deviſed, and the annuity of 40*l.* a-year, theſe ſorts of deviſes were never held to be in ſatisfaction of a debt, unleſs ſo expreſſed in the will; and his Lordſhip decreed accordingly. Stanway v. Styles, 2 Eq. Ca. Abr. tit. Deviſes, pl. 21.

A father gives legacies to his children, and makes his wife executrix: ſhe not having paid the legacies, by her will gives the Barkham v. Dorwine, Vin. Abr.

tit. Deviſe (T. c), pl. 37.

children legacies likewiſe; one of which was the ſame ſum, and the other a greater. It was decreed, the children ſhould not have both, and the latter was a ſatisfaction of the former.

Fowler v. Fowler, 3 P. Wms. 353.

Huſband, on his marriage, ſettled 100 *l. per annum* pin-money in truſt for his wife, for her ſeparate uſe, which became in arrear; and then the huſband by will gave the wife a legacy of 500 *l.*; after which there was a further arrear of the pin-money; and then the huſband died. This legacy being a greater ſum than the debt, was decreed, even in the caſe of a wife, to be a ſatisfaction of the arrears of the pin-money due before the making of the will, though not of thoſe incurred after the date of the will.

Nicholls v. Judſon, 2 Atk. 300.

W. L., to reward the ſervices of *A.*, who had lived with him a great number of years, gave her a bond in 1728 for payment of 300 *l.* and intereſt, on a day fixed; and in 1731 paid her 100 *l.*, part of the 300 *l.*, and all intereſt. In 1736 he made his will, and thereby (*inter al.*) gave to *B.* all his meſſuages, lands, *&c.* in *C.*, to hold to him, his executors, *&c.* for two hundred years, upon truſt out of the rents, *&c.*, by mortgage or ſale, to levy, raiſe, and pay to *A.* within two years after his death 200 *l.*, and ſubject to this term he deviſed the ſame premiſes to the plaintiff and his heirs: he alſo gave other lands to the ſame truſtee for 300 years, upon truſt, to pay 200 *l.* to *A.* within one year after his death. In other parts of his will he gave her plate, linen, *&c.*, and other perſonal legacies. The executor of *W. L.* paid off ſome part of the bond to *A.* in her lifetime. A bill was filed againſt the defendant, her repreſentative, praying, that the legacies bequeathed by the will of *W. L.* to *A.* might be decreed a ſatisfaction of the bond; and that the defendant might be directed to refund ſuch ſums as he had received in part payment of the ſaid bond from the executor of *W. L.* But the Maſter of the Rolls held theſe to be contingent legacies, and if the legatee had died before the days of payment, they would have ſunk into the land, for the benefit of the plaintiff: and as the rule of ademption had never been carried ſo far, as to take in a contingent legacy, he decreed for the defendant, that the legacies of 200 *l.* and 200 *l.* were not a ſatisfaction of the bond.

Graham v. Graham, 1 Vez. 262.

An annuity of 10 *l. per annum*, charged on a particular eſtate, was granted by deed to *A.* by her huſband's father for 99 years, on condition that ſhe maintained her ſon: another annuity of 6 *l. per annum* was given her by bond by the ſame perſon, during her widowhood: and he gave her a third annuity of 10 *l. per annum* by his will charged generally. The annuity given by the will cannot be conſidered as a ſatisfaction for both the other annuities, not being equal to them; nor as a ſatisfaction for the annuity of 10 *l. per annum*, becauſe out of different funds; the one being out of a particular eſtate, the other charged on the general fund of real and perſonal: but it is a ſatisfaction of the annuity of 6 *l. per annum*, for that is nothing more than a debt upon the teſtator's eſtate.

Haynes v. Mico, 1 Br. Ch. Rep.

A huſband entered into a bond on his marriage to leave to the wife, in caſe ſhe ſhould ſurvive him, 300 *l.* (which was her fortune), payable

payable in a month after his deceaſe. By will, he gave to his wife 500 *l.*, payable within ſix months after his deceaſe: he gave her alſo a houſe in fee, and ſeveral other ſpecifick legacies. Lord *Thurlowe* held this to be no ſatisfaction by reaſon of the different times of payment of the bond and legacy.

G. R. by his marriage articles covenanted to pay to his wife, in caſe ſhe ſhould ſurvive him, 200 *l.* free of all deductions in the name of a jointure, and the ſum of 50 *l.* to provide herſelf with a houſe, yearly during her life, to commence at *Whitſunday* or *Martinmas*, which ſhould firſt happen after his deceaſe. Afterwards, by his will he directed his debts to be paid, and gave his wife for life the capital meſſuage at *P.* in *C.* with the houſehold goods, plate, linen, and china therein; and deviſed an eſtate to his eldeſt ſon when he ſhould attain 21. Then reciting articles into which he had entered to aſſociate captains of *India* ſhips, he gave certain directions relative thereto; and then gave all the reſidue to truſtees upon truſt to inveſt the ſame in ſtock, and to permit his wife and her aſſigns to receive 100 *l. per ann.* during her life. He then gave annuities to his children, ſiſters, and uncles; and declared, that the ſeveral annuities, as well to his wife and children as to his ſiſter and uncles, ſhould be payable half-yearly, and commence from the day of his death. The Maſter of the Rolls, Sir *R. P. Arden*, thought the proviſions in the will were not intended as a ſatisfaction of the covenant; for if the teſtator had had the articles in contemplation, it was abſurd to ſuppoſe, he ſhould give a real eſtate in ſatisfaction for half, and an annuity payable and commencing at different times for the other half, proviſions ſo extremely different, without expreſſing it to be a ſatisfaction.

Richardſon v. Elphinſtone, 2 Ves. jun. 463.

Harry Merryweather and *Ann* his wife ſeiſed in fee-ſimple (in the right of *Ann* of a moiety of lands in *H.* and *N.* in the county of *S.*) by indenture, *Oct.* 4th, 1740, covenanted with truſtees to levy a fine to enure to the uſe of *H. M.* for life, remainder to *A.* for life, remainder to *Rachael Coles* (ſiſter to *A.*) for life, remainder to truſtees for a term of 1000 years, remainder to the right heirs of the ſurvivor of *H. M.* and *R. C.* The truſts of the term were to raiſe 1000 *l.* to be paid to ſuch of the relations, *&c.* of *A.*, and at ſuch times and in ſuch proportions as the ſurvivor of *H. M.* and *R. C.* ſhould by deed or will appoint, and in default of appointment to the next heir or coheirs of *R. C.* The fine was levied: *H. M.* and *A.* both died in the lifetime of *R. C.*, who thereby became entitled to the inheritance of the moiety compriſed in the indenture, ſubject to the term of 1000 years. She was at the ſame time, and at the time of the execution of the indenture, ſeiſed in fee of the other moiety. She died in 1769, having made her will bearing date the 26th *Nov.* 1756, by which ſhe gave annuities to the father of the plaintiff *Mills*, and to the mother of the defendant *Veale*; and after their deceaſe, ſums of 100 *l.* to be divided between the children of the annuitants, charged on lands not compriſed in the ſettlement, and an annuity to the mother of the plaintiff *Litman*,

Cantle v. Morris, 1 Br. Ch. Rep. 132. note.

man; and after her deceaſe, a ſum of 100*l.* to be divided between the children of the plaintiff *Litman*, charged upon *H.* eſtate, (one moiety of which was compriſed in the indenture); and, having given other legacies charged on *H.*, deviſed the premiſes to a truſtee for the term of 100 years to raiſe the ſame: and ſhe gave all her meſſuages, *&c.* whatſoever, in *H.* and *N.* (charged with the payment of the annuities and legacies,) to defendant *Morris* for life, with remainder to truſtees to preſerve, *&c.*; remainder to his firſt and other ſons in tail general; remainder to his daughters in tail general; remainder to defendant *Veale*, with like remainders; remainder to *J. Litman*, ſon of plaintiff *Litman*, in fee. And out of her perſonal eſtate the teſtatrix gave ſeveral legacies, and gave the reſidue to *J. Morris*. She made no other appointment of the 1000*l.* The plaintiffs *Cantle*, *Mills*, and *Elizabeth Litman*, wife of *William Litman*, (father and mother of plaintiff *Litman*, both ſince deceaſed,) were her heirs at law, and filed their bill, inſiſting that they were entitled to have the 1000*l.* raiſed. The defendant ſet up three defences: 1ſt, That *R. C.* having become entitled to the inheritance in fee of the moiety compriſed in the term, the term ſunk into the inheritance. 2d, That the will operated as an appointment, and the deviſees of the eſtate, being relations of *Ann*, were capable of taking as appointees. 3d, That the legacies and other charges were ſatisfactions *pro tanto;* and therefore, (if they were wrong upon the other point,) only the reſidue of the 1000*l.* ſhould be raiſed. But Lord Chancellor ordered the whole of the 1000*l.* to be raiſed for the plaintiffs, and, upon appeal to the Houſe of Lords, this decree was affirmed.]

June 12, 1782.

2 Vern. 258. Duffield and Smith.

By a marriage ſettlement, in caſe of failure of iſſue male, the remainder of the eſtate was limited to daughters, until they ſhould raiſe 3000*l.* for portions: there was iſſue of the marriage a ſon and two daughters: the father deviſed 700*l.* a-piece to the daughters, and died: the ſon afterwards made his will, and deviſed to the daughters to the amount of 7000*l.*, without any mention of its being in lieu or ſatisfaction of any thing due to them, and gave his land to his heirs male, and died without iſſue. It was held clearly, that the father's legacy could be no ſatisfaction, not being adequate in value: beſides, the father had a ſon then living, and it was altogether contingent and uncertain whether 3000*l.* would ever ariſe and become payable or not, and therefore it was but reaſonable that the father ſhould make ſome certain proviſion for his daughters: but as to the ſon's legacy of 7000*l.* it was by two lords commiſſioners, againſt *Rawlinſon*, decreed a ſatisfaction; but upon an appeal to the lords the decree was reverſed, for the daughters being heirs at law, and diſinherited, there was no ground for the court to make a ſtrained conſtruction to their prejudice, in favour of a voluntary deviſee.

Salk. 155. pl. 5. Cuthbert v. Peacock. 2 Vern. 595. S. C.

H. owed to his niece *A.* 100*l.* by bond, and having two other nieces, *B.* and *C.*, makes his will, and bequeaths 300*l.* to his niece *A.*, and to his two other nieces 200*l.* a-piece: after that he borrowed another 100*l.* of his niece *A.*, and died, being indebted to her

her in 200*l.* To prove that the 300*l.* ſhould go in ſatisfaction of the debt, it was inſiſted on as a rule in equity, that where a teſtator, being indebted, gives his debtee a legacy greater than his debt, it ſhall go in ſatisfaction; for a man ſhall be intended to be juſt before he is kind: otherwiſe, where a legacy is leſs, for that is neither to be juſt nor kind, and ſhall not be taken to go in ſatisfaction of any part. But *per Cowper*, Lord Chancellor, it might be as good equity to conſtrue him to be both juſt and kind, if he intended to be both; if any part of this 300*l.* be applied to the payment of the debt, as for ſo much it is not a gift; whereas a legacy muſt be taken to be a gift or gratuity: and there being aſſets, and ſome (*a*) proofs of the teſtator's greater kindneſs to *A.* than his other nieces, his Lordſhip decreed her the whole 300*l.* over and above her debt. 2 Atk. 517. *& infra.*

(*a*) But whether any parol evidence ought to be admitted in thoſe caſes, ſee tit. Evidence. See alſo Shudal v. Jekyll, Preced. Chan. 514.

If a legacy of 100*l.* is given to *A.* by *J. S.*, and another of 50*l.* by *J. D.*, and of both wills *A.*'s father is made executor, who having by a marriage ſettlement power to charge his land with 2000*l.* for portions, deviſes 1000*l.* equally between his daughters; by deviſing it to them equally, according to the marriage ſettlement, he ſhews that he intended them an equal benefit, and therefore the 1000*l.* ſhall not be in ſatisfaction of the legacies given *A.*

A. indebted to *B.* in 50*l.* left him a legacy of 500*l.* and made him executor, and after the making of his will, borrowed 150*l.* more of him; and the Maſter of the Rolls held, that the legacy ſhould be a ſatisfaction of both debts: but *Harcourt*, Lord Chancellor, reverſed his decree, and held, that a court of equity ought not to hinder a man from diſpoſing of his own as he pleaſes; and when he ſays he gives a legacy, it cannot contradict him, and ſay he pays a debt: and it was alſo held in thoſe caſes, if a legacy be leſs, it ſhall not be a ſatisfaction. So, if the thing given be of a different nature, as land, it ſhall not go in ſatisfaction of money. So, if the legacy be upon condition, for by the breach he may be a loſer, whereas the will intended it for his benefit. 2 Salk. 508. pl. 4. Cranmer's caſe.

A., by will, gave ſix ſeveral annuities for lives, three of 10*l.* each, and three of 5*l.* each, to be paid out of his perſonal eſtate, and gave all the reſt of his real and perſonal eſtate to *E.* his wife, whom he made ſole executrix: the annuitants were his ſiſters and their children; and about two years after the wife makes her will, and gives two annuities of 5*l.* each to two of the 5*l.* a-year annuitants in her huſband's will, but gives them to them and their heirs, in caſe they happen to overlive ſuch a one, who by her huſband's will had 10*l. per ann.* for life; ſhe likewiſe gives another annuity of 10*l. per ann.* to one and her heirs, and another of 5*l.* to another and her heirs, who had each of them the like annuities for life by the huſband's will; but in the diſpoſition of theſe annuities ſhe takes no manner of notice of her huſband's will, or that they had any annuities thereby given them; and the only queſtion was, Whether the four annuities given to the perſons in fee, by the wife's will, ſhould be taken to be only in ſatisfaction of the like annuities for life, given to the ſame perſons by the huſband's will? and it was argued that they ſhould, becauſe the Trin. 1729, Crompton v. Sale, 2 P. Wms. S. C.

husband's annuities being payable only out of his personal estate, and the wife being his executrix, she was in the nature of a debtor for them; and wherever a person, by his will, gives a legacy as great or greater than the debt he owes to the legatee, it has always been taken to be a satisfaction of the debt. But *per* Lord Chancellor, this doctrine has already been carried too far, and he would never carry it farther; for though it is true, a man ought to be just before he is bountiful, and therefore shall be presumed to pay a debt rather than give a legacy to the same person, when it is the same sum, or more, than he owes him; yet why may he not be both just and bountiful when there are assets to answer both, as in the present case; and there can be no pretence to say that the two first annuities of 5 *l.* can be a satisfaction of the like annuities given by the husband, because they are given upon the contingency of overliving such a one, which has not yet happened, and possibly never may; and then shall the annuities for life, which are certain, be extinguished by giving the same persons annuities in fee on a contingency which may never happen? And if that were so, as to these annuities, there is no reason to imagine the wife had a different intention as to the others, or that she intended two of them should go in satisfaction of the like annuities given by her husband, and the other two not: and the cases where a legacy has been held a satisfaction of a debt, are, where the debt was owing by the same person who gave the legacy: but if such legacy be given on a contingency, or to take place at a future day, it is no satisfaction of the debt; and therefore in the principal case it was decreed, that the annuities given by the wife were distinct additional annuities, and not an enlargement only of the husband's annuities from an interest for life to an interest in fee, and that the annuitants should take both.

Bellasis v. Uthwait, 1 Atk. 426.

[*J. S.*, on his marriage, made a settlement of some exchequer annuities for 99 years, to the amount of 300 *l. per ann.* in trust for himself for life, remainder to his wife for life, remainder to his children, in such manner as he should appoint, and if no children, to his executors, administrators, and assigns. By this marriage there was only one child, *B.* *J. S.* being likewise seised of a considerable real and personal estate, afterwards devised all his real and personal estate to his wife and her heirs, charged with the payment of 10,000 *l.* as a portion for his daughter, payable at the age of 18 years; and in case his wife should marry again, that then the estate should stand charged with a further sum of 5000 *l.* for his daughter. One point in the cause was, whether the 10,000 *l.* bequeathed by the father to *B.* should be taken to be in satisfaction of the annuities under the settlement, and so the annuities be considered as part of the father's personal estate which he had a right to dispose of by his will? And Lord *Hardwicke* was of opinion, that it could not be taken to be in satisfaction, but that *B.* was entitled to both as a double portion: for though the annuities and the legacy are both of the same nature, both personal estates; yet the legacy of 10,000 *l.* is subject to a contingency, and not payable, unless *B.* survived the age of 18 years: besides, *B.* might have

have lived till the annuities were run out, as ſeveral of the years were already gone; and as the legacy might never have become payable, it would be hard to ſay, that a mere contingency ſhould take away a portion abſolutely veſted, eſpecially in the caſe of an only child. If indeed the father had diſpoſed of theſe annuities to any other perſon, it might have been a queſtion, his Lordſhip added, whether the 10,000 *l.* ſhould not be taken to be in ſatisfaction, and whether, upon thoſe circumſtances, *B.* ought to be allowed to inſiſt upon both demands?

A freeman of *London*, having a wife and ſix children, by his will gives his wife her widow's chamber, and the third of his eſtate, which ſhe was entitled to by the cuſtom of *London*; and to his ſix children one other third which they were entitled to by the cuſtom; and as to the third which he had a power to diſpoſe of, he directed a debt of 100 *l.* to be paid out of it, and the reſidue to be equally divided between his wife and children. After making his will he married one of his daughters to the plaintiff, and gave her 1000 *l.*, which in the marriage articles was called her portion or proviſion. On the death of the teſtator, a bill was brought by the huſband and wife, for their ſeventh part of their teſtamentary third. For the defendants, the other children, it was inſiſted, that the portion was a ſatisfaction for the whole, and that as the plaintiffs did not offer to bring the 1000 *l.* into hotchpot, to make all the children equal, they ought not to claim this 1000 *l.* (which was more than their teſtamentary third, the whole eſtate being only 10,500 *l.*) and the ſhare of the teſtamentary part too, by which they would have 290 *l.* more than the other children; that the will intended an equality among all the children, and as they refuſed to bring in this 1000 *l.*, they claimed under the will as far as it makes for them, and againſt the will, when it makes againſt them, which equity would not permit. But Lord *Hardwicke* ſaid, that though it be true, that where a father, after making his will, advances his child with a portion as great or greater than the legacy given by the will, ſuch proviſion has been always holden an ademption; yet, there was no caſe where the deviſe has been of a reſidue (that is uncertain, and at the time of the teſtator's death may be more or leſs,) in which a ſubſequent portion given has been held to be an ademption; that this was not a deviſe of one third, but of a reſidue after payment of a debt charged on that third: that here was likewiſe ſomething to which this portion might be properly applied as a ſatisfaction, *viz.* the orphanage part; and the teſtator calls this a portion or proviſion in the marriage articles, which ſeems as if he then conſidered this as an advancement in his lifetime in bar of the cuſtom: that there was no declaration in the will, that he intended all equal; but what he has ſaid of equality is of the reſidue, which is a part of the eſtate remaining after what was given away in the teſtator's lifetime. His Lordſhip decreed accordingly. Farnham v. Phillips, 2 Atk. 215.

J. S. by a codicil, without any date, gives 1000 *l.* a-piece to *M.* and *S.*, (the daughters of Mrs. *R.* a widow, with whom he lived for ſeveral years till the time of his death,) and if either of them Spinks v. Robins, 2 Atk. 491.

ſhould die before their legacies were paid, then he gave the whole to the ſurvivor, and directed that each of the ſaid legacies ſhould remain in the hands of his executors, till the legatees attained the age of 21. He afterwards enters into two bonds, one to *M.* and the other to *S.*, reciting, that for divers good cauſes and conſiderations, he is deſirous of making a proviſion for and towards their maintenance. Each of the bonds was in the penalty of 4000 *l.* for ſecuring 2000 *l.* a-piece to them, provided they ſhould marry in his lifetime, with his conſent, or in caſe they ſhould ſurvive him. It was inſiſted, that the bonds were to be conſidered as given in ſatisfaction of the legacies under the will: but Lord *Hardwicke* held, that they were not; for that he did not remember in any caſe between ſtrangers, where a man firſt gives a legacy by will, and afterwards a different ſum to the ſame perſon by bond, that the one has been held to be in ſatisfaction of the other; that in this caſe it weighed with him very ſtrongly, that the money given by the bond was upon a contingency, and therefore wholly uncertain whether one ſhilling of the principal ſum would become due or not; and that in the conſtruction upon double portions, it had always been of weight, that they were both certain.

Shudal v. Jekyll, 2 Atk. 516.

A bill was brought againſt the executors of Sir *Joſeph Jekyll* for a legacy of 1000 *l.*; Sir *J.*'s will was dated the 4th of *May* 1738: ſoon afterwards Mr. *S.*, the plaintiff's late huſband, made his addreſſes to her, and applied in *July* following to Sir *J.*, who was her uncle, for his approbation; who, being ſatisfied with the match, ſaid, he would give him 500 *l.*, but as it was not convenient to let him have the money, he would draw a note payable to him on 25th of *March* 1739, and lodge it in Mr. *Hill*'s hands, to be delivered to Mr. *S.* after the marriage was had, (which he did accordingly); and alſo ſaid, that he would leave ſomething to his niece by will, but that he would not be put under any obligation of doing it. Upon the 19th of *Auguſt* 1738, Sir *J.* died without revoking his will, and the very next day the plaintiff and Mr. *S.* were married. The queſtion was, Whether the legacy under the will was ſatisfied by the 500 *l.* given in the teſtator's lifetime? Lord *Hardwicke* decreed, that it was not: that there was nothing done by Sir *J. J.* afterwards in his lifetime that induced a preſumption of ſatisfaction; and farther, that even if a father had given his daughter a portion in his lifetime, and accompanied it with ſuch declarations as uſed by the teſtator in this caſe, a portion ſo given would not have been an ademption of the legacy; *a fortiori* in this caſe, it could not, where the teſtator was only a remote collateral relation, the plaintiff's great-uncle, and did not even ſtand *in loco parentis*, for the plaintiff's father was living.

Wood v. Briant, 2 Atk. 521.

The plaintiff's wife was entitled to the reſidue of her grandmother's eſtate, under her will, and likewiſe was left executrix, *& durante minori ætate*, her father was adminiſtrator. At the time of her marriage with the plaintiff, he was, by agreement, to have 800 *l.* from the father, which in the ſettlement was mentioned to be for a portion, and in conſideration of natural love and affection. It was inſiſted for the plaintiff, that he is entitled to an

an account of the grandmother's eſtate from the repreſentative of the wife's father, and that the 800*l.* paid by her father, upon her marriage, was not in ſatisfaction of this reſidue, eſpecially as it is expreſſed to be given for natural love and affection: and as the father, at the time of the marriage, was worth at leaſt 8000*l.* and had only this daughter and one ſon, the counſel argued, it was not probable he meant it as a ſatisfaction; that conſtructive ſatisfactions muſt be drawn from circumſtances; that there is no caſe to be produced, where a father is indebted to a child on account of a demand under the will of a collateral relation, and that before the demand is liquidated, his giving a ſum as a portion to this child, has been held a ſatisfaction: and for this purpoſe were cited *Chidley* v. *Lee*, *Pr. Ch.* 228., and *Barnham* v. *Phillips (ſupra)*, before Lord *Hardwicke* in 1741.—The counſel for the defendant reſted chiefly upon the parol declarations of the plaintiff and his wife, ſoon after the marriage, that the 800*l.* was intended both as a portion and a ſatisfaction likewiſe as to the reſidue of the grandmother's eſtate; and the depoſitions of ſix or ſeven witneſſes were read, which were very full to this point. To encounter this, on the plaintiff's ſide, was read the evidence of the father's declarations before and after the marriage; that he ſaid his mother had left 500*l.* at leaſt to his daughter; and that he would give *John Wood* (the plaintiff) 1000*l.* and make a man of him; and not above ſix weeks before his death, ſaid to the plaintiff, "Thou knoweſt I owe thee a great deal of money, and "thou ſhalt not be wronged of a farthing." Lord *Hardwicke* refuſed to decree an account of the grandmother's perſonal eſtate, ſhe having been dead twenty years, and there being no grounds to think that the reſidue under her will was more than the fortune given to the plaintiff's wife in marriage, it being admitted, that 500*l.* was the utmoſt amount of it.

In the caſe of Chidley v Lee, the facts were theſe, viz. Mr. *L.* was father to the plaintiff's wife, and had in his hands a legacy of 150*l.* which had been given him by a collateral anceſtor. On her marriage with the plaintiff, the defendant, her father, gave her 1000*l.* portion, and after ſettled a church leaſe on the plaintiffs, and maintained them 14 or 15 years at his own houſe, and no notice was ever taken of the legacy, nor, for aught appeared, did the huſband know any thing of it; yet, after ſome difference between them, and a bill brought, the legacy was decreed with intereſt and coſts; and the Maſter of the Rolls ſaid, he could not diſcharge it, though he diſliked the ſuit.—Lord Hardwicke, in ſpeaking of this caſe, ſays, the ground Sir John Trevor went upon was, that the huſband knew nothing of the legacy to the wife from the collateral anceſtor, and therefore held it was not ſatisfied by the portion, though it was a much larger ſum than the legacy: but his Lordſhip added, he thought this an extremely hard caſe, and he believed he ſhould have been inclined to determine it otherwiſe. 2 Atk. 523.

Seed v. Bradford, 1 Vez. 501.

On a bill by the plaintiff, as adminiſtrator to his wife, one of the daughters of *W. Bradford*, which daughter was entitled to a fifth part of a legacy of 520*l.*, left to her and her four ſiſters by the will of *T. Tindall* their grandfather; the caſe was as follows, *viz. Tindall* made the wife of *Bradford* executrix. *Bradford*, as her huſband, poſſeſſed himſelf of the perſonal eſtate of *Tindall*; mixed the effects with his own; applied them to his own buſineſs; and continued ſo till his death. Upon a treaty for the marriage of the plaintiff in 1740, with one of his daughters, *Bradford* agreed to give 400*l.* as a marriage portion, as it was ſworn by the plaintiff's father, one of the parties to the agreement. On the wedding day, *Bradford* went up and fetched the 400*l.* which was put by for

for the husband's use; one witness swearing, that *Bradford* said, "there is the money, but that is not all;" another, that he said, "there is what I give my daughter, but that is not all;" and both added, "or words to that effect." It appeared, that the daughter was privy to the right she had to this fifth part. It did not appear (but rather the contrary) that her husband knew of it at that time; but he knew of it a year after the marriage, yet never made any demand of it in the life of his wife, who died in 1742, nor in the life of *Bradford*, who died in 1746. The court, principally upon the ground of the long acquiescence by the plaintiff, decreed the 400*l.* to be an implied satisfaction of the 104*l.*, the fifth part of the legacy of 520*l.*

Mackdowell v. Halfpenny, 2 Vern. 484.

A. devised his real and personal estate to *B.* his son, charged with 500*l.* to *B.*'s daughter, payable at 21 or marriage. *B.* married this daughter to *C.* her first husband, after the testator's death, and gave her 1500*l.* as a portion, but no mention was made of the 500*l.* legacy, nor was any release or discharge taken for it. Twenty-one years afterwards, the daughter and her second husband, brought their bill against the father for the 500*l.* legacy. But the bill was dismissed, it being to be presumed, that the 1500*l.* portion was intended in satisfaction of the legacy, especially after such a length of time.

Clerk v. Sewell, 3 Atk. 96.

E. G. by his will gives a legacy of 2000*l.* to trustees, in trust to pay the interest thereof, to his wife for life, and after her death the benefit of the principal to his son; but if he dies before 21, then he gives it over to his daughters, and makes *J. S.* and two more persons executors. The son attained 21, and became entitled to the 2000*l.* The directions in the will were, that the executors should carry on the testator's trade of a brewer; and in compliance with this, they suffered the 2000*l.* as well as the rest of the testator's estate to continue in the trade. The son, after he had attained his age of 21, still carried on the trade on the foot of the same stock which was left by his father. The son afterwards makes his will without any reference at all to his father's, and gives a legacy of 10,000*l.* upon different trusts from what his father had done of the 2000*l.*; for after the interest of the 10,000*l.* to his mother for life, he gives the principal to his sister *S.*'s children, and charges it upon all his real and personal estate, and to be paid to trustees *in a month after his death*. Upon the death of the son, the plaintiff, as devisee of the mother, insisted both on the interest of the 2000*l.* and the interest of the 10,000*l.* Lord *Hardwicke* held him entitled to both; that in the case of portions, it is true, the court always leans against incumbering estates twice over; and will overlook little circumstances of time; as to the payment of two sums to children, if it appears to be a double portion and a double provision for younger children; but that this has never been the rule in regard to debts, where the funds for payment are appointed by different persons: that the interest of the 2000*l.* was part of the provision and livelihood of the mother, and a debt upon the estate of the father in the hands of the son: that the mother might have lived till within a day of the time which was

to

to be the commencement of the payment of the intereſt of the 10,000 *l.* to her, and yet not have been entitled to it, and therefore it could be no ſatisfaction; for there is no caſe to make a legacy a ſatisfaction of a debt, when the legacy is not due at the time of the teſtator's death, but is made contingent, and to take place at a future day.

J. B. being by the will of *J. P.*, to whom he was executor, to pay 300 *l.* to his aunt *M. P.*, deviſes the reſidue of his eſtate to his mother and his aunt *M. P.* for life. It was adjudged, that this deviſe of the moiety of the reſidue for life was not a ſatisfaction of the annuity; for it is a general rule of ſatisfactions, that the thing given in ſatisfaction ſhould be exactly of the ſame nature, and equally certain; but that here it was neither: the firſt being a clear annuity of 300 *l.*, the laſt being the moiety of the reſidue of the perſonal eſtate, whether more or leſs: that when a legacy has been preſumed a ſatisfaction, it has been for a debt by the ſame teſtator. Barret v. Beckford, 1 Ves. 519.

A ſon was entitled under the marriage articles of his mother to have 1500 *l.* laid out in land to his ſole benefit after the death of his father and mother. The mother died; the father by a ſecond marriage had a daughter, and having made a proviſion for her by a ſettlement, he, by his will, deviſed other parts of his eſtate to his daughter and her heirs, and the reſidue in truſt for his ſon for life, and then to the daughter, with particular limitations and declarations of that truſt; and all his perſonal eſtate, except ſuch as was given to the daughter, he gave to the ſame truſtees to pay all juſt debts and legacies, and then to his ſon for life, with a bequeſt over to the daughter and her family. It was inſiſted, that this deviſe to the ſon was a ſatisfaction for the 1500 *l.* But Lord Chancellor ſaid, there was no authority that ſuch a bequeſt as this of the reſidue of real and perſonal eſtate, after payment of juſt debts, to teſtator's eldeſt ſon and heir for life only, ſhould be conſtrued a ſatisfaction for the 1500 *l.* he was entitled to under his mother's marriage articles. If the ſon died in the lifetime of the father, leaving ſeveral children, there was no proviſion for them. So, if he ſurvived, as he did, and had iſſue afterwards: the 1500 *l.* therefore muſt be conſidered as a debt by ſpecialty on the teſtator's eſtate, to be retained by the defendant his ſon. Alleyn v. Alleyn, 2 Ves. 37.

Mr. *Pelham*, having four daughters, by his will appointed a ſum of 10,000 *l.*, over which he had a power under his marriage ſettlement among his daughters, excepting Lady *Lincoln* (whom he had advanced); he then directed his *Nottinghamſhire* eſtate to be ſold after the death of the Duke of *Newcaſtle*, and the money to be divided among all his daughters, excepting Lady *Lincoln*; and alſo gave his perſonal eſtate among his daughters, excepting Lady *Lincoln*, and the reſidue of his real eſtate to all the daughters without any exception. By a codicil he charged his eſtate at *Eſher* with 5000 *l.* to each of his younger daughters who ſhould not be entitled to the houſe and park at *Eſher*. His daughter *Grace* afterwards married Mr. *Watſon*; and Mr. *Pelham* gave her 20,000 *l.*, by applying part of the 10,000 *l.* and other means, for her fortune: and the Watſon v. Earl of Lincoln, Ambl. 325. 1 Br. Ch. Rep. 66. note, S. C.

the queſtion was, Whether the legacy given by the will was ſatisfied by the portion? Lord *Hardwicke* held, that the 20,000 *l.* advanced to *Grace* in Mr. *Pelham*'s lifetime, which by her marriage ſettlement was recited to be in full of her portion or fortune, was a ſatisfaction of what ſhe could claim under the will or ſettlement of her father by way of portion; but as to the deviſe of the one-third of the perſonal eſtate, and the fourth of the reſidue of the real eſtate, his Lordſhip thought it was no ſatisfaction.

Jeacock v. Falkener, 1 Br. Ch. Rep. 295.

T. C. entered into a bond to truſtees, reciting, that he was deſirous of providing for one of the defendants *T. C.* his natural ſon, then about four years old, and conditioned that his executors ſhould, ſix months after his deceaſe, pay the ſum of 5000 *l.* to the truſtees for the uſe of the ſaid *T. C.*, the intereſt to be applied for his maintenance and education till 21, and the principal then to be paid him; but if he ſhould die, living the father, or under 21, then not to be paid.—*T. C.* afterwards made his will, whereby he gave the defendants, the truſtees, all his eſtates in truſt to pay legacies, and to lay out 15,000 *l.* upon ſecurities, and to apply 200 *l. per ann.* to the education of his natural ſon *T. C.*, till 25, and then to pay to him the 15,000 *l.*; but if he ſhould marry between 22 and 25, and ſhould die, to pay the whole to his iſſue; and if he ſhould die unmarried before 25, the whole over. Lord *Thurlowe* decreed, that the bond was not ſatisfied by the legacy; and his Lordſhip's decree was affirmed by the Lords Commiſſioners *Loughborough*, *Aſhhurſt*, and *Hotham*.

Grave v. Earl of Saliſbury, 1 Br. Ch. Rep. 425.

The Earl of *Saliſbury* left a legacy of 10,000 *l.* to *James Cecil Grave*, ſuggeſted, but not proved to be his natural ſon. The bill was filed to eſtabliſh the will, and for an account of the perſonal eſtate; but the defendant's anſwer ſtating that the teſtator had in his lifetime advanced money to *J. C. Grave*, which it was inſiſted ought to be taken in ſatisfaction *pro tanto* of his legacy, the Lord Chancellor referred it to the Maſter to inquire into the circumſtances of ſuch advancements, and to report them to the court. The Maſter found, that the teſtator had granted to *J. C. Grave*, a leaſe for 99 years of a farm called *T.*, at the rent of 40 *l.* a-year, which farm he found had before been let at 142 *l.*, and was reported to be worth to be let at 180 *l. per ann.* He calculated the difference between the reſerved rent and the real value, at 20 years purchaſe, to be 2800 *l.*; and alſo found that the teſtator had paid the former tenant of the premiſes 1200 *l.* for a ſtanding crop, dead ſtock, and farming utenſils, and alſo 400 *l.* for repairs; making together the ſum of 4400 *l.* The queſtion was, Whether this ſum of 4400 *l.* ſhould be conſidered as a ſatisfaction for ſo much of the legacy of 10,000 *l.*? Lord *Thurlowe* was of opinion it was not to be ſo conſidered, and ordered the legacy to be paid.

Holmes v. Holmes, 1 Br. Ch. Rep. 555.

Holmes the father, who was a jeweller, by his will gave his ſon 500 *l.*, and 2000 *l.* to four unmarried daughters; then gave his ſon the utenſils of his trade, (which were of trifling value); and gave the reſidue of his perſonal eſtate to his wife for life; and after her death, he gave further legacies to his daughters; to ſome 500 *l.*, and to others 1000 *l.*, and if any ſurplus, to be divided between all

all his children who ſhould be then living, (there being then ſeven in all). He afterwards took his ſon into partnerſhip with him, and by the deed of partnerſhip, the ſtock was to be 3000 *l.* to be brought in equally; and they were to be equally entitled to the whole. The father brought in the whole capital, and it was underſtood by the whole family, that he meant to give the ſon the half of the ſtock. The children, who were of age, by their anſwer admitted this; and there was parol evidence of declarations of the teſtator at different times, that he meant to bring his ſon into partnerſhip, and to give him half the ſtock, and even the whole; and that he told one witneſs, that he had brought his ſon in, and had given him 1500 *l.* The queſtion was, Whether this advancement was a ſatisfaction of the legacy of 500 *l.*? and it was held not to be a ſatisfaction, not being *ejuſdem generis*; and that it muſt have been the teſtator's intention, that the ſon ſhould have both.

A teſtator bequeathed to his putative daughter in the following terms, *viz.* "I bequeath the mortgage bond 1365 *l.* due to me from "Mrs. *M.*, to Miſs *Kitty Meredith*, now in my houſe, in order to "fit her out for *India*, or to diſpoſe of her in marriage." Miſs *Meredith*, during the teſtator's life, married *More* the bankrupt, and the teſtator gave *More* a bond for 1000 *l.* as a marriage portion. He alſo gave them after marriage 600 *l.* to buy furniture, *&c.* The bond was afterwards paid; 400 *l.* of it being retained by *More* out of money received on account of the teſtator, and the remaining 600 *l.* upon ſuit by the aſſignees. *More*, the bankrupt's father, being examined as a witneſs, ſaid, that the teſtator, before the marriage, told him, in a converſation on the ſubject, that "he could only give her 1000 *l.* on her marriage, but there "would be more hereafter, as his life was a bad one;" by which he underſtood ſhe would have a farther fortune at the teſtator's death. Lord *Thurlowe* held, that the ſum of 1000 *l.* advanced upon the marriage was not an ademption of the legacy; nor was there any evidence or preſumption, that the gift of 600 *l.* after the marriage was an execution of the teſtamentary gift. Debeze v. Mann, 2 Br. Ch. Rep. 165. 519.

A teſtator bequeathed to a young lady, to whom he was not related, the ſum of 6000 *l.*, payable in three months after his deceaſe. After the making of the will, the lady married a clergyman, which marriage was had with the approbation of the teſtator, who gave 5250 *l.*, 5000 *l.* of which was ſtated in the ſettlement to be her marriage portion. After the marriage, the teſtator laid out 800 *l.* in the purchaſe of a chaplainſhip of *Chelſea Hoſpital* for the huſband. It was inſiſted, that theſe ſums making together 6050 *l.* were inſtead and lieu of the legacy of 6000 *l.* But Lord *Thurlowe* held, that where a ſtranger gives a legacy by will, and afterwards gives a ſum, without any evidence that it is intended for the ſame purpoſe, it is not taken as a ſatisfaction; that to make it ſo, it muſt appear, at the time of the gift, to be meant as an ademption of the legacy; and nothing of that kind appearing here, he decreed the legacy not to be adeemed. Powell v. Cleaver, 2 Br. Ch. Rep. 499.

H. and *F.* the daughters of *J. S.* were entitled under his marriage ſettlement to 2000 *l.* charged upon his eſtate. *J. S.*, by codicil Hanbury v. Hanbury, 2 Br. Ch. Rep. 352.

codicil to his will, gave the ſum of 20,000 *l.* to be equally divided between *H.* and *F.*, to be paid down, or ſufficient ſecurity given for the payment thereof within thirty days of either of them being married, provided the perſon to whom ſhe ſhould be married ſhould ſettle on her a jointure of 500 *l. per ann.*, otherwiſe ſhe ſhould be entitled but to 5000 *l. &c.* This was adjudged to be a cumulative proviſion, and not a ſatisfaction of the 2000 *l.* provided for the daughters by the ſettlement.

Baugh v. Reed, 3 Br. Ch. Rep. 192.

A teſtator being poſſeſſed of 32,771 *l.* 16 *s.* 2 *d.* Bank 3 *per cents.*, deviſed to truſtees three ſums of 8114 *l.* 1 *s.* 11 *d.* in the ſaid ſtock, part of the ſaid capital therein, in truſt for his ſon *T.* and his daughters *S.* and *C.* and their reſpective children and grandchildren. After the making of the will, (the teſtator being then poſſeſſed of 34,657 *l.* 14 *s.* 2 *d.* Bank 3 *per cents.*) *C.* intermarried with the plaintiff, and by their marriage ſettlement, the plaintiff, in conſideration of 5000 *l.* in Bank 3 *per cent.* conſolidated annuities, which were to be accepted by him as the portion of *C.* his wife, and in ſatisfaction of his contingent right to a legacy given her by her grandfather's will, covenanted, within one month after ſhe ſhould attain her age of 23 years, to releaſe her ſhare of the ſaid legacy to her father. Lord *Thurlowe* held, that this portion could not be conſidered either an ademption or ſatisfaction of the legacy given to *C.* by her father's will.

Ackworth v. Ackworth, 1 Br. Ch. Rep. 307. note.

Before marriage, a ſum of money, partly belonging to the huſband, partly to the wife, was ſettled to the uſe of the huſband for life, remainder to the wife for life, remainder to the children to be equally divided between them. There were ſeveral children, and the money amounted to only 2400 *l.* among them. The father afterwards made his will, and gave each of the children 2000 *l.*, and the reſidue of his eſtate among them. Lord *Bathurſt* decreed, that what they took by the will ſhould be in lieu of their portions under the ſettlement.

Warren v. Warren, 1 Br. Ch. Rep. 305.

J. W. the plaintiff's father, by his marriage ſettlement, conveyed his eſtate to truſtees to the uſe of himſelf for life, remainder to truſtees to preſerve, *&c.*, remainder to his wife for life, remainder to truſtees for a term to raiſe 10,000 *l.* for younger children, remainder to his eldeſt ſon in tail, remainder over, *&c.* In the ſettlement was a power reſerved to him to raiſe money, but ſubject to the wife's life eſtate, and the proviſion for the children; and alſo a proviſo, that in caſe he ſhould in his lifetime give to any of his younger children any ſums of money towards his or their portions and advancement, and declare the ſame by writing to be in part of his or their portions, they ſhould go *pro tanto* in ſatisfaction thereof. By his will, reciting that he had made no proviſion for his wife by ſettlement or otherwiſe, he declared it to be his will that the truſtees ſhould pay her 600 *l. per ann.* for life in bar of dower; and if he ſhould have but one younger child only, they ſhould raiſe 5000 *l.* for ſuch one child, if more, 2000 *l.* each, which he charged on his perſonal eſtate, and in default thereof, upon the ſettled eſtate. He died leaving the plaintiff his eldeſt ſon, and two of the defendants, his younger

children. It was decreed, that this proviſion by the will was in part ſatisfaction of the portion by the ſettlement, and that upon payment of 5000 *l.* each, the ſurviving truſtee in the ſettlement ſhould aſſign the term.

Elliſon v. Cookſon, 2 Br. Ch. Rep. 307. 3 Br. Ch. Rep. 61.

Teſtator by will, 7th *March* 1774, deviſed to his eldeſt ſon *Iſaac Cookſon* certain freehold and copyhold eſtates, and continued as follows, "As to all my other lands, goods, and chattels, of "what nature or ſort ſoever, I give to my dear wife *Elizabeth*, "appointing her executrix of this my laſt will, with the tuition "and education of all and every ſuch younger children, and to "provide for them, with regard to their fortunes, as they may "deſerve and merit." To the will he added a paper of the ſame date, called *Inſtructions to my wife with regard to my younger children*; wherein, after directing fortunes for his younger ſons, he ſays, "My daughters *Hannah* (the plaintiff) and *Sarah* to have "5000 *l.* each; all the ſurpluſſes over and above your own ex-"pences to be laid out in mortgages or purchaſes for the purpoſes "before mentioned." By an additional codicil on the ſame paper, and of the ſame date, he ſays, "I do further add to what I "have ſaid on the other ſide, that what ſavings or increaſe I may "make, or my dear wife may make of my effects, ſhe may give "and diſpoſe of the ſame, either in her lifetime, or by will, to "ſuch of her children as ſhe ſees proper." The teſtator died in *December* 1783, without revoking the ſaid will and codicil, which were proved by the defendant, the widow, in the eccleſiaſtical court.

After the date of the will, *viz.* about *September* 1776, a treaty of marriage being on foot between the plaintiff *Richard Elliſon* and the co-plaintiff his wife, Mr. *Buſh*, brother-in-law to Mr. *Elliſon*, was deſired by Mr. *Elliſon* ſenior, the father of the plaintiff, to go to Mr. *Cookſon*, the co-plaintiff's father, to acquaint him with the proviſion intended by Mr. *Elliſon* ſenior for his ſon, and to learn from Mr. *Cookſon* what he meant to give his daughter; when Mr. *Cookſon* informed Mr. *Buſh* (as he ſwore in evidence), that he meant to give his daughter *Hannah* (the co-plaintiff) 5000 *l.* upon her marriage, and intended to give her *a further ſum, equal or nearly equal thereto, upon his death*; but refuſed to ſettle or ſpecify the ſums. In the courſe of the treaty between Mr. *Buſh* and Mr. *Cookſon*, ſeveral letters paſſed; and in one of them from Mr. *Buſh* to Mr. *Cookſon*, dated 5th of *October* 1776, Mr. *Buſh* ſays, "Mr. *Elliſon* (the father) ſays—as he hopes the "proviſion you told me and Mr. *Richard Elliſon* you intended "making for Miſs *Cookſon* at your deceaſe, WILL BE *equal, or* "*nearly ſo, to what you propoſe giving upon the marriage*, he ſhall "reſt perfectly ſatisfied with your word for fulfilling that engage-"ment." In anſwer to this letter the teſtator wrote to Mr. *Buſh*, and in the letter ſaid, "You muſt miſtake Mr. *Elliſon* in regard "to any ſuch declaration as you mention; the miſtake may ariſe "between what may be poſſible and probable: I told him my "preſent plan, which would be executed by my wife, if the longer "liver."

In

In *February* 1777, the plaintiffs intermarried; and, on the 14th of that month, the plaintiff *Richard* received from Mr. *Cookſon* the ſum of 5000 *l.*, and gave a receipt for the ſame as for his wife's portion. The Maſter of the Rolls, Sir *L. Kenyon*, thought there was not ſufficient to repel the general preſumption in ſuch a caſe as this, that the portion was a performance of the legacy; and Lord *Thurlowe* was afterwards of the ſame opinion.

Richardſon v. Greeſe, 3 Atk. 65.

A. by her will ſays, "*Item*, I give to my ſervant *Jane Greeſe* "500 *l.*, to be paid her within three months after my deceaſe." In another part ſhe ſays, "I give 5 *l.* a-piece to the reſt of my "ſervants, but I do not give 5 *l.* to the ſaid *Jane Greeſe*, becauſe "I have done very well for her before." By another clauſe ſhe gives her lands lying in different pariſhes, in truſt, by mortgage, ſale, or otherwiſe, to pay her debts and legacies; and after her debts and legacies paid, then, *&c.* The teſtatrix was at her death indebted to *Jane Greeſe* in 260 *l.* on bond. Lord Chancellor held, that the legacy was not a ſatisfaction of the debt; for the words, "*becauſe I have done very well for her before*," ſhew, that what ſhe had given her before ſhe intended as a bounty, and not as a ſatisfaction; and they likewiſe intimate, that the teſtator meant the 500 *l.* to be equally a reward for the ſervices of *Jane Greeſe*, as the 5 *l.* was for thoſe of the other ſervants; and legacies to ſervants have never been held to be in ſatisfaction of debts. The argument too, that the legacy was not to be paid within three months after the death of the teſtatrix, was not to be laid entirely out of the caſe: though, if it had been charged upon real eſtate only, and not at all chargeable upon the perſonal eſtate, his Lordſhip ſaid, he ſhould have thought it of greater weight; for the poſſibility and contingency of the legatee's dying before the legacy became payable, muſt be taken into conſideration, as the legacy might not have been paid at all, if the legatee had died before the three months. But where the legacy is charged upon a mixed fund of perſonal and real eſtate, if the perſonal aſſets are ſufficient, the legacy is payable, though the legatee die before the day of payment: otherwiſe, if the legacy be out of a real eſtate only.

Gaynon v. Wood, July 29, 1759, 1 Cox's P. Wms. 410. note.

Where a teſtator by will gave to *Sarah Gaynon* a legacy of 500 *l.*, and thereby declared, that in caſe his perſonal eſtate ſhould not be ſufficient to pay *all his debts, legacies, and funeral charges*, he thereby ſubjected all his real eſtates to the payment thereof; and afterwards by a codicil gave a further legacy of 500 *l.* to the ſaid *S. G.*, and died indebted to *S. G.* in 200 *l.* on bond, which debt was contracted after making the will, but before the codicil: the Maſter of the Rolls declared, that the 500 *l.* given *by the codicil*, was to be conſidered and deemed a ſatisfaction of the ſaid 200 *l.* owing by the teſtator to the plaintiff *Sarah*.

Mathews v. Mathews, 2 Vez. 635.

Admiral *Mathews* had upon his marriage a real eſtate of 300 *l.* *per annum* in ſtrict ſettlement, ſo as to make his eldeſt ſon tenant in tail. Long afterwards, in 1773, he enters into a deed, which was an agreement between the father and ſon upon the ſon's marriage, whereby the father agreed to take 800 *l.*, part of the fortune of

of the ſon's wife, and to make a ſettlement in this way; that in conſideration of the 800 *l.* he ſhould in one month afterwards convey to truſtees for a term of years, lands, ſubject to theſe truſts, to ſecure 50 *l. per annum* to the ſon, and 800 *l.* to the younger children of the ſon, to be paid at ſuch days, times, manners, and proportions, as the ſon ſhould direct and appoint, and for want of appointment, to be paid to them equally at twenty-one or marriage, with benefit of ſurvivorſhip upon the death of any before; and if he had no child, the ſaid 800 *l.* ſhould not be raiſed, and the term ſhould attend the inheritance. In 1749 he made a will, and deviſed 700 *l. per annum* to his ſon, upon condition that the ſon, within twelve months after teſtator's death, ſhould convey the whole family eſtate, for better ſecuring to the teſtator's ſiſter-in-law *Anne Burgeſs* 100 *l. per annum* for life, which he had before given her out of the ſaid lands; with another condition, that the ſon ſhould confirm his will, otherwiſe the 700 *l.* annuity to ceaſe; and then makes a very large proviſion for the grandchildren at their age of twenty-five, or marriage. In 1750, the teſtator by a deed made his ſon tenant for life, inſtead of tenant in tail, as he was before, by levying a fine, and reſettling the eſtate in the ſtricteſt ſettlement, and to no other uſes. After his death, the queſtion was, How far the claims of the ſon, his wife and children, under the agreement in 1773, were barred by any other proviſions in the will of the father; and whether that was a ſatisfaction? The Maſter of the Rolls, Sir *Thomas Clarke*, ſaid, that the deed in 1733 was a contract between the father and ſon, ſo as to make the ſon and his family purchaſers from the father, and created a debt owing from the father to them: that the wife had clearly received no ſatisfaction for the debt contracted to her: that as to the children, by the articles in 1733 they were entitled to 800 *l.*, ſo as that every child muſt have had part of it; by the will the teſtator has given twenty times as much in the whole among them; but then it is ſo given, that if they do not arrive at the age of twenty-five or marry, they are entitled to nothing: this therefore did not fall within the rules of ſatisfaction to which the court had adhered: that as to the annuity of 50 *l.* for life to the ſon, independent on the deed in 1750, what is given by the will is not a ſatisfaction of that: for the annuity given by the will is *diverſo intuitu*. It is the ſame as if the teſtator had deviſed the ſettled eſtate to his ſon for life, *&c.* ſubject to the annuity to *Anne Burgeſs*; and then if the ſon had performed that condition, he would be entitled to claim under the deed in 1733: for the rule of ſatisfaction was never carried ſo far by conſtruction as to make that anſwer a double purpoſe. That it ſtood thus with reſpect to this annuity of 50 *l.* merely upon the will; but by the deed of 1750 it was put out of the ſon's power to perform the condition annexed to the deviſe of the 700 *l. per annum*, which the ſon might have done when the will was made, he being then tenant in tail of that eſtate: the annuity of 700 *l.* therefore is, by the deed in 1750, a pure annuity, and free from the condi-

tion; and then it is the ſame as if the condition compriſed in the will never had been mentioned; and if it had been pure and free, it would be a ſatisfaction of the 50 *l. per annum.* By the deed in 1750, then, it is within the general rule of ſatisfaction, though by the will it would not have been ſo.

Attorney-General v. Hird, 1 Br. Ch. Rep. 170.

C. B. by her will gave to her brother *G. B.*, and the lawful heirs of his body, if he ſhould have any, her whole fortune (except a few legacies), but if he ſhould die without heirs, ſhe gave to *J. S.* 1000 *l.*, and to *J. C.* 500 *l.*, the reſidue to her brother. The property was perſonal to the amount of about 5000 *l.* The teſtatrix died, and the brother ſurviving, and having no child, by his will gave a like legacy of 1000 *l.* to the ſaid *J. S.*, *to her ſole and ſeparate uſe*, and alſo 500 *l.* to the ſaid *J. C.* It was decreed, that the legacies given by the brother would be a ſatisfaction for the legacies given by the former will (ſuppoſing thoſe legacies not to be too remote, as it was holden they were).

Pugh v. Duke of Leeds, 1 Br. Ch. Rep. 67. note.

By ſettlement on the marriage of *Godolphin Edwards* and *Elizabeth More*, a term of 600 years was created to raiſe portions for daughters, by which it was provided, that in caſe there ſhould be but one daughter, the ſum of 5000 *l.* ſhould be raiſed for ſuch only daughter, to be paid at eighteen or day of marriage, with maintenance in the mean while. There was a proviſo in the ſettlement, that in caſe the daughters ſhould be advanced with portions in money or lands, equal in value to the portions thereby provided, in the lifetime of *Godolphin Edwards*, or he ſhould give or leave them money or lands not equal in value, the truſtees ſhould raiſe only ſo much as would make the money, or value of the lands ſo given, equal to the portions provided. *Elizabeth*, the appellant, being the only daughter of the marriage, attained eighteen the 4th *December* 1746. *Godolphin Edwards* being poſſeſſed of 5300 *l. Eaſt India* annuities, which he had ſaved from the income of the eſtate, 21ſt *November* 1772 transferred them to the appellant *Elizabeth*, then the widow of Mr. *Manlove*. A bill had been filed, and the cauſe came on to be heard before Lord *Bathurſt*, 25th *June* 1776, when there was a decree in favour of the appellant for her portion of 5000 *l.*, the preſent queſtion not being then before the court. The reſpondents afterwards exhibited their bill of review, ſtating, that ſince the pronouncing of the decree in that cauſe, they had diſcovered, that *Godolphin Edwards* had transferred to the plaintiff theſe *India* annuities in part of her portion. Upon the cauſe coming on to be heard, Lord Chancellor declared, that theſe annuities transferred by *Godolphin Edwards* to the appellant *Elizabeth*, were to be conſidered as having been ſo transferred in part ſatisfaction of the portion of 5000 *l.* under the marriage ſettlement, and therefore varied the former decree ſo far; whereupon an appeal was lodged in parliament, which being heard *March* 15th, 1780, it was ordered that the ſame ſhould be diſmiſſed, and the decree therein complained of affirmed.]

(E) Of Legacies veſted or lapſed: And herein,

1. Where it ſhall be a lapſed Legacy by the Legatee's dying in the Lifetime of the Teſtator, and where in ſuch Caſe it ſhall veſt in another Perſon, to whom it is limited over.

IT ſeems by the rule of the civil law, and by the caſes on this head, that if a legacy be deviſed to *J. S.*, and he die in the lifetime of the teſtator, that the legacy is lapſed, there being no ſuch perſon to take at the time, when the will is to take effect. Abr. Eq. 296, 297.

So, where *A.* by will, reciting that *B.* owed him, 400 *l.* gave and bequeathed thoſe 400 *l.* to him, provided he out of the 400 *l.* paid ſeveral ſums in the will mentioned to his wife and children, and the reſt and reſidue he freely and abſolutely gave to him, and willed and required the executor to deliver up the ſecurity immediately upon his death, and not to claim or meddle with the debt, or any part thereof, but to give ſuch releaſe or diſcharge as *B.*, his executors or adminiſtrators, ſhould require or think fit; and *B.* died in the lifetime of the teſtator: it was held, that the money directed to be paid the wife and children was well deviſed; but as to the reſidue deviſed to the debtor himſelf, that it was a lapſed legacy, he dying in the lifetime of the teſtator (*a*); although it was admitted, that if the teſtator had ſaid, *I forgive ſuch a debt*, or *my executor ſhall not demand it*, or *ſhall releaſe it*, that would have been a good diſcharge of the debt, though the debtor died in the lifetime of the teſtator. 2 Vern. 521. Elliot and Davenport. [1 P. Wms. 83. S. C. (*a*) The Lord Keeper declared, "that the laſt clauſe in the will, (whereby it was directed that the ſecurity ſhould be delivered up to the ſaid William Elliot, his executors, adminiſtrators, or aſſigns, to be cancelled, and that no uſe ſhould be made thereof,) was only in aid of the firſt clauſe in the will, by which alone the ſum is to be taken as a lapſed legacy." Reg. Lib. A. 1705. fol. 521.]

[The teſtatrix, the grandmother of the plaintiff, deviſed in the following words: "I likewiſe forgive my ſon-in-law *Richard* "*Chillingworth* a debt of 500 *l.* due to me upon bond, and all "intereſt that ſhall be due for the ſame at my deceaſe, and de- "ſire my executor to deliver up the bond to be cancelled," and made her ſon *J. P.* executor. The legatee died in the lifetime of the teſtatrix. Lord *Hardwicke* thought the teſtatrix intended *in all events* the bond ſhould be delivered up to be cancelled: that there was nothing perſonal in the preſent caſe for the direction that it ſhould be delivered up. In *Elliot* v. *Davenport*, his Lordſhip ſaid, the words are not penned as *forgiveneſs or remiſſion*; there was no intention to releaſe the recognizance till Sir *William Elliot* paid 150 *l.* thereout; but here is a clear intention to releaſe the debt. There, it was to be delivered up to Sir *William Elliot*; here, in general, to be cancelled. There, the right of action ſubſiſted, which was the reaſon of that opinion; here, it would be too nice to make ſuch a diſtinction, and would narrow too much the bounty intended by the teſtatrix to her family. His Lordſhip therefore decreed the bond to be delivered up to the plaintiff to be cancelled, but without coſts. Sibthorp v. Moxom, 3 Atk. 580.

Toplis v. Baker, Excheq. Hil. 1789. 1. Cox's P. Wms. 86. note.

In a will was the following clauſe: "I give to my kinſman "*N. D.* the ſum of 400 *l.*, which he owes to me on mortgage of "his eſtate in S., and I further order my executor to *give him up* "*all bonds* owing from him to me, and which ſhall be found in "my cuſtody at the time of my deceaſe, together with all intereſt "due thereon." The mortgage debt was alſo ſecured by bond; beſides which, *N. D.* was indebted to the teſtator on another bond in 200 *l.*: both bonds were in the cuſtody of the teſtator at the time of his death. After great conſideration, the court held this to be a lapſed legacy. The Lord Chief Baron, in delivering the judgment of the court, obſerved, that none of the circumſtances which could be ſuppoſed to diſtinguiſh the caſe of *Sibthorp* v. *Moxom*, from *Elliot* v. *Davenport*, occurred in the preſent caſe. That the principal ground on which *Sibthorp* v. *Moxom* was decided, was this, *viz.* that there was nothing in the will to confine the delivery of the bond to the *perſon* of the ſon-in-law, and that charge therefore was not ancillary to the former bequeſt to him, but amounted to a declaration that in all events the bond ſhould be delivered up, and therefore of neceſſity operated for the benefit of the repreſentative; that in the preſent caſe, the word uſed by the teſtator was "*give*," and not "*forgive*;" and (what was more material) the bond was directed to be delivered up to *N. D.* (perſonally), and there was no direction whatever for delivering up the mortgage; and therefore the court ſaw no reaſon for departing in this caſe from the general rule, *viz.* that a teſtamentary diſpoſition muſt lapſe by the death of the legatee in the lifetime of the teſtator.]

Abr. Eq. 296. Burnet and Holgrave. [This caſe of Burnet, v. Holgrave is much weakened in point of authority, by the caſe of Oke v. Heath, 1 Vez. 135. In that caſe a feme-covert having by marriage articles power by deed or will to appoint 4000 *l.* for ſuch perſons as ſhould be her kin, and for none other; the 4000 *l.* in default of appointment

A. deviſed an eſtate to his wife for life, and after to the plaintiff, his niece, and her heirs, upon condition and to the intent that ſhe pay 400 *l.* to ſuch perſon as his wife by her will in writing, or any other writing, ſhould direct and appoint, and dies; the wife after marries a ſecond huſband, and then makes a will in writing, and thereby reciting the power given her by her former huſband's will, appoints the 400 *l.* to be paid to her huſband, his executors or adminiſtrators, and that when he ſhall have fully received the 400 *l.* he ſhall pay 100 *l.* out of it to *B.*, 50 *l.* to *C.*, and 50 *l.* to *D.*, and makes her huſband her executor; and then goes on, and ſays, that ſhe has publiſhed this her laſt will and teſtament in the preſence of three witneſſes; and the huſband ſubſcribed that he approved of this will: the huſband dies before her, and makes her executrix of his will, and reſiduary legatee; then *B.* and *C.* die both inteſtate, and afterwards the wife dies, and the defendants take out adminiſtration to her, with the will annexed, and alſo adminiſtration to *B.* and *C.*, and the queſtion was, Whether this appointment being made by will, and the appointee dying before the appointer, this ſhould be in the nature of a legacy, and ſo the appointment void, the teſtatrix ſurviving the nominee? And my Lord Keeper held, that if it was a thing purely teſtamentary, it would be plainly a lapſed legacy, but that in this caſe the 400 *l.* was not in its own nature teſtamentary,

mentary, but they take as nominees, and it is but the execution of a truſt; and decreed the money to be paid. to go according to the ſtatute of

diſtributions; appointed by will to her nephew *C.* he in conſideration thereof paying an annuity to his mother. *C.* died in the lifetime of the teſtatrix. Lord Hardwicke held, that by the death of the appointee in the lifetime of the teſtatrix, the appointment was void; for though it ariſes under a power, it is a teſtamentary diſpoſition, and ſubject to all the qualities of a will. The caſe of Burnet v. Holgrave, his Lordſhip ſaid, is a very particular and extraordinary caſe, and, he doubted, if it would be ſo determined now: it appeared by the regiſter to have been a cauſe by conſent, and not adverſary; which takes off greatly from the weight of the opinion there, ſhewing it to have been probably ſudden, and without conſideration. But taking it as it is, his Lordſhip obſerved, there are ſeveral differences: firſt, the wife there, by marrying a ſecond huſband, had diſabled herſelf from making a will; nor is the power given her to be executed during coverture; therefore, it could not be a will, but muſt be conſidered as a writing under hand and ſeal only; and then the determination may be right: but that is nothing to this, which is by a will properly proved as ſuch. But, ſuppoſe the court took it as a will, or a writing in nature of a will; the appointment, there, was not perſonally to the huſband only, but the executors or adminiſtrators, and on truſt to pay thereout. It is true, that in general the words *executors* or *adminiſtrators* are underſtood as repreſentatives only, but not always; as in caſes *pur autre vie*, executors or adminiſtrators take, not as repreſentatives of the firſt taker, but as new ſpecial occupants newly named in the will or deed: and if they took further ſo as to be perſons taking the truſt, in that light it is different. And the court rather did this in ſupport of the truſt, one of the *ceſtuy que truſts*, for whoſe benefit it clearly was, being then living; nor can the *ceſtuy que truſt* be defeated by the death of the truſtee in the teſtator's life. The words are that the court took it to be an execution of a *truſt*; which is not a miſprint inſtead of *power*; and imports the huſband, his executors or adminiſtrators, to be barely truſtees. Another thing in ſupport of that determination is, that all was come back to the wife herſelf; the huſband, to whom and his executors ſhe had appointed, dying in her life, and making her executrix.]

So, where *E.* made her will, and deviſed in theſe words, *I give unto my loving kinſman* R. H. *the ſon of* 300 *l. one* 100 *l. part whereof, he doth owe me, which I intend to give to my couſin* S. H. *his youngeſt daughter; but my will and deſire is, that he will give the ſaid* 300*l. to his daughter* S. H. *at the time of his death, or ſooner, if there be occaſion, for her better advancement and preferment;* the teſtatrix, at the time of making her will, was in *England*, and it happened that *R. H.* died in *Ireland*, eight days before the death of the teſtatrix; afterwards *S. H.* died, at the age of ſixteen, and unmarried, and the plaintiff was her adminiſtrator; and it was decreed at the Rolls, and affirmed by my Lord Chancellour, that the words *I deſire*, or *I will*, amount to an expreſs deviſe, and that the 100*l.* bond to the teſtatrix ſhould be aſſigned to the plaintiff, and the 200*l.* paid him, with intereſt, from the time of exhibiting the bill; although it was inſiſted upon, that a benefit was deſigned *R. H.*, and that he was not a bare truſtee; for he was to have the intereſt of the 300*l.* for his life, unleſs his daughter had occaſion for it before his death, which ſhe had not. 2 Vern. 466-7. Earles v. England. Prec. Chan. 200. S. C.

But if the teſtator gives his ſiſter 350*l.* upon condition that ſhe, at or before her death, give to her children 200*l.* thereof, and the ſiſter dies in the lifetime of the teſtator, the whole legacy is lapſed; although it was inſiſted, that if the deviſe had been only of the intereſt of the 200*l.* to the teſtator's ſiſter for life, and the principal to the children, that had been a good deviſe to the children as to the 200*l.*, and it would not have been loſt by the mother's dying in the teſtator's lifetime, and the intention of the teſtator in this caſe amounted to as much; but it was adjudged *ut ſupra*, the court taking it, that, being a deviſe of money, the abſolute property veſted in the firſt legatee: *Quære.* 2 Vern. 116. Birkhead v. Coward.

[*J. S. (inter al.)* bequeathed the ſurplus of his perſonal eſtate unto four perſons equally to be divided between them, ſhare and Bagwell v. Dry, 1 P. Wms. 700.

ſhare alike. One of the four reſiduary legatees died in the lifetime of the teſtator; and the queſtion being, to whom the fourth part bequeathed to the legatee ſo dying, ſhould belong? Lord Chancellour was of opinion, that the teſtator having bequeathed his *reſiduum* in fourths, and one of the reſiduary legatees dying in his lifetime, the deviſe of that fourth part became void, and was as ſo much of the teſtator's eſtate undiſpoſed of by the will; that it could not go to the ſurviving reſiduary legatees, becauſe each of them had but a fourth deviſed to them in common, and the death of the fourth reſiduary legatee could not avail them, as it would have done, had they been all joint legatees, for then the ſhare of the legatee dying in the life of the teſtator would have gone to the ſurvivors (*a*). But here the *reſiduum* being deviſed in common, it was the ſame as if a fourth part had been deviſed to each of the four, which could not be increaſed by the death of any of them.

(*a*) Show. 91. Salk. 238.

Page v. Page, 2 P. Wms 489. Moſel. 42. S. C.

One deviſed the reſidue of his perſonal eſtate to ſix perſons, *to each of them a ſixth part*, and made them executors. One of theſe executors and reſiduary legatees died in the lifetime of the teſtator. *Per* Lord Chancellour—This is a lapſed legacy as to one-ſixth, and undiſpoſed of by the will, the reſiduary legatees being tenants in common, and not joint-tenants.

Owen v. Owen, 3 Atk. 494.

A teſtatrix, after ſeveral legacies, bequeaths in theſe words: "All the reſt and reſidue, *&c.* I give and bequeath to my two "nieces *M.* and *E.* daughters to my nephew *W. O.*, and *A.* his "wife, whom I deſire to be truſtees for their children, to take "care of their legacies for them, they being of tender age; and "my will is, that my eſtate be equally divided between my two "nieces *M.* and *E.*, whom I nominate and appoint my execu-"trixes accordingly." One of the nieces died in the lifetime of the teſtatrix. Lord *Hardwicke* thought that the bequeſt to the two nieces did not make a joint-tenancy, for the words *equally divided*, though not annexed to the clauſe which gives the reſidue, can relate to that only; the conſequence was, that it was a lapſed legacy.

Peat v. Chapman, 3 Ves. 542.

A teſtator deſired all the reſt and reſidue ſhould be divided between two. By the Maſter of the Rolls—This muſt be underſtood to be *equally divided*; and by the death of one in the lifetime of the teſtator, his moiety ſhall not ſurvive to the other deviſee of the reſidue.

Ackroyd v. Smithſon, 1 Br. Ch. Rep. 503.

A teſtator gave ſeveral legacies to *A.*, *B.*, *C.*, *D.*, *E.*, *F.*, and *G.*, and afterwards directed all his real and perſonal eſtate to be ſold, and after payment thereout of his debts and legacies, he ordered the reſidue to be paid to the ſaid *A.*, *B.*, *C.*, *D.*, *E.*, *F.*, and *G.*, *in proportion to their ſeveral and reſpective legacies therein to them bequeathed* Two of the reſiduary legatees died in the teſtator's lifetime. Lord *Thurlowe* was clear, that this was a tenancy in common in the reſidue, and therefore the ſhares of the two who died in the teſtator's life had lapſed.

Man v. Man, 2 Str. 905.

S. M. by his will gave the uſe of his perſonal eſtate to his wife for life, if ſhe ſhould ſo long continue his widow, and after her death

death to *A.*, *B.*, *C.*, and *D.*, ſhare and ſhare alike. *C.* and *D.* died in the lifetime of the teſtator. Adjudged, that the ſhares of *C.* and *D.* had lapſed, the teſtator having particularly appointed that each of his legatees ſhould have a ſpecial ſhare.

A teſtator left a legacy to *M.* his executors, adminiſtrators, or aſſigns. At the time of making the will, *M.* was dead. This is a lapſed legacy, notwithſtanding the words are to *M.*, his executors, adminiſtrators, and aſſigns; nor is parol proof admiſſible, that the teſtator knew of the legatee's death, as an argument, that he meant, it ſhould be tranſmiſſible to his perſonal repreſentative.] Maybank v. Brooks, 1 Br. Ch. Rep. 84.

But however a legacy may become void or lapſed by the legatee's dying in the lifetime of the teſtator, yet it is plain, that if in ſuch caſe there be a limitation over to another, that the limitation over is good, though the firſt legatee die in the lifetime of the teſtator; as, where *A.* deviſed 500 *l.* a-piece to his two grandchildren by name, and if either of them die, his ſhare to go to the ſurvivor; one of them died in the lifetime of the teſtator; it was held, that his ſhare ſhould go to the ſurvivor, and was not a lapſed legacy. Preced. Chan. 470, 471.

So, if *A.* deviſe 1500 *l.* a-piece to the four children of *J. S.* by name, to the ſons to be paid at their age of 21 years, and to the daughters at eighteen, or days of marriage; and in caſe one or more of the aforeſaid children ſhall happen to die before his, her, or their reſpective legacy or legacies ſhall become due, then ſuch legacy or legacies ſhall go to the ſurvivors of them; and in caſe three ſhould die, then the ſurvivor to take the whole; if one of the children dies in the lifetime of the teſtator, the ſurvivors ſhall take that ſhare, and it ſhall not be a lapſed legacy. 2 Vern. 207. Miller and Warren, decreed. 2 Vern. 611. Ledſome and Hickman, S. P. decreed. Willing v. Baine, 3 P. Wms. 113. S. P.

So, where a legacy of 50 *l.* was given to *A.* at twenty-one, or marriage, and 50 *l.* to *B.* at twenty-one, or marriage, and in the cloſe of the will the teſtator added, *If any legatee dies before his legacy is payable, the ſame ſhall go to the brothers and ſiſters of ſuch legatee*; *A.* dying in the lifetime of the teſtator, it was adjudged no lapſed legacy, but that it ſhould go to his ſiſter. Hornſby, Moſel. 2 Vern. 378. Dorrel and Moleſworth, Vern. 425. 2 Vern. 653. 744. S. P. Hornſby v. 319. S. P.

So, where a man deviſed 100 *l.* to *A.* and *B.*, the two daughters of his brother *G.*, to be paid within a year after the death of his wife, *viz.* 50 *l.* to *A.*, and 50 *l.* to *B.*, if they ſhall be both alive at the time of payment; but if either of them ſhould die before, then the ſaid 100 *l.* to the ſurvivor of the ſaid two daughters: one of the ſaid two daughters died in the lifetime of the teſtator; and the only queſtion was, Whether the ſurviving daughter ſhould have the whole 100 *l*, or only the 50 *l.*? and *Rawlinſon* and *Hutchins*, Lords Commiſſioners, were clearly of opinion, that ſhe ſhould have the whole 100 *l.*; they ſaid, that by the firſt clauſe of the will it is a joint deviſe to them of the 100 *l.*, in which caſe, if the will had gone no farther, if one had died, it would have ſurvived to the other; then the *viz.* that comes after is only a ſeverance of it, in caſe they ſhould both live to the time of payment, which they did not; and then the laſt clauſe of the will, in caſe Abr. Eq. 298. Scoolding and Green.

either died before the time of payment, is a new ſubſtantive deviſe of the whole 100*l.* to the ſurvivor; and decreed accordingly.

Abr. Eq. 243. Trin. 1730, Hunt and Berkley. Moſel. 47. S. C.

So, where one made his will, and, after ſeveral legacies, gave and deviſed all the reſt, reſidue, and remainder of his perſonal eſtate to three perſons, whom he thereby made his executors, one of them died in the lifetime of the teſtator; and the only queſtion was, Whether the two ſurviving executors ſhould have the whole; or whether the third part ſhould be diſtributed, according to the ſtatute, amongſt the next of kin? And the Maſter of the Rolls, on time taken to conſider of the caſe, and citing moſt of the authorities, both out of the civil and common law, was of opinion, and decreed accordingly, that the two ſurviving ſhould take the whole.

Northy v. Burbage, Gilb. Eq. Rep. 137.

[A deviſe was of 500*l.* a-piece to two of the teſtator's grandchildren by name; and if either of them died, his ſhare to go to the ſurvivor; and if both died, then their ſhares to go to their mother: one of them died in the lifetime of the teſtator, yet his ſhare went by the expreſs words of the will to the other grandchild, and was held to be no lapſed legacy.

Buffar v. Bradford, 2 Atk. 220.

A teſtator having divided his perſonal eſtate into eight parts, bequeathed four parts to his niece *B.*, and the children born of her body. The plaintiff was born after the making of the will, and *B.* died in the teſtator's lifetime. This was adjudged not to be a lapſed legacy, for the plaintiff took as joint-tenant with *B.*, and upon her death is entitled to the whole by ſurvivorſhip.

Sibley v. Cook, 3 Atk. 572.

A teſtatrix deviſed (*inter al.*) as follows: "I give and deviſe "the ſeveral legacies and ſums following, which I will ſhall be "paid to the ſeveral perſons hereinafter named; *and that if any "of thoſe perſons ſhould die before the ſame become due and payable, I "will that they, or any of them, ſhall not be deemed lapſed legacies;*" then ſhe particularized the ſeveral legatees, and ſays, "To *Anne* "the wife of *Richard Wenſley*, and to her executors or admini-"ſtrators, I give the ſum of 50*l.*" *Anne Wenſley* died in the lifetime of the teſtatrix, and her huſband adminiſtered to her. Lord *Hardwicke* ſaid, I am of opinion this is not a lapſed legacy. If a man deviſes a real eſtate to *J. S.* and his heirs, and ſignifies or indicates his intention, that if *J. S.* dies before him it ſhould not be a lapſed legacy, yet, unleſs he had nominated another deviſee, the heir at law is not excluded, notwithſtanding the teſtator's declaration. So, in the bequeſt of a perſonal legacy to *A.*, though the teſtator ſhould ſhew an intention that the legacy ſhould not lapſe in caſe *A.* die before him, yet this is not ſufficient to exclude the next of kin. But, here, in caſe *Anne Wenſley* dies before the teſtatrix, ſhe expreſsly provides againſt the lapſing, for ſhe ſays, *If any of theſe perſons die before the ſame become due or payable, I will, that they or any of them ſhall not be deemed lapſed legacies;* and ſubſequent to this, bequeaths to *Anne* and her executors and adminiſtrators 50*l.*, ſo that in caſe of her death before the teſtatrix, other perſons are named to take, which diſtinguiſhes it from the caſe I put before; and in *Dorrel* v. *Moleſworth*, the court laid a ſtreſs

a ſtreſs upon the words *was payable*, which are much the ſame with the preſent, *become due or payable*. And upon the authority of this caſe, his Lordſhip decreed the legacy to the huſband.

A teſtatrix conveyed the reſidue of her perſonal eſtate to *J. W.* and ſeven other perſons, equally to be divided between them, ſhare and ſhare alike; and ſhe directed "that *in caſe of the death* "*of any of them* (the ſaid reſiduary legatees) *before her, then the* "*ſhare or ſhares of him, her, or them, ſo dying before her, ſhould go to,* "*be had and received* by his or her legal repreſentatives." *J. W.* died in the lifetime of the teſtatrix. His ſhare was prevented from lapſing, and thoſe perſons are entitled to it as his legal repreſentatives, who would have been entitled as next of kin to him at the death of the teſtatrix. Bridges v. Abbot, 3 Br. Ch. Rep. 224.

A teſtator ordered the intereſt of the reſidue of his perſonal eſtate to be paid to his ſiſters for their lives equally between them, and in caſe any of them ſhould die leaving iſſue, he directed his truſtees "to pay and transfer the ſhare and proportion of the "*reſiduum* to which his ſiſter ſo deceaſing was entitled, at or "before the time of her deceaſe, to receive the intereſt and divi- "dends thereon, unto and amongſt all and every ſuch child or "children of ſuch deceaſed ſiſter, equally between them, ſhare "and ſhare alike, at their reſpective ages of 21 years." One of the ſiſters died in the lifetime of the teſtator. Adjudged, that her children were entitled to her ſhare of the reſidue.] Rheeder v. Ower, 3 Br. Ch. Rep. 240.

2. Where a Legacy ſhall be ſaid to be veſted or lapſed, being to be paid at a future Time, to which the Legatee did not arrive.

The rule and diſtinction which hath obtained in theſe caſes, and which is agreeable to the rule of the civil law, is, that if a legacy be deviſed to one generally, to be paid or payable at the age of twenty-one, or any other age, and the legatee die before that age, yet this is ſuch an intereſt veſted in the legatee, that it ſhall go to his executor or adminiſtrator; for it is *debitum in præſenti*, though *ſolvendum in futuro*, the *time* being annexed to the *payment*, and not to the *legacy* itſelf; but if a legacy be deviſed to one at twenty-one, or if, or when he ſhall attain the age of twenty-one, and the legatee die before that age, the legacy is lapſed; and though, ſays my Lord *Cowper*, this diſtinction was at firſt introduced upon very ſlender reaſons, and probably upon no other but from a conſtant willingneſs in the civil law to ſtretch in favour of a particular legatee againſt the reſiduary legatee, who went away with the whole ſurplus of the perſonal eſtate; yet, it being the rule of the eccleſiaſtical courts, it is fit that the ſame rule ſhould be obſerved in Chancery, as this court has now a concurrent juriſdiction with the eccleſiaſtical courts in matters of this nature; and therefore there ought to be a conformity in their reſolutions, that the ſubject may have the ſame meaſure of juſtice, in which court ſoever he ſues. This diſtinction is laid down in Dyer, 59. Leon. 177. Swinb. 311. 313. Off. Ex. 347. Godb. 182. 2 Vent. 342. Cloberie's caſe. 2 Chan. Caſes, 155. 2 Salk. 415. pl. 2. Carth. 52. Vern. 462. 2 Vern. 673. Preced. Chan. 21. Abr. Eq. 294, 295. Bur. Rep. 227. Atk. Rep. 504.

But

Paſch. 7 Annæ, Strick v. Hudſon, in Canc.

But if legacies are given to children, and if any die, their legacies to ſurvive, yet after twenty-one, or marriage, there ſhall be no ſurvivorſhip, though the words are general.

2 Vern. 673. Stapleton v. Cheales, Pr. Ch. 318. S. C. Gilb. Eq. Rep. S. C.

So, if a legacy of 50 *l.* is deviſed to *J. S.* when of the age of ſixteen years, and intereſt in the mean time, to be paid quarterly, this is a legacy veſted, and ſhall go to the repreſentative of the legatee, becauſe it carries intereſt.

2 Salk. 415. Snell and Dee, pl. 2.

But if *A.* deviſe in theſe words, *viz. I give* 100 l. *a-piece to the two children of* J. S. *at the end of ten years after my deceaſe*, and the children die within the ten years, this is a lapſed legacy, and is ſo in all caſes where the *time* is annexed to the *legacy* itſelf, and not to the *payment* of it; though it was objected, that this differed from the caſe where a man deviſes 100 *l.* to *J. S.* at his age of twenty-one; becauſe it is a contingency whether he will attain to that age; but the expiration of the ten years is inevitable.

Abr. Eq. 295-6. Onſlow v. South.

Again, one being poſſeſſed of a very conſiderable eſtate, part in *Jamaica*, and part in *England*, and being himſelf reſident in *Jamaica*, made his will, and thereof appointed ſeveral executors, ſome for his eſtate in *Jamaica*, and others reſiding in *England*, for his eſtate here, and, amongſt other things, deviſed in theſe words, *viz. I give and bequeath to* J. S., *now under the cuſtody of* R. D., the ſum of 2000 *l. at the age of twenty-one years, to be paid by my executors in* England, and deviſed all the reſt and reſidue of his eſtate to the plaintiff, and died. *J. S.* having attained the age of eighteen, made his will, and thereby deviſed this legacy, and all his eſtate, to the defendant. My Lord Chancellour held this a lapſed legacy, and that it was a vain endeavour in the defendant's counſel to conſtrue it a preſent legacy, and therefore veſted by the word *now*, becauſe it was a plain deſcription of the condition of the legatee, *viz. now* under the cuſtody of, *&c.*, for otherwiſe they muſt ſtop at *now*, which would be playing with the words; and though the word *paid* was made uſe of, yet it was plainly intended a deſignation of the perſons by whom the legacy was to be paid, *viz.* by his executors in *England*, which was proper, he having two ſets of them.

Love v. L'Eſtrange, 3 Br. P. C. 337.

[A teſtator gave all the reſidue of his perſonal eſtate, after debts and legacies paid, to truſtees, until *W. N.* ſhould attain his age of twenty-four years; from the age of twenty-one until the age of twenty-four to pay him thereout an annuity of 10 *l.* yearly; and thenceforth in truſt for him, his executors, adminiſtrators, and aſſigns. *W. N.* attained his age of 21, but died before his age of 24 inteſtate. It was decreed, that the repreſentative of *W. N.* was entitled, as the right veſted in him immediately upon the teſtator's death.

Corbet v. Palmer, 2 Eq. Ca. Abr. tit. Legacies (A), pl. 27.

J. C. bequeathed his perſonal eſtate to his wife for her life, and gave ſeveral particular legacies after her death, and then declared, that the reſidue at her deceaſe, and after the legacies paid, ſhould be divided between his relations *A.*, *B.*, *C.*, and *D.*—*A.* and *B.* died in the lifetime of the wife, and after her deceaſe, the

adminiſtrator of *A.* and *B.* had a decree for their ſhares; for by Lord *Talbot*, the time of payment was future, but the right to the legacies veſted upon the death of the teſtator.

A teſtatrix bequeathed her perſonal eſtate to her daughter, to be ſold and diſpoſed of by ſuch parcels, and at ſuch times, and in ſuch manner, as ſhe ſhould think fit, and out of the money ariſing by ſale thereof to pay her debts; and the reſidue thereof ſhe willed ſhould be equally paid and divided to and between *E. S.* and *T. S.*, her two grandchildren, at ſuch time as they ſhould ſeverally attain their reſpective ages of twenty-one, *or ſooner*, if her daughter ſhould think fit, and appointed her daughter ſole executrix. Lord *Hardwicke* ſaid, if it had reſted upon the words, *at ſuch time as they ſhould ſeverally attain twenty-one*, he ſhould have thought that the legacies did not veſt till then, and that it would have been the ſame thing as if the teſtator had ſaid, "I give it them at twenty-"one." But what is the meaning of the teſtatrix's ſaying *or ſooner, if her daughter ſhould think fit?* Not to hinder the legacies from veſting; but ſhe conſidered her daughter as the natural guardian of her children, and left it to her diſcretion to accelerate it, if ſhe thought proper. And as the teſtatrix, by the whole tenor of her will, left the mother a truſtee only for the children, without giving her any power over the capital of the legacies, his Lordſhip was of opinion that the legacy veſted in *E. S.* and *T. S.* at the death of the teſtatrix. Steadman v. Palling, 3 Atk. 423.

T. A. bequeathed the reſidue of his perſonal eſtate to his wife for life; "but if it ſhall happen that my wife ſhall depart this "life, leaving no child or children at the time of her death, then "my will is, that my truſtees ſhall transfer the ſecurities in which "my eſtate ſhall then be veſted to my two brothers, or, if either "of them ſhall depart this life without iſſue, then to the ſurvivor, "and I hereby give the ſame to *J. A.* and *H. A.* accordingly." *J. A.* and *H. A.* ſurvived the teſtator, but both died in the lifetime of the wife. Lord *Thurlowe* declared, that the intereſt veſted in them as joint-tenants, and *H. A.* having ſurvived *J. A.*, it belonged, ſubject to the wife's intereſt for life, to the perſonal repreſentative of *H. A.* Barnes v. Allen, 1 Br. Ch. Rep. 181.

J. M. by will gave his wife the uſe of 800 *l.* for life, and from and after her deceaſe diſpoſed of the ſame as follows: that is to ſay, to *L. H.* 100 *l.*, to *M. M.* 100 *l.*, to *E.* and *C. H.* 100 *l.* each, to *M. H.* 5 *l.* a-year. Then followed other deviſes, ſome of real, ſome of perſonal eſtate, among others to a ſervant 5 *l.*, and then the legacy on which the queſtion aroſe. "*I alſo give to* J. M., "*ſon of my brother* G., *the ſum of* 100 *l.*" He then gave the reſt and reſidue to his wife. The nephew *J. M.* (the legatee of the 100 *l.*) died in the lifetime of the teſtator's widow. His legacy was holden to be veſted, and tranſmiſſible to his perſonal repreſentative. Monkhouſe v. Holmes, 1 Br. Ch. Rep. 298.

L. made his will, and ſubject to his debts was a clauſe, by which he gave the whole of his eſtate to *J. M.*, in order to pay the income to his (the teſtator's) mother *H. L.* for life, and after her deceaſe, he then gave to five perſons the ſum of 500 *l.* each Benyon v. Maddiſon, 2 Br. Ch. Rep. 75.

3 *per*

3 *per cent.* annuities, and to *J. B.* and *M.* his ſiſter, the ſum of 100 *l.* 3 *per cent.* annuities. All the reſt and reſidue he gave to his executor, and empowered him to diſpoſe of by will the *reſiduum* he would be entitled to after the deceaſe of his (the teſtator's) mother. *J. B.* died in the lifetime of the teſtator's mother. His legacy veſted immediately upon the teſtator's death.

May v. Wood, 3 Br. Ch. Rep. 471.

A teſtator bequeathed to his daughters the ſum of 3000 *l.* 5 *per cent.* navy annuities, and all the dividends and proceeds ariſing therefrom, to be equally divided between them, and all his eſtate at *S.*, to be equally divided between them, *when they ſhould arrive at twenty-four years of age.* One of his daughters died before ſhe attained her age of twenty-four years. The Maſter of the Rolls was of opinion, that according to the true rule of conſtruction, the word *when* could not be otherwiſe conſidered than as denoting the period of payment, and muſt not be deemed as a condition precedent, upon which the legacy was to veſt, but merely poſtponing the payment of this 3000 *l.* with the dividends thereon till twenty-four; and therefore declared, that the perſonal repreſentative of the deceaſed daughter was entitled to a moiety of the 3000 *l.* 5 *per cent.* navy annuities.

Barlow v. Grant, 3 Vern. 255.

A legacy of 30 *l.* was given to an infant to bind him an apprentice. The infant died before he attained a proper age to be bound an apprentice. It was decreed, that this legacy was veſted; and the infant being 17 years old, and having made a will, and named an executor, it was allowed to be a good diſpoſition of the 30 *l.*

Collins v. Metcalfe, 3 Vern. 462.

The giving of intereſt before the payment has been conſidered as evidence of an intention to veſt the legacy. Hence, where a portion was deviſed to a child with intereſt, but not to be paid or payable, until the child ſhould attain twenty-one years, or be married; and the child died under twenty-one and unmarried; it was decreed, that the portion ſhould go to the adminiſtrator of the child.

Pr. Ch. 317.

So, in the caſe of *Stapleton* v. *Cheales*, *ſupra*, if the teſtator had there added, that in the mean time, or until the legatee attain the age of twenty-one, he ſhould have intereſt for the legacy at ſuch a rate, from the time of his (the teſtator's) deceaſe, this ſubſequent clauſe would explain the intent of the teſtator, ſo as to make the legacy, which was the principal, an intereſt veſted, which ſhall go to his executors or adminiſtrators, though the legatee die before that age, becauſe, if the principal were not due preſently upon the teſtator's deceaſe, there could no intereſt accrue to the legatee at the time.

Neale v. Willis, Barnardiſt. Ch. Rep. 43.

Again, *T. B.* being poſſeſſed of a conſiderable perſonal eſtate, by his will gave *J. N.* 600 *l.* to be laid out in the names of his executors, as counſel ſhould adviſe, in the purchaſe of ſome advowſon or advowſons, or other ſpiritual preferment for him, and until the ſame ſhould be purchaſed, ordered his executors to place out the 600 *l.* at intereſt in their names, and continue the ſame until ſuch preferment could be had, and to pay *J. N.* ſuch intereſt for his maintenance; and if there ſhould be a remainder after the payment

ment of the purchaſe, directed the ſame to be paid to him; but if he ſhould afterwards lend him any money upon bond or note, it ſhould be deducted out of the 600 *l.* but without intereſt. *T. B.* afterwards by his will directed, that if his brother-in-law *R. N.* ſhould be living at his deceaſe, he thereby charged *R. N.*'s three ſons, *viz.* the ſaid *J. N.* and *T.* and *R.*, to pay their father yearly during his life, 20*s.* out of each of their legacies; and then directed, that if *J. T.* and *R. N.* ſhould die before their legacies ſhould become payable, that then the legacies of them or him ſo dying ſhould not be paid, but fall into the *reſiduum* of his perſonal eſtate, and be applied as the ſame was directed. *J. N.* died about a year after the death of the teſtator, being at that time about twenty-five years of age. The 600 *l.* given him by the will was never paid him, nor was it ever laid out according to the directions of the will. The queſtion was, Whether the 600 *l.* given to *J. N.* by this will, was tranſmiſſible to his adminiſtratrix with the will annexed? Lord *Hardwicke* was of opinion, that it was: for it is payable at the death of the teſtator, and if *J. N.* had, inſtantly upon the teſtator's death, found out a purchaſe for the money to be laid out in, he might have demanded it. There is no ſuſpenſion of the intereſt ariſing from the legacy, till the advowſon can be purchaſed; but, on the contrary, intereſt is to be paid on the legacy in the mean time, and that to *J. N.* himſelf. And as to the clauſe reſpecting the deviſe over, the words of it may well be anſwered by conſtruing it to mean no more, than that the legacies given to the nephews ſhould ſink into the eſtate in caſe any of them had happened to have died in the teſtator's lifetime.

A teſtator bequeathed to *C. F.*, when he ſhall have attained the age of 25 years, 1000 *l.* which he empowered his four ſons his executors, guardians, and truſtees of the will, to lay out on ſuch ſecurities as they ſhould think fit, and the intereſt or income thereof to be for or toward the education of the infant as they ſhould think fit, as alſo part of the principal to put him apprentice, and the remainder to be paid him when he ſhould have attained his age of twenty-five, and not before. The queſtion was, Whether the time of twenty-five years was put in, in order to poſtpone the veſting of the legacy, or only to poſtpone the payment of it? Lord *Hardwicke* held, that it was only to poſtpone the payment. Where a teſtator gives intereſt in the mean time, he gives a property in the principal, unleſs ſomething ariſes on the face of the will to take off the force of it. And this caſe is ſtill ſtronger than that, there being a direction to diſpoſe of part to put him apprentice, to which a court of equity would compel the executors, it being obligatory upon them; and their diſcretionary power being confined to the ſecurities, the executors might have taken the greater part, almoſt to the extent of the whole, to place him out; which ſhews, it ariſes from his property. In the caſe of the *Attorney-General* v. *Hall*, in Lord *King*'s time, where the teſtator gave a legacy to one for life, and ſo much as he did not diſpoſe of gave to a charity, it was held, the legatee might diſpoſe of the whole:

Fonnereau v. Fonnereau, 3 Atk. 645. 1 Vez. 118. S. C.

ſo,

ſo, here is a direction very near to the whole of the principal; which can ariſe only from his having the property.

Walcott v. Hall, 2 Br. Ch. Rep. 305.

J. P. bequeathed to his godſon *T.* the plaintiff, the ſum of 50*l.* to be paid to him at the age of twenty-one years, or day of marriage, which ſhould firſt happen, the ſame to be put out at intereſt in the name of his executors and adminiſtrators, the intereſt ariſing therefrom from time to time to be applied towards his maintenance and education; and if he ſhould die before 21, or marriage, he gave the legacy to his executors in truſt for the poor of *S.*, and appointed the defendant his executor. The defendant proved the will, retained 50*l.* for the payment of the legacy to the plaintiff, and paid over the reſidue (after payment of debts and legacies) to the reſiduary legatees, and afterwards became bankrupt, and obtained his certificate. By the Maſter of the Rolls, this was a veſted legacy, and as ſuch, might have been proved under the commiſſion. The giving intereſt always veſts perſonal legacies. It was therefore veſted, ſubject to be diveſted, on the legatee's dying under 21, and although it might not have been proveable as a debt, yet the guardian, upon petition, would have been admitted to prove it. The certificate therefore bars it.

Atkins v. Hiccocks, 1 Atk. 500.

A teſtator deviſed in theſe words: "I deviſe to my daughter "*E. H.* the ſum of 200*l.* to be paid her at the time of her mar- "riage, or within three months after, provided ſhe marry with "the approbation of my two ſons *W.* and *S. H.* or the ſurvivor "of them; and my will is, that my ſaid daughter *E.* ſhall yearly "receive and be paid, until ſuch time as ſhe ſhall marry, the "ſum of 12*l.*, free and clear of all taxes and impoſitions what- "ſoever." And he willed, that his leaſehold eſtate called ——, ſhould ſtand charged with the payment of the 12*l. per ann.* and likewiſe with the payment of the 200*l.* when the ſame ſhould become due, and deviſed the ſaid leaſehold premiſes, and his whole perſonal eſtate to his two ſons, and made them executors. *E.* died after 21, but without being married, and her adminiſtrator claimed the legacy of 200*l.* But Lord *Hardwicke* was of opinion, that it was not a veſted legacy; for that when the time annexed to the payment is merely eventual, and may or may not come, and the perſon dies before the contingency happens, he could find no inſtance, where it had been held, that the legacy ſhould in all events be paid: that the rule as to veſting is founded upon another rule, *certum eſt quod certum reddi poteſt*, and it is plain the teſtator did not regard the point of time, but the fact that was to happen, *the marriage*, which makes it a legacy on a condition, and cannot be demanded till the condition is ſatisfied; that as to what had been inſiſted, that the teſtator's giving 12*l. per ann.* to *E.* till the contingency of her marriage, is in the nature of intereſt for the 200*l.*, and that from thence it appears to be his intention, that the legacy ſhould veſt in the mean time; whenever this doctrine has been allowed, the payment of the principal hath been certain, and ſo not ſimilar to the preſent caſe, becauſe, here, this is not meant as intereſt, for it is an annuity of 12*l. per ann.* charged upon, and iſſuing out of an eſtate.

The

The above authorities, it must be observed, are applicable only where the legacies arise out of a fund *merely personal*: for with respect to interests arising out of land, these rules are totally different; for whether the land be the primary or auxiliary fund, whether the legacy be given with or without interest, the *general* rule is, that charges upon land payable at a *future* day, shall not be raised, where the party dies before the time of payment. Therefore where *T. S.* by will gave his daughter 1000 *l.* to be paid by his executor, at her age of 21, or marriage, which should first happen, willing the same to be raised out of the rents and profits of his lands; and further willed, that in case his son should die before his age of 21 years, or without heirs of his body lawfully begotten, then from and after the death of his son, he gave all his said lands, *&c.* to the defendant, he making up his daughter's portion 2000 *l.*; and the daughter died soon after the testator's death an infant and unmarried; upon which her mother took out letters of administration and claimed the 2000 *l.*; it was decreed, that she was not entitled to any part of it, for it appears, that the intention of the testator was, that it should be for a portion, and it is expressly called a portion in the will: it is no personal legacy, but money to be raised out of the rents and profits of lands, and the payment is expressly to be at 21 years, or marriage.

Duke of Chandois v. Talbot, 2 P. Wms. 612. Bateman v. Roach, 9 Mod. 106. Smith v. Smith, 2 Vern. 92.

A. having entailed his lands on his son, subject to a mortgage, devised his leasehold and personal estate for the payment of his debts and legacies; directing, that if his personal estate was applied to pay off his mortgage, the same should be kept on foot to make good his daughter's portion, and bequeathed to his daughter 3000 *l.* to be paid her at 21, or marriage, if married with consent; if not, then but 1000 *l.* The daughter died under age, and unmarried. It was decreed, that this being a portion and charged upon land, should extinguish in the land for the benefit of the heir. Besides, the devise being of 3000 *l.* at 21 or marriage, which marriage was to be had by consent, it did not vest in the daughter, but was contingent.

Yates v. Phettiplace, 2 Vern. 416.

A. devised his lands to his eldest son *B.* in fee, and added, "But my will and mind nevertheless is, that *B.* shall pay out of "the lands so devised to him, the sum of 600 *l. viz.* to my daughter *M.* 200 *l.* at her age of 21 years, and to my son *J.* 200 *l.* "at his age of 21, and to my son *N.* 200 *l.* at his age of 21; and "if my son *B.* shall die before he attain the age of 21 years, then "my will is, that my son *J.* shall not have the 200 *l.* settled on "him, but that it shall be paid to my daughter *M.* and son *N.*, "to be added to their portions, and *J.* to have all the estate "given to *B.* paying the 600 *l.* as before expressed; and my "said children shall be allowed 4 *l. per ann.* maintenance for "every 100 *l.* till their several portions are paid." *B.* died before 21: the plaintiff married *M.* and has issue by her. *M.* dies two months before her age of 21. The question was, Whether this was not a subsisting charge upon the land, and an interest so vested in *M.* as to entitle the plaintiff, as her administrator, to the legacies?

Carter v. Bletsoe, Pr. Ch. 267. 2 Vern. 617. S. C. Gilb. Eq. Rep. 11. S. C.

legacies? Lord Chancellour diſmiſſed the bill as to the demand of both the legacies, becauſe there were no words in the will which veſted any intereſt in thoſe legacies before the age of 21 years; and as to the other 100 *l.* that was governed by the other legacies.

Pr. Ch. 318. In the caſe of *Stapleton* v. *Cheales*, *ſupra*, it is ſaid, if ſuch portion were to ariſe out of lands or a term for years, though it were limited to the party *generally* to be paid, or payable at ſuch an age, there, for the benefit of the heir, the portion ſhould ſink, and not go to the repreſentatives of the party ſo dying.

Jennings v. Looks, 2 P. Wms. 276. One has two ſons *R.* and *T.*, and being ſeiſed in fee of the manor of *B.* (which manor was in mortgage) makes his will, thereby deviſing 1000 *l.* to his younger ſon *T.* (being then about a year old) to be paid to him when he ſhould arrive at his age of 21, out of the manor of *B.*, with a power to the executors by felling timber growing on the eſtate to raiſe ſuch monies, as his perſonal eſtate ſhould fall ſhort of, for the payment of his debts and legacies. The younger ſon *T.* dies about the age of two years, and the eldeſt ſon *R.* about the age of ſix, upon which the eſtate comes to the uncle, and the mother having adminiſtered to the younger ſon, claims the 1000 *l.* legacy. But Lord Commiſſioner *Jekyll* ſaid, that it was determined about the latter end of Lord *Somers*'s time, in the caſe of *Yates* v. *Phettiplace*, *ſupra*, that where one by will gave a portion to a child out of a real eſtate, payable at a future time, and the child died before that time, the portion ſhould ſink; nay, that it ſhould ſink as well for the benefit of an *hæres factus*, as of an *hæres natus*, for the former is ſubſtituted by the teſtator in the place of the latter; and the true reaſon is, that the legacy being given as a portion, when the child dies before the portion is payable, there is no occaſion for it; and equity will not countenance the loading of an heir for the benefit of an adminiſtrator. And it being objected, that though this might be true as to a portion given out of a real eſtate, yet here the legacy was a charge alſo upon the perſonal eſtate, and therefore that if the real eſtate was not ſufficient for the payment of the ſaid legacy, yet the perſonal eſtate ſhould be liable; and that this was the plainer from the executor's being empowered to fell timber for the payment of ſuch of the legacies as the perſonal eſtate was not ſufficient to pay; the court ſaid, this muſt be intended ſuch of the legacies as the perſonal eſtate was liable to pay; it is true, were the legacy chargeable on the perſonal as well as real eſtate, that ſo much thereof as the perſonal eſtate would extend to pay, ſhould go to the executors or adminiſtrators of the child; but this is a charge only upon the land.

Rich v. Wilſon, Moſel. 68. Sir *R. R.* ſettled all his lands in truſt for the payment of debts and portions to his children, as he ſhould direct by his will. Afterwards, he makes his will, and gives 1000 *l.* a-piece to his five ſons, payable at their reſpective ages of 21, with intereſt in the mean time, and bequeaths all his perſonal eſtate to his lady for her ſole uſe and benefit, and makes her executrix. Sir *R.* dies, and afterwards *R.*, one of the ſons, dies under the age of 21, and Lady *R.* takes out adminiſtration to him, and Mrs. *W.* the defendant, his ſiſter,

ſiſter, ſues her in the ſpiritual court, (ſhe being in poſſeſſion both of the real and perſonal eſtate of Sir *R. R.*) for a diſtribution of the 1000*l.* bequeathed to her brother by her father's will. Lady *R.* files a bill, and moves for an injunction to the ſpiritual court, becauſe the portion of the ſon was charged on the real eſtate, and therefore ought not to be ſued for in that court; and the whole perſonal is given to the plaintiff. Lord Chancellour granted the injunction.

Hall v. Terry, 1 Atk. 502.

M. T. being entitled to the reverſion of an eſtate after the death of his wife, "deviſed it to *C. D.* and his heirs, ſo as he ſhould pay "to his ſiſter *E. O.* the ſum of 100*l.*, within ſix months after the "reverſion came into poſſeſſion, and deviſed the reſt and reſidue "of his perſonal eſtate, all his debts and legacies before bequeathed "being firſt deducted, to *C. D.* and another, whom he made his "executors." *E. O.* died in the lifetime of the wife, and upon the death of the wife *E. O.*'s repreſentative brings a bill againſt *C. D.* for the 100*l.* It was inſiſted by the plaintiff's counſel, that the legacy is veſted, and only the time of payment poſtponed for the convenience of the eſtate, as it was a dry reverſion. But Lord *Hardwicke* thought, that the gift of the ſum of money is only by direction for the payment; and that it cannot be ſaid, this is an original gift ſo as to veſt the legacy, and the payment only poſtponed to a future time. Another diſtinction was attempted, that the time of payment was not taken from the nature of the legacy, or the circumſtances of the legatee, but from the nature of the eſtate, and that therefore this is different from all the caſes. But Lord Chancellour ſaid, if he ſhould give into this reaſoning, he ſhould overturn the caſes of portions, or of other ſums bequeathed; for that of late years it had been holden, that where a ſum of money is given by way of portion, or as a general legacy, charged upon land, if the party dies before the time, it cannot be received. In the preſent caſe, there is no contingency, the time is ſingle, within ſix months after the death of the tenant for life, when the reverſion came in poſſeſſion, ſo that it never could be raiſed, becauſe the perſon died before the time for raiſing it.

Lord Hardwicke ſpeaking of this caſe, in the Attorney-General v. Tunſtal, ſays, there, the whole of the gift depended upon the time of payment.

Prowſe v. Abingdon, 1 Atk. 482.

T. C. deviſed all his lands to *J. C.* and *J. P.* in truſt, that they ſhould ſell his lands in *M.* and *P.*, and out of the purchaſe money pay his debts; and as to the reſt of the lands in truſt to receive the rents, and to make leaſes for 99 years determinable on three lives, and therewith to pay his debts and legacies, then to the uſe, &c.; and he bequeathed a legacy of 500*l.* to his nephew *T. P.*, to be paid at his age of 21, or marriage. The nephew *T. P.* died before the age of 21, and unmarried. His adminiſtrator claimed this legacy as being a veſted intereſt, and tranſmiſſible. After a long argument, Lord *Hardwicke* ſaid, that the only inducement he had to ſuffer ſo long a debate, was in order to receive ſatisfaction as to the point, which had been inſiſted upon in relation to this legacy being chargeable on a mixed fund, conſiſting of real and perſonal eſtate. He ſaid, that was a difficulty which always ſtuck with him, and it was ſomething very extraordinary, that the real eſtate which was only an auxiliary fund to the perſonal, ſhould, in caſes of this kind, be chargeable in a different manner, and not be

made liable to the ſame rules and determinations with the primary ſecurity, the perſonal eſtate; but, he ſaid, he found the reſolutions ſo ſtrong, that there was no difference between a charge on the real eſtate only, and a charge on the real and perſonal eſtate too; that he could not, at that time of day, think of determining in a different manner. He ſaid, it was very clear, that charges on land, payable at a future day, could not be raiſed, if the party died before the day of payment; that there was no difference at all whether that charge was created by deed or will; nor, whether it was provided by way of portion for a child, or given merely as a legacy by collateral relations, or others; and this was the caſe in the Duke of *Chandos* v. *Talbot*, and *Jennings* v. *Looks*, in which he was counſel, for in neither of them was the proviſion made by a parent. That the true reaſon, why legacies charged on land, payable at a future day, ſhall not be raiſed, if the legatee dies before the day of payment, is, that the court will govern themſelves, as far as is conſiſtent with equity, by the rules of the common law. In the caſe of perſonal eſtate, the rule is the ſame here as in the civil law, that there may be an uniformity of judgments in the different courts: but in caſe of lands, the rule of the common law has always been adhered to: as, ſuppoſe a perſon ſhould covenant to pay money to another at a future day, if the covenantee (*a*) dies before the day of payment, the money is not due to his repreſentative. The ſame rule holds in a promiſe to pay money, &c.

So, Boycot v. Cotton, 1 Atk. 555-6. in which the authority of Jackſon v. Farrant, 2 Vern. 424. and Cave v. Cave, *id.* 508. is denied.

(*a*) But ſurely the law is not ſo, nor ever hath been ſo. That executors or adminiſtrators ſhall have a writ of covenant for a perſonal thing, ſee F. N. B. 145. D. 146. D. Reg. 165. b. Goſs v. Nelſon, 1 Burr. 227.

Van v. Clarke, 1 Atk. 510.

M. C. deviſed to *G. C.*, his heirs, executors, and adminiſtrators, all that her meſſuage in *Great Lincoln's-Inn Fields*, with all her furniture, &c. and all her real and perſonal eſtate not otherwiſe diſpoſed of, to the intent that, out of the ſaid real and perſonal eſtates ſo deviſed, her ſeveral legacies might be paid. She then gave to *T. L.* 2000*l.* in truſt for the uſe of his daughter *M.*, and declared that he the ſaid *T. L.* ſhould, until the ſaid *M.* ſhould attain the age of eighteen, or be married, which ſhould firſt happen, place out the 2000*l.* at intereſt upon good ſecurity, and alſo ſhould from time to time put out at intereſt, the intereſt of the ſaid ſum, as the ſame ſhould ariſe to a fit ſum for that purpoſe, and ſhould pay the 2000*l.*, with the intereſt and produce thereof, to the ſaid *M.* for her own uſe, upon her attaining her age of eighteen, or marriage; ſhe likewiſe directed the 2000*l.* to be paid to *T. L.* the truſtee, within one year and a half after her deceaſe. *T. L.* died in the lifetime of the teſtatrix; *M.* died about half a year after the teſtatrix, unmarried. Lord Chancellour was of opinion, that, as the infant died before the time of payment to the truſtee, the legacy was not raiſable for the benefit of her repreſentative. If ſhe had ſurvived the year and half, (for the death of the truſtee made no difference,) ſhe would have been entitled to the legacy; or, if ſhe had died *after the term aforeſaid*, and before eighteen, or marriage, her repreſentatives would have been entitled: but if this had been merely perſonal, as ſhe died within the year and half, her repreſentative could not have been entitled, for the whole

whole gift is in the direction of the payment, which makes that the ſubſtance. In the preſent caſe, his Lordſhip ſaid, it is not a legacy merely out of perſonal eſtate, but out of both funds, and the real charged in the firſt place, by the teſtator's expreſs directions, *viz.* her eſtate in *Great Lincoln's-Inn Fields*. And this conſtruction is more agreeable, as the ſum was intended clearly as a portion for *M.*; and the court always goes as far as it poſſibly can to hinder the raiſing of portions out of land for the benefit of repreſentatives.

A. S. (inter al.) gives to three truſtees 8000 *l.* upon truſt, that they ſhould diſpoſe thereof in the purchaſe of lands of inheritance in fee-ſimple, to be ſettled to the uſe of her grandſon *T. M.*, and the heirs of his body; and for default of ſuch iſſue, directed the truſtees to convey the ſame to the Drapers Company, upon truſt, that they ſhould, within three months after the eſtate ſhould be conveyed to them, by mortgage, or ſale of ſome part thereof, raiſe and pay to *E. L.* her nephew 2000 *l.*, which ſhe bequeathed to him, in caſe of the death of her grandſon without iſſue. *E. L.* died in the lifetime of the grandſon; and the grandſon died a few years afterwards, under the age of twenty-one, and without iſſue. The queſtion was, Whether this legacy of 2000 *l.* was lapſed, as *E. L.* died before the contingency happened, or, whether it was tranſmiſſible to his perſonal repreſentative? The Maſter of the Rolls held, that it was lapſed: that the 8000 *l.* being directed to be laid out in land, muſt be conſidered in equity as land: that the teſtatrix herſelf conſidered it as land, becauſe ſhe directs the 2000 *l.* to be raiſed by mortgage or ſale, which ſhews it muſt be out of land: that as the legacy therefore is to be paid out of real eſtate, it was within the general rule, and ought to ſink in favour of the heir at law. Attorney-General v. Milner, 3 Atk. 112.

Legacies were given to infants out of land (charged generally with debts) payable at twenty-one, with intereſt at 3 *per cent.* One of the infants dying before that age, Sir *L. Kenyon*, after great conſideration, decreed, that the legacy lapſed. Gawler v. Standewicke, 1 Br. Ch. Rep. 106. note.

A teſtator gave legacies to his natural children, payable at the age of twenty-one, to be raiſed by the means thereinafter pointed out: he then directed an eſtate to be purchaſed, a ſum to be raiſed for maintenance of two of his natural children, upon whom he had ſettled the eſtate he directed to be purchaſed, and ordered the reſidue of the rents and profits of the ſaid eſtate to be applied to raiſe the legacies, and in default thereof, made the eſtate liable. One of the legatees died an infant. Lord Chancellour ſaid, he thought at firſt it was a mere perſonal legacy; but he doubted, upon the whole, whether it muſt not be conſidered as charged upon the land, the teſtator having referred to the manner in which it was to be raiſed, and having afterwards provided for the payment of it, by charging his real eſtate. The moment the money ought to be laid out in land, it muſt be conſidered as a real fund, and therefore the legacy fell within the general rule, and was lapſed. Harriſon v. Naylor, 3 Br. Ch. Rep. 108.

This rule however, that charges upon land payable at a *future* day, ſhall not be raiſed, where the party dies before the day of payment, is ſubject to many exceptions, as, where the time of payment is poſtponed from the circumſtances, not of the perſon, but the fund.

Lowther v. Condon, 2 Atk. 127. 130. Barnard. Ch. Rep. 327. S. C.

A bequeſt ran in theſe words: "I give and bequeath unto each "of my ſaid daughters the ſum of 1000 *l.*, to be raiſed and to "be paid unto them ſeverally and reſpectively immediately after "the deceaſe of my wife, out of the rents, iſſues, and profits of "my manors, lands, tenements, and hereditaments in *W.*, or by "ſale or mortgage of the ſame, or a competent part thereof, to-"gether with intereſt for the ſaid ſeveral ſums of 1000 *l.*, after "the rate aforeſaid, from the deceaſe of my ſaid wife, until the "ſaid ſums ſhall be duly paid to my ſaid daughters, or their re-"ſpective executors, adminiſtrators, or aſſigns: and my further "will is, that in caſe either of my ſaid daughters ſhall depart this "life before me, then the ſurvivor of my ſaid daughters, her exe-"cutors, adminiſtrators, and aſſigns, ſhall have and receive all "and every the ſum and ſums of money herein by me before "deviſed out of my ſaid lands, to be raiſed in the manner herein-"before appointed; and in ſuch caſe, the part of the daughter "ſo dying, ſhall not ceaſe or ſink into the eſtate for the benefit of "my heir, but ſhall remain and be raiſed for the benefit of my "ſurviving daughter." The teſtator died, and left one ſon *T.*, and two daughters, *D.* and *J.* In 1719, after the death of the teſtator, *D.* intermarried with Sir *W. L.*: *D.* died in 1736: *A.* the mother died in the year following: upon which Sir *W. L.* brought his bill againſt *T.* and *J.*, in order to have the ſum of 1000 *l.* mentioned in the will, raiſed out of the eſtate, which was thereby charged with it. Lord Chancellour held, that it ought to be raiſed: that the teſtator had poſtponed the raiſing of it till after his wife's deceaſe, not from the circumſtances of the perſon, but becauſe it did not ſuit the circumſtances of his eſtate, that it ſhould be raiſed before: that the intention of the teſtator that it ſhould veſt, was ſhewn moſt ſtrongly in the clauſe, where he gives the whole to the ſurviving daughter: that that intention was further manifeſted, by his uſing the words *executors*, *adminiſtrators*, *and aſſigns*, immediately preceding the clauſe of ſurvivorſhip; for his meaning was, that in caſe the daughters ſhould die before the portion was raiſed, the executors ſhould be entitled to have the 1000 *l.* raiſed off the eſtate. On the whole, his Lordſhip ſaid, he thought the intention extremely clear under the will, that the portion ſhould be raiſed, and that the poſtponing the time of payment was only for the convenience of the eſtate, becauſe it would have diſtreſſed the ſon to have raiſed it in the mother's lifetime, before her jointure fell in.

King v. Withers, Ca. temp. Talb. 117. 3 P. Wms.

J. S., having a conſiderable real and perſonal eſtate, deviſed as follows: "I give and bequeath unto my daughter *M.*, at her age "of twenty-one, or day of marriage, which ſhall firſt happen, the "ſum of 2500 *l.*; and my will and meaning is, that if my ſon "*A.* ſhould

"*A.* ſhould die without iſſue male of his body then living, or "which may afterwards be born, that then my ſaid daughter "ſhould have and receive at her age of twenty-one, or day of "marriage, which ſhall firſt happen, the further ſum of 3500*l.*, "over and above the ſaid ſum of 2500*l.*; but in caſe the contin-"gency of my ſaid ſon's dying ſhould not happen before the ſaid "age of my daughter, or her day of marriage, that then ſhe ſhall "receive and be paid the ſum of 3500*l.* whenever it may after "happen." Then he deviſes his real eſtate to his ſon in tail, and for want of ſuch iſſue remainder to his brother in fee; and then goes on thus: "And my will and meaning is, that the lands and "premiſes hereby deviſed ſhall be liable to, and chargeable with "the payment of the ſaid ſum of 3500*l.*, whenever it ſhall be-"come due and payable;" and directs, that in caſe of failure of iſſue of his ſon, his daughter, her heirs or aſſigns, ſhould join in a ſurrender of ſome copyhold lands to the uſe of his brother, otherwiſe the legacy of 3500*l.* to become void.—The daughter marries, having attained her age of twenty-one, and dies in her brother's lifetime, leaving the plaintiff, her huſband, who took out adminiſtration to her, and then her brother dies without iſſue male.—The queſtion was, Whether the legacy of 3500*l.* ſhould be raiſed out of the land, the perſonal eſtate being deficient; and whether it was ſuch an intereſt in her as would go to the plaintiff, her adminiſtrator? Lord Chancellour ſaid, that three things were by the will neceſſary to happen, to entitle *M.* to this legacy of 3500*l.*, *viz.* the death of *A.* the ſon without iſſue male; marriage, or her attaining the age of twenty-one; and that all three had happened; and that though it is to be raiſed out of land, it remains money ſtill; and though ſhe has not lived to receive it, yet, the contingency having happened, it muſt go to her huſband, who is her repreſentative, and who may well be thought to have married in contemplation of this additional fortune of 3500*l.*, though depending upon a contingency.

414. S. C. 4 Br. P. C. 228. S. C.

T. H. deviſed copyhold lands to his wife and her aſſigns for her life, and after her deceaſe to his ſon *S.*, till his grandſon, the defendant *T.*, attained the age of twenty-three, and no longer; and ſo ſoon as his grandſon attained that age, then he gave them to his ſaid grandſon, his heirs and aſſigns for ever, on condition that the ſaid grandſon, his heirs or aſſigns, ſhould pay or cauſe to be paid to his grand-daughter *E. H.* the ſum of 60*l.* within two years after his ſaid grandſon attained his age of twenty-three; and if his ſaid grandſon ſhould happen to die without iſſue of his body, then he gave and deviſed the ſame to his ſon *S. H.* and his heirs, on condition of paying the ſum of 100*l.* to *E. H.* within one year after his ſon *S. H.* enjoyed the ſaid premiſes by virtue of this laſt deviſe; and his will further was, that if his ſaid grandſon or ſon ſhould make default in payment of the ſaid ſum of 60*l.* then it ſhould be lawful for his ſaid grand-daughter *E. H.*, her executors and adminiſtrators, to enter into the ſaid premiſes, and the rents thereof to receive and take till the 60*l.* ſhould be paid.—*E. H.* married the plaintiff, and lived till after the defendant, her brother, attained his age of twenty-three, but died before the two

Emes v. Hancock, 2 Atk. 507.

years were expired after his attaining that age. It was decreed, that the 60 *l.* was a veſted legacy, and tranſmiſſible to *E.*'s repreſentative: that the teſtator ſo appointing two years after his grandſon attained twenty-three, for raiſing the 600*l.*, ſeemed to be done merely *for the convenience of the eſtate:* that if *T.* the grandſon had died within the two years, (for if he had died after, *E.* would have been entitled only to the 60 *l.*) and the money had not been paid, and he had left a ſon, and the ſon had likewiſe died within the two years, and then *E.* had died before the year was out which the teſtator had allowed to *S. H.* for payment of the 100*l.*, *E.*'s repreſentative would clearly have been entitled to the 100 *l.*: that the caſe of *King* v. *Withers*, *ſupra*, was directly in point for that purpoſe; and thence it might be argued, that it was the intention of the teſtator, that his grand-daughter *E.* ſhould have one or the other. The deviſe was further conſidered as a conditional limitation, and therefore whatever right *E.* gained thereby was a legal eſtate.

Sherman v. Collins, 3 Atk. 319.

A teſtator bequeathed unto each of his daughters *A.* and *M. C.* 300 *l.*, to be paid them by his executor *J. C.* when he ſhould attain his age of twenty-ſix; and then went on thus: "but in regard "my two daughters are already provided for by lands ſettled on "them by me, and my late wife, and by legacies left them by "their grandfather, and which I have paid to them; it is my in- "tention, that they ſhall not be entitled to any intereſt (*a*) for "the ſaid ſums to them given by me as aforeſaid: however, for "the better ſecuring the ſaid ſeveral ſums of 300*l.* given to my two "daughters, my will is, that my two cloſes in *S.* ſhall ſtand "reſpectively charged with my perſonal eſtate, and be liable "to the payment of the ſaid ſeveral ſums of 300 *l.* to my two "daughters at the time above-mentioned, with a power to enter "and hold till payment of principal and intereſt, from the time "it ſhall become due;" and after the payment thereof he deviſed the premiſes to his ſon *J. C.* in fee, whom he makes executor and reſiduary legatee. Both the daughters arrived at their age of twenty-one, but died before *J. C.* attained his age of twenty-ſix: one of them married, and left two children; the other died unmarried, but by will gave the 300 *l.* to her ſiſter. Lord *Hardwicke* held theſe to be veſted legacies; for that the time of payment was poſtponed, in order to prevent the burden of intereſt from falling upon the eſtate of the ſon till he attained his age of twenty-ſix. Beſides, upon general rules of law, the legacies are veſted, for the perſons entitled might have had a legal remedy by ejectment. The words are, *with a power to enter and hold till payment.* This is a right of entry given them to hold the land in the nature of a tenancy by *elegit*, and is a chattel intereſt. The charge is not an equitable charge, but a legal one.

(*a*) Theſe words, Lord Camden obſerved, operated as words of gift.

Hutchins v. Foy, Com. Rep. 716.

A teſtator deviſed all his real and perſonal eſtate to *T. B.* for life, and afterwards to his children, and for want of ſuch iſſue, to his ſiſter *Martha* for life, and after her deceaſe, to *J. B.* for life, and then to his children, and for want of ſuch iſſue, part of his real eſtate called *M.*, to *W.* and his heirs; the other part called *C.*, to the defendant *Foy* and his heirs, paying out of it, when it falls, 500*l. viz.* 100 *l.* to *S. D.*, 150 *l.* to *W.* and *O.*, 100 *l.*

to

to *N.*, and 50 *l.* a-piece to *Elizabeth*, *Mary*, and *Margaret*, the three daughters of his ſiſter. *J. B.* died without iſſue, and his ſiſter *Martha* died in his lifetime. *Margaret*, one of the three daughters, married the defendant *G.*, and died two years after the teſtator. *T. B.* died without iſſue two years after *Margaret*, whereby the defendant *Foy* came to the poſſeſſion of the eſtate deviſed to him and his heirs. The defendant *G.* having taken out adminiſtration to his wife *Margaret*, aſſigned to the plaintiff the 50 *l.* payable to his wife; and the queſtion was, Whether this legacy was veſted in *Margaret?* The court held that it was; for firſt the remainder veſted immediately by the death of the teſtator; for *Foy* might ſell or deviſe it, and, conſequently, the 50 *l.* is veſted in thoſe to whom it was payable; for if he had ſold it, it muſt have been ſubject to the charge laid upon it by the teſtator. And farther, the eſtate and the charge upon it paſs together, and the deviſee muſt take it *cum onere*; for as it was the teſtator's intent that *Foy* ſhould have the eſtate, it was as much his intent, that he ſhould pay the money out of it when he had it.

J. H. deviſed part of his real eſtate for payment of debts, the ſurplus to his mother, and another part to his mother for life; and afterwards to *W. R.* his heirs and aſſigns; he and they paying thereout legacies to ſeveral perſons, which ſums he willed to be paid within 12 months next after his mother's deceaſe, charging his land therewith accordingly. After the teſtator's death the mother entered, and poſſeſſed the real eſtate, and died. A legatee of 100 *l.* ſurvived her but a month, and his executors bring a bill for the legacy againſt the deviſee of the real eſtate, who was not the heir at law. Lord *Hardwicke* held, that it was a veſted legacy, and tranſmiſſible to the repreſentatives; that the twelvemonth clauſe was not intended to ſuſpend the veſting, and make it contingent; but only as a reaſonable time to the deviſee for payment, which he could not do before he was poſſeſſed. And his Lordſhip cited the following caſe of *Wilſon* v. *Spencer*, *Jan.* 31, 1732, which was determined on that ground only. There, the teſtator directed the payment of his debts and legacies by and out of ſuch part of his perſonal eſtate, as ſhould not afterwards be ſpecially deviſed; and if that proved deficient, then out of the real eſtate; and that his executor ſhould within 12 months after his death levy and raiſe ſufficient to pay 1000 *l.* to his younger ſon, to be paid to him immediately when raiſed, charging all his real eſtate, if the perſonal eſtate not ſpecifically deviſed proved deficient. The younger ſon died before the expiration of the year: his executors bring a bill for it againſt the eldeſt ſon, the deviſee for life of the real eſtate, with a remainder to his ſons. The defendant admitted it was intended for the brother's advancement; but inſiſted, that he dying unmarried before it was extinguiſhed, and not to be raiſed; the perſonal eſtate was admitted to be deficient, and it was therefore chargeable on the real eſtate, and to take the fate out of real eſtate. The court held, it ſhould be raiſed, which is an authority, that the year for raiſing was not ſufficient to prevent the legacy from veſting. Upon the authority of *Wilſon* v. *Spencer*, his Lord-

Hodgſon Rawſon, 1 Vez. 44.

ſhip held, that the legacy in the principal caſe ſhould be raiſed and paid with intereſt at 4 *per cent.* from a year after the mother's death, and that the plaintiff muſt have his coſts.

Thompſon v. Dow, 1 Br. Ch. Rep. 193. note. See Manning v. Herbert, Ambl. 575. S. P. upon nearly the ſame words.

A teſtator, ſeiſed of the reverſion of an eſtate, expectant upon the deceaſe of his aunt, deviſed this eſtate to his wife for life, remainder to *J. D.* in fee; ſubject to the payment of 200 *l.* to his daughter *E.*, ſix months after his wife's deceaſe; with power for the daughter in default of payment to ſeize the rents. *E.* died in 1750; the mother in 1754; the aunt in 1760. Lord *Northington* held this a veſted intereſt in the daughter, and decreed the 200 *l.* to be paid with intereſt from the deceaſe of the aunt, it appearing, from the words of the will, that the ſon was to pay this 200 *l.* out of the rents of the eſtate.

Tunſtall v. Brachen, Ambl. 167. 1 Br. Ch. Rep. 124. note, S. C.

A. deviſed lands to *M. B.* his ſiſter, in fee, paying 100 *l. per annum* to his wife for her life, and alſo ſeveral legacies to ſeveral of his nephews and couſins within 12 months after the death of his wife, with a proviſo, that in caſe his wife ſhould at his death have a child or children who ſhould live to 21, he revoked the deviſes and bequeſts, except the annuity to his wife, and gave all his ſaid lands, *&c.* to ſuch child or children, his, her, or their heirs. Several of the legatees died in the lifetime of the wife, who had no child at the teſtator's death. It was decreed that their legacies were tranſmiſſible to their repreſentatives.

Embry v. Martin, Ambl. 230.

W. N. deviſed his freehold eſtates to his ſon *J.* in tail, remainder to his daughter *P.* in tail, remainder to his daughter *E.* for life, remainder to her ſon *J. N*, and his heirs for ever, upon condition of his paying to his eldeſt ſiſter, the plaintiff's mother, 100 *l.* at or ſoon after his being poſſeſſed of the premiſes, and for non-payment the eſtate ſhould be to the plaintiff's mother, *&c.* *J.*, *P.*, and *E.* are all dead; the plaintiff's mother is alſo dead; and ſince her death, the remainder in fee is veſted in *J. N.*, in poſſeſſion. The plaintiff, as his mother's executor, is entitled to have the 100 *l.* raiſed.

Jeal v. Tickener, 1 Br. Ch. Rep. 120. note.

H. S. deviſed two houſes to his wife for life, and immediately after her deceaſe, to the defendant in fee, he paying thereout to the teſtator's couſins *H. T.* and *T. T.* 20 *l.* a-piece, within three months after the death of his wife. The teſtator died in 1752, and his wife entered. *T. T.* ſurvived the teſtator, and by will gave the legacy to the plaintiff *Jeal*, but appointed no executor. The plaintiff *Jeal* obtained adminiſtration. *H. T.* ſurvived the teſtator, and died in 1758 inteſtate. The teſtator's widow died in 1767, and *E. T.* entered. It was inſiſted by the defendant, that as *T. T.* and *H. T.* died in the life of the wife, the legacies were not payable. But, Lord *Bathurſt* declared, that they were veſted, and tranſmiſſible to their repreſentatives, and a charge upon the premiſes deviſed to *E. T.*

Clarke v. Roſs, *ibid.*

A teſtator deviſed real eſtates to truſtees, to the uſe of *T. S. M.* for life, remainder to truſtees, *&c.*, remainder to his firſt and other ſons, in tail general, remainder to daughters in tail general, remainder to his wife for life, remainder to *A. W.*, his heirs and aſſigns for ever, with a proviſo, that *A. W.*, or his heirs, if he or they

they ſhould actually come into poſſeſſion by virtue of the limitation in the will, ſhould pay to his daughter *E. W.* 2000 *l.*; and he thereby charged all the premiſes with the payment of the 2000 *l.* to the ſaid *E. W.*, at the end of two years next after the ſaid *A. W.* or his heirs ſhould come into poſſeſſion as aforeſaid. After the death of the teſtator, a commiſſion of bankruptcy iſſued againſt *A. W.*, under which the defendant was choſen aſſignee. *T. S. M.* and the teſtator's widow both died, the former without iſſue; upon which the reverſion in fee-ſimple veſted in the defendant, who entered and enjoyed two years. *E. W.* died in the lifetime of *T. S. M.* and the teſtator's widow. Lord *Bathurſt* nevertheleſs decreed the legacy given to her to be raiſed with intereſt from the end of two years after the defendant came into poſſeſſion.

By a clauſe in the will of Sir *J. K.*, he gave, in caſe his nephew ſhould depart this life before he ſhould attain the age of 21, the ſeveral additional legacies hereafter mentioned, *viz.* to his wife 2000 *l.*, to his ſiſter *J. B.* 1000 *l.*, to his ſiſter *M. S.* 1000 *l.*, to his ſiſter *E. K.* 1000 *l.*, and he directed thoſe ſeveral legacies ſhould be paid and payable within ſix months next after ſuch the deceaſe of his ſaid nephew under the age of 21 years, and directed and empowered his truſtees, their heirs, and aſſigns, to raiſe thoſe additional legacies by any mortgage or mortgages of the whole or a competent part of his eſtates thereby deviſed to them. The nephew died unmarried, under the age of 21. The queſtion was, Whether as theſe legatees, though they ſurvived the teſtator, died in the lifetime of the nephew, their perſonal repreſentatives were entitled to the additional legacies given them on the contingency of the nephew dying under 21? The court held, that they were veſted intereſts, and tranſmiſſible to the repreſentatives. Kemp v. Davy, *ibid.*

A teſtator deviſed real eſtate to his wife *T.* for her life, remainder to his ſon *R.* in tail male, remainder to his (the teſtator's) right heirs in fee, upon condition that *R.*, or thoſe then in poſſeſſion of this eſtate, ſhould, within ſix months after the death of teſtator's wife, pay to his two daughters *M.* and *T.* 1200 *l.*, *viz.* 600 *l.* to each, and intereſt at 5 *per cent.* from the death of their ſaid mother, with power of entry to the daughters in default of payment: the daughter *T.* ſurvived the teſtator, but died in the lifetime of her mother: *M.* the other daughter adminiſtered to her ſiſter, but died without claiming the 600 *l.* in her right. The perſonal repreſentative of the daughters brought a bill againſt *R.* as heir at law and deviſee of the teſtator for this ſum of 600 *l.* bequeathed to *T.* the daughter, with intereſt from the mother's death; and upon the authorities of *Hutchins* v. *Foy*, and *Hodgſon* v. *Rawſon*, (both *ſupra*,) Lord *Bathurſt* determined, that the charge veſted with the land, and decreed for the plaintiff. Pawſey v. Edgar, 1 Br. Ch. Rep. 192. note.

H. P. deviſed his eſtate to his wife for life, remainder to his daughter *M.*, and her heirs for ever, chargeable with 400 *l.* to his four younger daughters, within one year after the death of his wife, with intereſt from the death of his wife. Two of the younger ſiſters died in the lifetime of the mother unmarried; the eldeſt daughter alſo died in her mother's lifetime, ſo that ſhe was never poſſeſſed of the remainder in fee of the eſtate, but it deſcended Morgan v. Gardiner, 1 Br. Ch. Rep. 193. note.

ſcended to her only ſon. It was holden in the Exchequer, that the legacies to the younger daughters were veſted intereſts, tranſmiſſible to their repreſentatives.

Dawſon v. Killet, 1 Br. Ch. Rep. 119.

R. M. deviſed an eſtate to his wife for life, and if there ſhould be no iſſue between them, then to the defendant, charged with 100 *l.* to *W. R.*, and 100 *l.* to *M. B.*, to be paid within ſix months after the deceaſe of his wife. Afterwards, *M. B.* being dead, the teſtator by a codicil, reciting, that ſhe was ſo, gave 50 *l.* of that 100 *l.* to *W. R.*, and 50 *l.* thereof to *A. B.*, to be paid at the time when *M. B.* would have been entitled to receive it, if ſhe had lived. *W. R.* ſurvived the teſtator, but died in the lifetime of the wife, making the plaintiffs his executors, who, after the deceaſe of teſtator's wife, filed their bill for the ſums of 100 *l.* and 50 *l.* Lord *Thurlowe* ſaid, that this was a deviſe after the death of the wife to the defendant, and the teſtator charges the eſtate of the defendant (meaning the intereſt of the defendant in the eſtate) with the ſums in queſtion, which diſtributes the eſtate between the defendant and the legatees. Upon the death of the teſtator, the remainder veſted in the defendant, and the moment it veſted in the defendant, the charges veſted in thoſe to whom they were given. The legacies therefore of 100 *l.* and 50 *l.* muſt be raiſed for the plaintiffs, with intereſt from ſix months after the death of the wife.

Goodwin v. Munday, 1 Br. Ch. Rep. 191.

J. M. deviſed an eſtate to his ſecond ſon *J.* and his heirs for ever, after the deceaſe or marriage of his (the teſtator's) wife *E.*, with a proviſo, that he ſhould pay to the teſtator's daughter *Mary* then the wife of the plaintiff, and ſince deceaſed, the ſum of 100 *l.*, and unto *Martha* 80 *l.*, to be paid within one year after the death or marriage of his wife. *Mary* died in the life of her mother. Lord *Thurlowe* held the legacy veſted.]

(F) Of Conditional Legacies, and how far the Condition muſt be complied with, otherwiſe the Legacy will be forfeited.

2 Vern. 91. (*a*) If the lord of a copyhold manor come to a copyholder, and require him to do his ſervices, and the copyholder anſwer, if they are due, he will do them, but it ſhall be tried at law firſt, whether they are due or not; this is no forfeiture, being no wilful refuſal. Roll. Abr. 506. Roll. Rep. 429. 3 Bulſ. 80. 268. 4 Co. 21. b.

IF a legacy be given on condition not to diſpute the will, and the legatee commence a ſuit, whereby he diſputes the validity of the will, yet this is no (*a*) forfeiture of the legacy, if there was *probabilis cauſa litigandi*.

But what we are here chiefly to conſider is, how far conditions, annexed to legacies which reſtrain marriage, are to be performed, and how, and in what caſe, the neglect or non-performance of them will forfeit the legacy.

Swinb. 266.

And here we muſt obſerve as a general rule, that all conditions in reſtraint of marriage are to be conſidered ſtrictly, being prejudicial to ſociety, as they hinder the propagation of the ſpecies.

Therefore

Therefore by our law, as alſo by the civil law, a deviſe upon condition not to marry, or not to marry a perſon of ſuch a profeſſion or calling, is void, whether there be a limitation over, or not; for (*a*) every perſon ought to be at liberty to marry when he pleaſes; and therefore conditions reſtrictive of that power are againſt law, and void. Godolph. Orph. Leg. 45. Swinb. 266. Vern. 20. Mod. 86.

(*a*) If an annuity be bequeathed by a man to his wife for ſo many years, if ſhe ſhall remain a widow ſo long, this is a good conditional bequeſt, becauſe of the particular intereſt every huſband has in his wife's remaining a widow; for thereby ſhe will the better take care of the concerns of his family, in reſpect of which he may well allow her a maintenance for that time, to ceaſe when ſhe removes herſelf into the intereſt of another family. Godolph. Orph. Leg. 45.——But if a ſtranger gives a legacy upon ſuch condition, it is not good; for there is no more reaſon for reſtraining a widow from marrying, than a maid. Godolph. 46. ——Where a man deviſed, after debts and legacies paid, the ſurplus of his eſtate to his wife and his ſon *John*, equally betwixt them, and adds, *whom I make my executors*, and farther wills, that ſhe ſhould continue his true widow; but if ſhe marry again, *my will is, ſhe ſhall render the right of being my executrix to my ſon* Roger, *to be partner with his brother* John *in the executorſhip*; it was held, that by the wife's marrying again, ſhe had as well loſt her ſhare of the ſurplus, as her right to the executorſhip. 2 Vern. 308. Barton v. Barton.

Alſo, by the civil law, a gift or deviſe upon condition not to marry without (*b*) conſent is void, though there be a limitation over; for the maxim there is, *matrimonium debet eſſe liberum*. Swinb. 267.

(*b*) If one be appointed executor or legatee, upon condition he marry with the conſent and approbation of another, and if he marry againſt their conſent, that the executorſhip or legacy ſhall go to another; yet he ſhall have the executorſhip or legacy: But in this caſe it is ſaid, that he is bound to aſk conſent, and to marry; for both theſe parts of the condition are lawful, though the part is not, that reſtrains him from marrying againſt the conſent of another. Godolph. 46.

But though conditions which reſtrain marriage generally are void, yet both by our law and the civil law, a condition, that reſtrains marriage as to time, place, or perſon, is good; as not to marry before twenty-one, not to marry at *York*, not to marry a papiſt, *&c.* Swinb. 267. 8. Vern. 20. 2 Br. Ch. Rep. 488.

But the prevailing diſtinction in the courts of equity as to this matter is, between ſuch conditions as are good, and bind the legatee, and ſuch as are only *in terrorem*; as to which it is clearly agreed, that if a legacy be given to a perſon upon condition that he or ſhe marry with the conſent of *J. S.*, that in ſuch caſe the condition is only *in terrorem*, and the legatee does not forfeit, though the marriage was without ſuch conſent: but if in this caſe the legacy had been limited over to another, the marriage without conſent had been a forfeiture. And the reaſon thereof is, not only from the intention of the teſtator appearing more ſtrongly in the latter, than in the firſt caſe, but alſo becauſe the courts cannot in this caſe relieve againſt the forfeiture, without doing an injury to the perſon to whom it is limited over (*c*). 2 Chan. Ca. 22. 138. Vent. 199. Vern. 20. 2 Vern. 293. 5 Vin. Abr. 343. pl. 41. Atk. Rep. 502. Preced. Chan. 565. the ſame diſtinction; and there ſaid, that though a lawyer may know it to be no forfeiture, not being limited over, yet the parties themſelves might not be ſo learned, and therefore it would be ſome terror to them to venture to break it; and without this diſtinction, ſtrangers, executors, might run away with a great part of a man's eſtate from his children. [(*c*) Hence, if in the event of a marriage without conſent, the legacy or portion be given over, a demurrer will lie to a bill for a diſcovery of the fact of the marriage. Chauncey v. Tabourdin, 2 Atk. 392. Chancey v. Fenhoulet, 2 Ves. 265.]

[This diſtinction as to the legacy being given over or not, it is true, does prevail in our courts of equity, and may in general enable us to decide on the validity of any condition of marriage, where the gift or legacy, to which ſuch condition is annexed, is charged upon perſonal eſtate. But where the gift is of real eſtate, or

or charged upon real eſtate, in that caſe, it becomes material to conſider whether the condition be precedent or ſubſequent, for intereſts ariſing out of land muſt be governed by the rules of the common law. If therefore ſuch condition of marriage be precedent, it muſt be ſtrictly performed, in order to entitle the party claiming to the benefit of the gift.]

1 Chan. Ca. 58. Fleming and Waldgrave. 2 Vern. 573. S. C. cited; and there ſaid, that there may be a difference between a condition that a perſon cannot marry without conſent, and where it is that the party ſhall not marry againſt conſent.

If by leaſe 9000*l.* are ſecured for a feme ſole, in caſe ſhe marries not contrary to the liking of *A.*, and if ſhe doth, then for ſuch perſon as *A.* ſhall nominate; and, for want of ſuch nomination, for *A.*, and ſhe marries without the conſent of *A.*, yet he cannot diſpoſe of the leaſe otherwiſe than for her benefit; for it would be the moſt unreaſonable thing imaginable, that his giving or refuſing his conſent ſhould have any influence in an affair that was to turn ſo much to his own advantage.

[So, by Lord Hardwicke in 3 Atk. 335. As to this caſe of Fleming v. Waldgrave, it was ſaid by the Attorney-General, and agreed by the Maſter of the Rolls in Reeves v. Herne, *infra*, that the legacy, *here*, veſted immediately, it being given upon her not marrying without conſent, &c.; and his Honour remembered a like caſe in the time of Wright, S. C. where the condition being, if ſhe did not marry with conſent, &c. the legacy was decreed her immediately, ſhe entering into a recognizance to refund, in caſe ſhe married without conſent, &c. A teſtator gave his grand-daughter 200*l.* on condition ſhe continued with his executors till ſhe was twenty-one; but if ſhe was taken from them by her father (who was a papiſt), or married againſt the conſent of his executors, then he gave her but 10*l.* The grand-daughter was placed by his executors with a clergyman, who, before ſhe was twenty-one, with conſent of one of the executors, permitted her to make a viſit to her father, who took that opportunity to marry her to a papiſt. She was decreed the legacy at the Rolls; but upon a re-hearing Lord Keeper held, that ſhe ſhould have only the 10*l.*; and he ſaid, that in this caſe there was no difference between a condition that ſhe ſhould not marry without conſent, and that ſhe ſhould not marry againſt conſent. Creagh v. Wilſon, 2 Vern. 572. *Qu.* Whether there was any limitation over?]

Vent. 199. Mod. 300. 1 Chan. Ca. 138. Fry and Porter. See alſo Bertie v. Lord Falkland, *ſupra*, vol. i. 643.

If *A.* deviſe a meſſuage, *&c.* to *B.* his wife for life, remainder to *C.* his grand-daughter in tail, upon condition that ſhe marry with the conſent of his wife and *D.* and *E.*, or the major part of them, and if ſhe marry without their conſent, or die without iſſue, the ſame to remain to *F.* and her heirs; and *C.* marries without the conſent of any of them, who, as ſoon as they hear of it, declare their diſlike to the marriage, but afterwards conſent to it; yet *C.* ſhall not be relieved in equity, for the ſubſequent aſſent cannot diveſt the eſtate which was before veſted in *F.*, neither can there be any collateral averment that the condition was intended only *in terrorem*.

Reeves v. Herne, Vin. Abr. tit. Condition, (Z. d), pl. 41.

[*J. S.* charged his real eſtate with 500*l.*, to be paid his ſiſter *Alice Herne* within one month after her marriage, but ſo nevertheleſs as ſhe married with the approbation of his brother *Joſeph Herne*, (if living,) and in caſe ſhe married without his conſent, the 500*l.* were not to be raiſed. *Alice Herne* married in the lifetime of *Joſeph Herne*, and without his conſent, and the queſtion was, Whether ſhe was entitled to the 500*l.* or not? For here, it was ſaid, that this was a condition only *in terrorem*, and that the conſtruction of ſuch conditions had always been, that where there is no deviſe over, ſuch condition is void; otherwiſe, where limited over; and here it is not. On the other hand, it was argued, that this is a condition precedent, and nothing ariſes or becomes due but upon the marrying with conſent; and this being a deviſe of money out of land, or of a charge upon the land, it is to be conſi-

dered

dered as a deviſe of land, and governed by the ſame rules; and then being a plain condition precedent, nothing can ariſe; and for this were cited the caſes of *Fry* v. *Porter*, and *Bertie* v. Lord *Falkland*. The Maſter of the Rolls ſaid, that the civil law makes no diſtinction in *perſonal* legacies, between conditions precedent and ſubſequent; neither does this court as to mere *perſonal* legacies given upon condition of marrying with conſent. But this court differs from the civil law in this; that whereas by that law all conditions in reſtraint of marriage are void, this court ſays, they are not void, where the legacy is given over, and another perſon particularly ſubſtituted by the teſtator to have the benefit of it, in caſe the condition be not complied with. But this muſt be a ſpecial nomination as a legatee; and therefore a reſiduary legatee or executor ſhall not have the benefit of ſuch non-performance. And his Honour remembered a caſe to this purpoſe, where on a legacy given upon condition of marrying with conſent, and if not, to ſink into the reſidue of teſtator's eſtate which he gave to *J. S.* &c., it was holden, that though the marriage was without ſuch conſent, yet, it was not loſt, becauſe it would have been the ſame if the teſtator had ſaid nothing about its ſinking into the *reſiduum*, and therefore was conſtrued only *in terrorem*. So it is in the caſe of a truſt of a term limited of lands for raiſing portions with ſuch reſtriction, this court governs itſelf by the ſame rules as in caſe of a deviſe of a legacy with ſuch condition, becauſe though the term be a legal eſtate and intereſt, yet the truſt of a term is a creation of equity only. But it is otherwiſe in caſe of a deviſe of lands; there, conditions precedent and ſubſequent take place. And this was *Fry* and *Porter*'s caſe of an infant bound by condition relating to her marriage, it being a condition precedent: and the preſent caſe being a charge upon land, is to be governed by the ſame rule, and is to be conſidered as land; the will muſt be atteſted in the ſame manner; and this being plainly a condition precedent, and nothing veſted, (as it is in the caſe of a truſt-term, where the term is veſted, and the truſt only left open,) it is too hard for this court to charge the land contrary to the expreſs will of the teſtator; and to ſay the money ſhould be raiſed, when the teſtator has ſaid it ſhall not: and a charge upon the land cannot ariſe otherwiſe than as a deviſe of the land itſelf.

Sed vide infra contra.

A. by ſettlement after marriage created a truſt-term of 100 years by mortgage or ſale to raiſe 2000 *l.* for the portion of each of his daughters, provided they married with their mother's conſent, and directed a yearly payment out of the rent till they married; and if any of them died before marriage with ſuch conſent, her portion was to ceaſe, and the eſtate was to be exonerated thereof; or, if it were raiſed, it was to be paid to the perſon to whom the eſtate ſhould belong. By will, he created another truſt-term to raiſe by ſale or mortgage 4500 *l.*, whereof 2000 *l.* were to be paid to each of his daughters, in augmentation of their fortunes, ſubject to the conditions in the ſettlement; and by a codicil (in purſuance of a power of revocation,) he created another truſt-term for the better raiſing of his daughters portions. *A.* died.

Hervey v. Aſton, Ca. temp. Talb. 212. 1 Atk. 361. S. C. Com. Rep. 726. S. C.

died. The daughters married without conſent. The Maſter of the Rolls held, that the portions ſhould be raiſed, the huſband making a competent ſettlement. But this decree was reverſed by Lord Chancellour *Hardwicke*, aſſiſted by Lord C. J. *Lee*, Lord C. J. *Willes*, and *Comyns*, J., for they conſidered portions or intereſts directed to be raiſed out of land, as having nothing teſtamentary in them, and that they were therefore not to be governed by the rules of the civil or canon law, but by thoſe of the common law: that, in that law, no rule was more fixed, than that portions charged upon land did not veſt till the time of payment arrived; and that the preſent condition to marry with conſent was a lawful one, and a condition *precedent;* and that being ſuch, nothing veſted in the daughters until that condition was performed.

Reyniſh v. Martin, 3 Atk. 330. 1 Wilſ. 130. S. C.

E. P. deviſed her real eſtate to her daughter *Martha* and her heirs for ever, ſubject to ſuch charges as ſhould afterwards in her will be expreſſed: then follows this clauſe: "Provided always, "and it is my will, that if my daughter *Mary* marry by and with "the conſent of the truſtees (therein named), or the major part "of them, and ſignified in writing before ſuch marriage had, "then, and not otherwiſe, I give and deviſe unto my ſaid daughter *Mary* the ſum of 800 *l.*; and it is my will that my ſaid "daughter *Martha* ſhall pay unto my ſaid daughter *Mary* the "ſum of 30 *l.* yearly, during the ſaid *Mary*'s continuing ſole "and unmarried, by 15 *l.* each *May-day* and *All-Saints-day*. "And I do hereby charge all my aforeſaid real eſtate with all "my debts and legacies of all kinds." *Martha* and *Mary* ſurvived the teſtatrix. The latter married the plaintiff without the conſent of the truſtees. Upon her death, the plaintiff, as her repreſentative and adminiſtrator, filed a bill for an account of the perſonal eſtate, and that the ſame might be applied in payment of the ſaid legacy of 800 *l.*, and ſo much of the arrears of the annuity of 30 *l. per annum* as were due to *Mary* before her marriage; but in caſe the perſonal eſtate ſhould not be ſufficient, that then the real eſtate, or ſo much thereof as would make good the deficiency, might be ſold, and the money ariſing therefrom applied for that purpoſe. Lord Chancellour ſaid, that the real eſtate was not originally charged with this legacy, but only as auxiliary in failure of the perſonalty; and the charge upon the lands depended upon a condition precedent, which never was performed; that this could not be conſidered as a legacy charged, or chargeable upon the real eſtate, but as a mere perſonal legacy, and as ſuch, was to be governed by the rules of the civil and canon law. He therefore directed, that the plaintiff be paid the arrears of the 30 *l. pro rata*, till the time of the marriage; and in caſe the perſonal eſtate ſhould be exhauſted by the payment of debts or other legacies, that the plaintiff ſhould ſtand in the place of ſuch creditors and legatees *pro tanto*, as had received ſatisfaction, and that ſo much of the real eſtate ſhould be ſold, as would be ſufficient to ſatisfy the legacy of 800 *l.* and the arrears of the annuity.

Randal v. Payne, 1 Br. Ch. Rep. 55.

A teſtator gave to truſtees 4000 *l.* for the uſe of *J. W.*, if ſhe married with conſent; if not, then only 1000 *l.*, and a ſimilar legacy

legacy to the uſe of *M. W.*: then followed this clauſe: "*If* "*either of theſe girls ſhould marry into the family of* G. *or* R., *and* "*have a ſon, I give all my eſtate to him for life,*" (with remainder over); "*if they ſhall not marry, then I give all my eſtate to* Randal." A bill was filed, and there was a decree that the money ſhould be inveſted in the funds till the event ſhould happen, with leave for the parties intereſted to apply, as occaſions ſhould ariſe. The girls being married with conſent, but neither of them into the families of *R.* or *G.*, *Randal* filed his bill for the reſidue, as forfeited to him. But, by Lord *Thurlowe*—Nothing could veſt till they married, marriage being a condition precedent: then can any thing veſt till the whole condition becomes impoſſible? The plaintiff ſuppoſes, that if the girls once married, they had loſt all chance of marrying into the family of *R.* or *G.* If the teſtator had ſaid ſo, it would have been very well. Suppoſe one of them, after the death of her huſband, to marry into one of the favoured families, and to have a ſon, who comes here to claim the eſtate: the court would not incline to refuſe him. The decree that the money ſhould be inveſted, *&c.*, muſt be carried into execution.]

A. deviſed 300 *l.* to *B.* her daughter, and that if ſhe married under 21, without conſent of the executors, or the major part of them, the legacy to go to the children of her ſiſter, the wife of *C.*, and made *C.* and two others executors; *B.* being at the houſe of *C.*, there marries his ſon, by a former wife, with his privity, being under twenty-one; *B.* and her huſband bring a bill for the legacy, *C.*, in favour of his other children, inſiſts, that the legacy is forfeited; the other executors confeſſed they had notice of the courtſhip, and did not contradict or diſapprove of it, and the 300 *l.* were decreed the plaintiffs, there being at leaſt a tacit conſent. Vern. 580. Miſgret v. Miſgret.

[A father deviſed lands in truſt to permit his daughter *S.*, to receive the rents until her marriage or death, and in caſe ſhe married with the conſent of the truſtees, then to convey the premiſes to her and her heirs; but if ſhe died before marriage, or married without ſuch conſent, then to convey to other perſons. The daughter afterwards married with the conſent of her father, who ſettled part of the lands on her and her huſband, and died. By the father's conſenting in his lifetime the condition is diſpenſed with. Clerk v. Berkley, 2 Vern. 720.

A legacy was given to a daughter with a condition annexed to it, that ſhe ſhould marry with her mother's conſent. The daughter ſued for the legacy, and it was pleaded in bar, that ſhe did not marry with her mother's conſent; notwithſtanding which, ſentence was given in her favour, that ſhe ſhould have the legacy. Pigot's caſe, cited in Moor, 857.

The plaintiff's bill was for 400 *l.*, left her to be paid at her age of 21, or day of marriage, ſo as ſhe married with the aſſent of the truſtees, and her mother, and eldeſt brother. The defendant inſiſted, that the plaintiff was about to marry without ſuch aſſent, and refuſed payment. But the court declared it juſt and reaſonable, that the ſaid 400 *l.* with damages ſhould be paid to the plaintiff. Norwood v. Norwood, 1 Ch. Rep. 65.

R. P.

Vintner v. Pix, 1 Ch. Rep. 65.

R. P. bequeathed to his two daughters *Eleanor* and *Alice* 200 *l.* a-piece, to be paid at their ages of 21 years, or days of marriage, and he alſo gave them 200 *l.* more by a marginal note in his will, with this clauſe, "*if they behave themſelves dutifully to their mother.*" *Alice* died, and *Eleanor* adminiſtered to her, and married the plaintiff without the conſent of the defendant her mother, who was executrix of her father's will. The court of Chancery declared, that as to the 200 *l.* poſitively given by the will, the defendant ought to pay the ſame to the plaintiff; but as to the 200 *l.* given by the marginal note in the will upon their dutiful behaviour to the defendant, ſhe having married herſelf without the conſent of her mother, they referred that point to the judges. The judges certified, that the 200 *l.* mentioned in the marginal note, as well as the 200 *l.* in the body of the will, belonged to the plaintiff *Eleanor*, her marriage notwithſtanding.

Bellaſis v. Ermine, 1 Ch. Ca. 22.

A ſuit was for a portion of 8000 *l.*, given to the plaintiff's wife. The defendant pleaded, that it was given her, provided ſhe married with the conſent of *A.*, and if not, that ſhe ſhould have but 100 *l. per annum*; and that ſhe married without the conſent of *A.* It was ordered, that the plea ſtand over-ruled. And the court all declared this proviſo was but *in terrorem*, to make the perſon careful, and that it would not defeat the portion. But it was ſaid, that if the party who gave the portion, had limited it to another, in the caſe of her marriage without the conſent of *A.*, there, it would have been otherwiſe.

Sutton and Wife v. Jewke, 2 Ch. Rep. 50.

A ſum of 1500 *l.* was to be put out at intereſt for the uſe of the plaintiff *Anne*, and the principal and proceeds thereof were to be paid to her at her age of 21, or marriage; but if ſhe ſhould marry without the conſent of the defendant *Jewke* and his wife, her father and mother, or one of them, or the ſurvivor of them, then 500 *l.*, part of the ſaid 1500 *l.*, was to be paid to ſuch perſon, as the defendant *Jewke*'s wife, by writing under her hand, and without her huſband, ſhould appoint. The plaintiffs filed their bill for the 1500 *l.*, ſtating, that the defendant *Jewke*'s wife died in 1668, without making any appointment, ſo that the plaintiff *Anne* was become entitled to the whole 1500 *l.* and the proceed thereof. The defendant *Jewke* inſiſted, that *Mary*, his wife, died in 1670; but, before her death in 1666, by deed poll directed, that in caſe the plaintiff *Anne* married without the conſent of her, the ſaid *Mary*, or the defendant *Jewke*, her huſband, then 500 *l.* part of the ſaid 1500 *l.* was to be paid to her and the defendant, or the ſurvivor of them, and that the ſaid deed was made upon mature deliberation, to keep the plaintiff *Anne* in due obedience; that the plaintiff *Sutton* having in a clandeſtine manner married the plaintiff *Anne*, without the defendant's privity and conſent, and after he had forbidden his daughter to marry him on the forfeiture of his bleſſing, or what otherwiſe ſhe might expect from him, he the ſaid defendant, by means thereof, and by being adminiſtrator to his late wife, became entitled to 500 *l.*, part of the ſaid 1500 *l.* The queſtion therefore was, Whether the plaintiff

Anne

Anne was entitled to the whole 1500 *l.*, or, whether she had not forfeited 500 *l.* thereof by her marriage without her father's consent and privity, and contrary to his direction and advice? Lord Chancellour was fully satisfied, that the plaintiff *Anne*'s marriage was without the defendant's privity, and against his consent, and that therefore she could not have the 500 *l.*

A sum of 500 *l.* was bequeathed to the plaintiff's wife, if she married with the consent of certain trustees; and in case she did not, then 20 *l. per annum* for her life. She married the plaintiff without the consent of the trustees, and he preferred his bill for the 500 *l.* It was urged on behalf of the defendant, that this differed from the common case of a devise on a condition *in terrorem*; for it had always been holden, that where there is a devise over to a third person for non-performance of the condition, there, if the party marry without consent, all shall go to the third person, because he hath a conditional interest by the will; but if there be no devise over, then it is esteemed only *in terrorem*, and the party shall have the legacy, notwithstanding the breach of the condition. But here, that this is tantamount, or as strong as a devise over, when the party himself saith, that if she marry without consent, she shall have but 20 *l. per annum*. But it was answered by Lord Chancellour, that this differed not from the reason of the common case of a devise *in terrorem*, and the reason, he said, he had from the Lord Chief Justice, (*Hale*,) who (when it was objected in another case in this court, that this court did not make men's wills for them, and give their estates quite contrary to their intent) answered, that this court holds plea of legacies, and judges of them by the rules of the civil law, and by that law any condition added to restrain marriage is void; so that where an interest doth not accrue to a third person by the breach of the condition, such a condition is void, and only *in terrorem*; and therefore decreed the 500 *l.* to the plaintiff.

Hicks v. Pendarvis, 2 Freem. 41.

A testator, having two daughters, bequeathed to each of them 20,000 *l.* to be paid them at their ages of 25 years, or marriage, which should first happen, so as such marriage was had with the consent of the mother and other trustees, and after such time as they respectively had attained the age of sixteen years: if either of them married before sixteen, or without consent, then such daughter to have only 10,000 *l.* And he directed, that the surplus of his personal estate should be invested in lands, and settled on his daughters and their issue with cross remainders. In the testator's lifetime a treaty of marriage was set on foot between the plaintiff and one of the daughters; but before any agreement could be made, the testator died. After his death, however, the treaty was renewed, and the marriage was had with the consent of all the trustees, but before the lady was sixteen. The court decreed the 20,000 *l.* to the plaintiff.

Lord Salisbury v. Bennet, 2 Vern. 223. Skin. 285. S. C. 2 Ventr. 365. S. C. but differently reported, for it is said there, that the court decreed the Earl only 10,000 *l.*, for that both parts of the condition must be observed. But these histories of the case seem to refer to different periods of time; the last to the original hearing before the Lord Keeper; the two former to a re-hearing before the Lords Commissioners.

Garret v. Pritty, 2 Vern. 293.

A. bequeathed 3000 *l.* to his daughter, the plaintiff *Garret's* wife, at 21, or marriage, and recommended her to the care of *S.*, provided that if she married without the consent of *S*, her legacy of 3000 *l.* was to cease, and she was to have but 500 *l.*, and made the defendant, his son, executor and residuary legatee. The plaintiff married the daughter without the consent of *S.*; yet the court decreed her the whole 3000 *l.* with interest from the marriage; and principally, because it was not expressly devised over, but to fall into the surplus.]

Preced. Chan. 562. Semphil v. Bayley, decreed in the duchy court by Lechmere, Chancellour, and King, C. J. against the opinion of Justice Dormer.

A., having issue three daughters *B.*, *C.*, and *D.*, devised 1000 *l.* to be paid to *B.*, at the age of 21, or marriage, upon condition that she married with the consent of his executors; and likewise devised to her several messuages, *&c.* upon the like condition; and, after several other legacies and bequests, he devised the residue of his estate to his executors, for the benefit of his children. *B.* married, against the consent of the executors, a person who made his addresses to her in her father's lifetime, which the father knew, and was dissatisfied at; she had likewise notice given her by the executors of her father's will, and that by marrying without their consent she would be in danger of forfeiting her legacy; and that they could not approve of that match, because they knew that her father disliked it in his lifetime; yet it was held, that there being no express limitation over, the devise of the residue being after debts and legacies paid, that the condition was only *in terrorem*, and that the marriage, without consent, did not amount to a forfeiture of the legacy, *&c.*

Abr. Eq. 112. Amos v. Horner.

A. devised to his daughter *M.* 100 *l.*, to be paid by his executors upon her day of marriage, or age of twenty-five years, which should first happen, upon condition that she should marry with the consent of such and such persons; and if she married without their consent, then to have 50 *l.* only, and no more, and gave the residue of his personal estate to the defendants; *M.* married the plaintiff, without such consent, before she was 20. And it was held by the Master of the Rolls, that this was more than a clause *in terrorem*, and that the devise of the surplus of the personal estate was a devise over of the 50 *l.*, on *M.*'s disobedience.

Wheeler v. Bingham, 3 Atk. 364.

[*P.* by his will *(inter al.)* gave to each of his grand-daughters that should be living and unmarried at the time of his decease, on their respective days of marriage, the sum of 1500 *l.*, and desired, that none of his grand-daughters should marry without the consent of the father and mother, or the survivor of them; and therefore, if any or either of them should marry without such consent, then by his will he revoked what was thereby directed to be paid to such grand-daughter or grand-daughters, and such of them should not be entitled to any benefit by virtue of such his will, further than what the father and mother, or the survivor of them, should direct; and he afterwards directed, that after the several legacies and sums directed to be paid were satisfied, if any sum of money should remain in the hands of the trustees, the survivors or survivor of them, the same should be paid to his daughter *P.* for life,

life, and after her deceaſe to the defendant and his heirs. The plaintiff, one of the daughters, married without the conſent of the father and mother, and brought a bill for the legacy. Her mother appointed truſtees of the legacy for the plaintiff for her ſeparate uſe for life, and to her iſſue, but if ſhe had no iſſue, then to the defendant. Lord *Hardwicke* held, that the plaintiff was entitled abſolutely to this legacy; that it was merely perſonal; and though an expreſs deviſe, that if the legatee ſhould not perform the condition, the legacy ſhould ſink into the *reſiduum*, amounts to a deviſe over, yet that there was no ſuch direction here; that if this had been a particular fund, which was given to the truſtees, as certain ſtocks, or certain mortgages, and the will had ſaid, the legatee ſhall have no more than the father and mother ſhall appoint, it would then have been a deviſe over of the remainder of that particular fund; but that this was only a deſcription of the *reſiduum* of the perſonal eſtate in the hands of the truſtees.

A teſtator bequeathed part of his perſonal eſtate to truſtees, to pay one moiety thereof to *M. T.*, at her age of 21 years, if unmarried; and the other moiety to her at her age of 25 years, if unmarried; but if ſhe ſhould marry before ſhe ſhould be 21, with conſent of her mother, then one moiety to be ſettled on her and her iſſue in ſuch manner as her mother ſhould think proper, and the other moiety to be diſpoſed of as *M. T.* ſhould think fit. But in caſe *M. T.* ſhould die before 25 years unmarried, then, the whole of this legacy was bequeathed to her mother, to whom there was alſo a gift of the general reſidue of the real and perſonal eſtate. *M. T.* married before ſhe was 21, againſt the conſent of her mother. Lord *Thurlowe* held, that the bequeſt to *M. T.* was hereby rendered void, and became the property of her mother, as part of the reſidue; for that a bequeſt of the reſidue is as effectual to defeat a perſonal legacy or a portion payable out of money, when the condition which is to veſt the legacy has not been performed, as a ſpecifick deviſe over. Scott v. Tyler, 2 Br. Ch. Rep. 431.

A teſtator deviſed 1000 *l.* a-piece to daughters, if they married with the conſent of *B.*, and if they married without ſuch conſent, then, they ſhould have but 500 *l.* a-piece, and the reſidue ſhould go to the ſon. The daughters being 30 years of age ſued for their legacies, and it was alleged in their behalf, that now being of that age, it was not material, whether they married with or without conſent, being of underſtanding and diſcretion to diſpoſe of themſelves. But it was reſolved, that the teſtator was chancellour of his own eſtate, and having added this reſtriction, and a limitation over, the court of Chancery could not alter it. Their full legacies were decreed to them; but they were to enter into recognizances for ſecurity of re-payment in caſe they married without ſuch conſent. Lady Kilmurry's caſe, cited in 2 Freem. 59.

A teſtator deviſed in the following words: "I give and bequeath "to my kinſwoman *Mary Barlow*, the ſum of 1000 *l.* to be paid "her at her age of 21 years, or marriage, which ſhall firſt happen. "*Item*, In caſe the ſaid *Mary Barlow* ſhall marry with any one of Barlow v. Bateman, 3 P. Wms. 65. 4 Br. P. C. 194. S. C.

" the ſurname of *Barlow*, then I give her the further ſum of 1000*l.* " to be paid her on the day of ſuch her marriage with a *Barlow* " aforeſaid. But if the ſaid *Mary Barlow* ſhall die unmarried, " or ſhall marry a perſon not bearing the ſurname of *Barlow*, " then I give the laſt-mentioned ſum of 1000*l.* unto *Charles* " *Barlow.*" *Mary Barlow* married one *Robert Bateman*, and thereupon *Charles Barlow* preferred his bill for the laſt-mentioned 1000*l.* as forfeited by this marriage. The defendant, *Robert Bateman*, by his anſwer admitted; that *on the occaſion of his marriage, and not before*, he aſſumed and took upon him the name of *Barlow*, that his father's name was *Bateman*, and that he aſſumed and took upon him the name of *Barlow*, *in order to entitle him to the ſaid ſum of* 1000*l. bequeathed to the ſaid* Mary *on the condition aforeſaid.* The Maſter of the Rolls held, that the condition was complied with by the defendant's taking the name of *Barlow*, and diſmiſſed the plaintiff's bill. But on appeal to the Houſe of Lords, it was declared, that the appellant was entitled to the legacy of 1000*l.* conditionally bequeathed to him, and the decree of the Maſter of the Rolls was reverſed.]

Mich. 1688. Pawlett and Dogget, in Can.

One by will deviſed 1300*l.* to his daughter *A.*, to be paid at her age of 21 years, and if ſhe died without iſſue before 21, then to go over to *B.*, provided that if ſhe married before 21, without conſent of certain perſons, then to go over to *C.* She did marry before 21, without ſuch conſent; and upon a bill brought by *B.*, it was decreed that *A.* ſhould give ſecurity, *&c.* for the money, if ſhe died before twenty-one without iſſue; and the Maſter of the Rolls, who heard the cauſe, ſaid, the law was now ſettled accordingly; but the decree was ſo ordered as to ſerve both contingencies, *viz.*, that upon her marriage before 21, without conſent, the money ſhould go to *C.*, yet ſo that if ſhe died before 21 without iſſue, it ſhould go to *B.* according to the deviſe.

2 Vern. 452. Aſton and Aſton.

A. by will gave portions to his daughters, without mentioning any time of payment, upon condition that they married with the conſent of his wife; and if any married without ſuch conſent, her portion to go over. On a bill brought by the daughters for their portions, it was decreed accordingly, but on ſecurity to refund in caſe the condition ſhould be broken; for it was held, that though the marriage without conſent was but a condition ſubſequent, yet the court could not relieve againſt the forfeiture, by reaſon of the deviſe over, although it was admitted to be a hard condition, no time being limited, but going to a marriage at any time, even after the age of 21 years.

Abr. Eq. 112, 113. King v. Withers.

The defendant's father deviſed to him, who was his heir at law, all his lands, *&c.*, (except ſuch and ſuch parts) charged with the ſum of 2500*l.* to his daughter (ſince married to the plaintiff) at her age of 21 years, or marriage, which ſhould firſt happen; and deviſed the excepted lands, in truſt, to be ſold for the payment of his debts, provided that if his ſaid daughter ſhould marry in the lifetime of her mother, without her conſent firſt had in writing, then 500*l.*, part of the ſaid 2500*l.*, ſhould ceaſe, and ſhould be applied towards payment of his debts charged on the ſaid excepted

excepted lands, and appoints his wife to be guardian of his ſaid daughter, and makes her executrix, and dies; the daughter attains her age of twenty-one years, and without the conſent or privity of her mother, intermarries with the plaintiff, who was a gentleman of ſome eſtate, and called to the bar, but had made no ſettlement or proviſion for his wife; and therefore the defendant, the heir at law, refuſed to raiſe or pay any part of his ſiſter's portion; and inſiſted likewiſe, that by her marriage without her mother's conſent, 500*l.* part of her fortune, was become forfeited. Whereupon the plaintiffs brought their bill to have the whole portion raiſed by ſale of the land charged therewith. *Per* Lord Keeper, this is a portion to be raiſed out of lands, and therefore to be conſidered as land: and though it be to go towards payment of debts on breach of the condition, and there appear one hundred and twenty creditors concerned, yet none that are in danger of loſing their debts; and it is then to be conſidered as it ſtands upon the condition itſelf, and therefore the plaintiff muſt have her whole portion; for the teſtator has appointed two periods of time to entitle her to it, *viz.* marriage, or the age of 21; and as ſhe has attained that age, it becomes a veſted and ſettled intereſt in her, not to be diveſted by the marriage without the conſent of the mother, for that conſent cannot, in any reaſon, be carried farther than during her minority.

[A caſe aroſe upon the words of two wills, the one made by the father, and the other made by the mother of *Mary Graydon*, the plaintiff in the croſs bill. The father's will was as follows: "I give the ſum of 1000*l.* to my only daughter *Mary Graydon*, "to be paid her at her age of twenty-one years, or day of mar- "riage, which ſhall firſt happen, provided ſhe marry by and with "the conſent of my executors: but, in caſe ſhe dies before the "money becomes payable, on the condition aforeſaid, then I give "the ſaid 1000*l.* equally between my two youngeſt ſons, *Benjamin* "and *Gregory Graydon*, Mrs. *Mary Graydon*, grandmother of *Mary* "*Graydon*, *Mary Graydon* the mother, and Mr. *Jeremy Graydon* "the uncle, to be my joint and ſole executors." The mother's will was in theſe words: "*Item*, I give to my daughter *Mary* "*Graydon* all my wearing apparel of all ſorts, with all my dreſſing "plate, jewels, watch-chain, *&c.* Then my will is, that in caſe "my daughter *Mary Graydon* ſhall marry before ſhe comes to the "age of twenty-one years, without the conſent and approbation "of my executor, under his hand firſt had and obtained, (if he be "living,) that then ſhe ſhall not be entitled to any part of ſuch "legacies as I have herein left her, but her whole ſhare ſhall be "equally divided between my ſons *Benjamin* and *Gregory Gray-* "*don;*" and the reſidue, after her debts and legacies paid, the teſtatrix gave to her three children, *Benjamin*, *Gregory*, and *Mary*, equally to be divided between them, or the ſurvivors of them, ſhare and ſhare alike, and appointed her ſon *J. Graydon* to be her ſole executor. The bill was brought by the plaintiff in the original cauſe againſt the defendant *Hicks*, as the huſband of *Mary* *Graydon*,

Graydon v. Hicks, and Graydon v. Graydon, 2 Atk. 16.

Graydon, to relinquiſh the 100 *l.* which were left to the wife under the will of the father, ſhe having married without the conſent of the executors, and contrary to the direction of his will; and likewiſe to relinquiſh the legacies under the will of the mother. The executors under the will of the father were all dead before the marriage of *Mary Graydon*; and *J. Graydon*, appointed executor under the will of the mother, and who was to give his conſent to *Mary Graydon*'s marriage, renounced the executorſhip in the moſt formal manner in the eccleſiaſtical court. The croſs bill was brought by *Mary Graydon*, as a feme ſole, againſt the plaintiff in the original cauſe, as one of the deviſees over under both wills, in caſe of *Mary Graydon*'s marriage without conſent; and likewiſe againſt Mr. *Timewell*, who took out adminiſtration to the mother, on the executor's renouncing; and alſo adminiſtration *de bonis non* to the father. Lord *Hardwicke* diſmiſſed the croſs bill, there being abundant evidence of *Mary Graydon* being married to *Hicks*. As to the original bill, his Lordſhip held *Mary Graydon* entitled to the 1000 *l.* under her father's will, the condition upon which it was given being ſubſequent (*a*), and having become impoſſible to be performed by the death, before her marriage, of the perſons whoſe conſent was required; but he declared that the portion given under the mother's will was forfeited by the marriage without conſent.

(*a*) So, Peyton v. Bury, 2 P. Wms. 626.

Holmes v. Lyſaght, 4 Br. P. C. 103.

J. S. bequeathed to his daughter in theſe words: "*Item*, I leave "and bequeath to my ſaid daughter *Anne* 2000 *l.*, to be paid her "on the day of her marriage, or at the age of twenty-one years, "which ſhall firſt happen; and in caſe my ſaid daughter *Anne* "ſhall marry with the conſent of *R. S.*, *&c.* or any two of them, "I leave her the additional ſum of 2000 *l.* more, otherwiſe not." *Anne* married without the conſent required in the will, and to a perſon to whom her father had expreſſed ſtrong objections in his lifetime. On a bill brought by her and huſband for both theſe legacies, it was decreed, that ſhe was entitled to the firſt, but had forfeited the ſecond. This decree was affirmed in the Houſe of Lords by conſent of parties.

Underwood v. Morris, 2 Atk. 184.

A father by his will gave the plaintiff *Agnes* his daughter 3000 *l.*, payable at her age of twenty-one, or day of marriage, if ſhe married with the conſent of his executors; provided, if either of the legatees died before their legacies became payable as aforeſaid, then ſuch legacy was to be divided between the ſurvivor of her brother and ſiſters. *Agnes* married the plaintiff *Underwood* at her age of fifteen, without the conſent of the executors. The queſtion was, Whether as *Agnes* was married without the conſent of the executors, this deviſe was not to be conſidered as a deviſe over; and that, conſequently, the legacy will not veſt unleſs ſhe arrive at her age of twenty-one? But Mr. Juſtice *Parker* ſaid, as this is a mere perſonal legacy, he was of opinion, it was a deviſe *in terrorem* only, and that it veſted abſolutely in the daughter; and that marriage, one of the contingencies upon which it became payable, having happened, the executors muſt be decreed to pay it to the plaintiffs.

W. C.

W. C. by his will gave five-ſixteenth parts of the reſidue of his perſonal eſtate to truſtees, to lay out the ſame, and to pay the dividends, *&c.* to his daughter *Rachael*, on her attaining her age of twenty-eight years, or day of marriage, which ſhould firſt happen, provided his daughter ſhould marry with the approbation of his ſaid executors, or ſuch of them as ſhould be then living. He gave the remaining eleven ſixteenth parts among his other four children; and in caſe either of his ſons or daughters ſhould die before his, her, or their ſhare or ſhares ſhould become payable, then, the part or ſhare, parts or ſhares, of him, her, or them ſo dying, ſhould go and be paid among all the reſt of his children who ſhould then be living, and the iſſue of a deceaſed child or children (if any) *per ſtirpes*, and not *per capita*, at the ſame time as their original ſhares would become due. *Rachael* married *J. C.*, one of the defendants, without the conſent of the executors, and had a child, (to whom *J. C.* adminiſtered,) and died under twenty-eight. It was inſiſted for the plaintiffs, that the portion never veſted in *Rachael*, ſhe marrying without conſent, and not attaining twenty-eight years of age. On the other ſide it was argued, that the portion veſted on the marriage, notwithſtanding the proviſo, which was only *in terrorem*, for which was cited the above caſe of *Underwood* v. *Morris*: and that, whether the condition be precedent or ſubſequent, it will not prevent the legacy from veſting, unleſs it be given over. But Lord *Loughborough* doubted the authority (*a*) of *Underwood* v. *Morris*, and decreed, that it did not veſt: but there being five children of the teſtator, he held the infant child of *Rachael* to be entitled to one-fifth of the legacy, under the deviſe over, (as being "the iſſue "of a deceaſed child,") and decreed the ſame to her father in her right.

Hemmings v. Munkley, 1 Br. Ch. Rep. 303.

(*a*) So, by Lord Thurlowe—— "The caſe "of Underwood v. "Morris, "by Baron "Parker, "does not "ſeem to "have been "cloſely "conſider- "ed. I agree "with the "late Lords "Commiſ- "ſioners in "denying "the au- "thority." 2 Br. Ch. Rep. 488.

A teſtator gave to *M.* 8000*l.*, and to her ſiſter *S.* 5000*l.*, which ſeveral ſums were to be paid to them at their ages of twenty-one, or day of marriage, which ſhould firſt happen, provided they married with the conſent of their father and mother, or the ſurvivor of them; otherwiſe their legacies ſhould ſink into his perſonal eſtate. And it was the teſtator's will, that if the ſaid *S.* and *M.*, or either of them, ſhould thereafter marry with any perſon or perſons whomſoever, without the conſent of their father and mother, and the truſtees named in the ſaid will, or the greater number of them living, ſignified under their hand; that ſuch of them ſo marrying ſhould have or receive no more benefit or advantage by his will, or any thing therein contained, than if they were actually dead, or not named in his ſaid will. Lord *Hardwicke* held, that the legacies veſted in *M.* and *S.* on their attaining their age of twenty-one, and though either of them afterwards married without conſent, yet it would be of no effect; for the marriage with conſent muſt be conſtrued to relate to the time of the legacies veſting.

Pullen v. Ready, 2 Atk. 587.

The teſtator having only one child, a daughter, deviſed all his real and perſonal eſtate to *J. S.* in truſt, after paying an annuity to his widow, for his daughter, if ſhe married with the conſent and approbation of *J. S.*; but if ſhe ſhould marry without ſuch

Burleton v. Humfrey, Ambl. 256.

conſent and approbation, then the premiſes to go to, &c. The daughter married within a month after the teſtator's death without even aſking the conſent of *J. S.*, but about eleven months after her marriage, ſhe obtained his approbation in writing. The queſtion being, whether ſhe had forfeited her eſtate or not; Lord *Hardwicke* held, that he was at liberty to conſtrue the word *and* to mean *or*, which he accordingly did, and then the ſubſequent approbation was ſufficient, and the previous conſent was not neceſſary. He alſo held, that ſuppoſing the condition had made conſent neceſſary, yet, that notice to the daughter, being heir at law, was neceſſary to work a forfeiture.

Long v. Dennis, 4 Burr. 2052. 1 Bl. Rep. 630. S. C.

A teſtator deviſed to truſtees, upon truſt for his only ſon for life, then to the uſe of ſuch woman as ſhould be his ſon's wife at his ſon's death, for her life; remainder to the iſſue of his ſon's body in tail; remainder to the teſtator's two daughters in fee: "Provided always, and it was his very will, true intent, and expreſs meaning, that in caſe his ſaid ſon ſhould marry with any woman not having a competent marriage portion, or without the conſent and approbation of the ſaid truſtees, their heirs and aſſigns, in writing under their hands and ſeals, to be executed in the preſence of two or more credible witneſſes firſt had and obtained; then his ſaid truſtees, and their heirs and aſſigns, ſhould ſtand and be ſeiſed to and for the uſe of his (the teſtator's) ſaid two daughters and their heirs for ever; any truſt, uſe, &c. notwithſtanding. And his will, true intent, and meaning was, and he did declare, that the ſaid proviſo and condition therein before expreſsly mentioned, was not intended by him, nor to be conſtrued or taken *in terrorem;* but *a condition*, for want of performance whereof in every reſpect, the ſaid lands, &c. ſhould in no caſe be veſted in ſuch wife of his ſaid ſon, nor the heirs of that marriage; but, on the contrary, that his ſaid truſtees and their heirs ſhould ſtand ſeiſed of the premiſes, to the only uſe and behoof of his ſaid two daughters and their heirs in manner aforeſaid." The court of *K. B.* held, that all clauſes and conditions in reſtraint of marriage, ought to be conſtrued with the utmoſt rigour and ſtrictneſs, againſt ſuch reſtraint, and in favour of the perſon attempted to be reſtrained: that the teſtator meant, that the ſon's complying with either part of the alternative ſhould be a performance of the condition; and that therefore he had not incurred a forfeiture by marrying (as the ſpecial verdict found he had done) a woman, who, at the time of her marriage with him, had a competent marriage portion, though he married her without any conſent or approbation of the truſtees.

Knapp v. Noyes, Ambl. 662.

The teſtator bequeathed to each of his daughters 1500*l.*, to be paid to them reſpectively at the time of marriage with the conſent of his executors, whom he alſo made guardians of his daughters during their minority. There was likewiſe a clauſe in the will for their maintenance and education till their portions became payable. One of the daughters, after having attained twenty-one, died unmarried; and the queſtion was, Whether the portion ſurvived, that is, whether the time of payment was confined to the marriage?

marriage? Lord *Camden*, after obſerving, that it was very unnatural for a parent to impoſe a conſent to a marriage during his daughter's whole life, ſaid, that, conſidering all the clauſes of this will, the portions muſt be underſtood to be payable at twenty-one, or marriage with conſent.

A. E. bequeathed the ſum of 1500 *l.* to his grand-daughter, to be at her own diſpoſal, purſuant to the requeſt of his deceaſed daughter *E. D.*, in caſe ſhe married with the conſent and approbation of his ſon *J. E.* and his wife; and in caſe of their deaths before that time, then with the conſent and approbation of their truſtees, and not otherwiſe. The grand-daughter ſurvived the teſtator, but died at fourteen years of age, and unmarried. The legacy never veſted. Elton v. Elton, 1 Wilſ. 159.

A teſtator bequeathed the plaintiff 200 *l.*, provided ſhe married with the conſent of her father and mother, or the ſurvivor of them. The plaintiff brought her bill to have the legacy raiſed and paid to her; and the queſtion was, Whether ſhe muſt not be married before ſhe was entitled to have the 200 *l.*? The Maſter of the Rolls was clearly of opinion, that there muſt be a marriage firſt.] Garbut v. Hilton, cited *ibid.*

(G) Of Specifick and Pecuniary Legacies, and the Difference between them.

[THere are two kinds of gifts included under the deſcription of ſpecifick legacies. Firſt, when a particular chattel is ſpecifically deſcribed, and diſtinguiſhed from all others of the ſame kind. Secondly, ſomething of a particular ſpecies, which the executor may ſatisfy by delivering ſomething of the ſame kind, as an horſe, *&c.* The firſt kind may be more properly called an individual legacy, and if ſuch, ſo bequeathed, is not found among the teſtator's effects, it fails; or, if given firſt to *A.* and then to *B.*, they muſt divide it; or, if it is diſpoſed of in the life of the teſtator, it is an ademption of ſuch legacy. *Per* Lord Hardwicke in Pearce v. Snaplin, 1 Atk. 417.

Although it may be difficult to make pecuniary legacies ſpecifick, yet money may be ſo diſtinguiſhed as to be the ſubject of a ſpecifick bequeſt, as money in a certain cheſt (*a*), *&c.*; or a particular ſum of money in the hands of *B.* (*b*); or a particular debt (*c*). So, a bequeſt of ſtock in a particular fund is ſpecifick (*d*); or a legacy to be paid out of the profits of a farm which the teſtator directs to be carried on (*e*). So, a bequeſt of part of a ſpecifick chattel may be equally a ſpecifick legacy, as, where the teſtator gives part of the debt due to him from *A.* (*f*); or part of his ſtock in a particular fund (*g*).

(*a*) Lawſon v. Stitch, 1 Atk. 508. (*b*) Hinton v. Pinke, 1 P. Wms. 540. (*c*) Ellis v. Walker, Ambl. 310. Aſhburner v. Macguire, 2 Br. Ch. Rep. 108.

(*d*) Aſhton v. Aſhton, Ca. temp. Talb. 152. Avelyn v. Ward, 1 Vez. 424. Drinkwater v. Falconer, 2 Vez. 623. (*e*) Mayet v. Mayet, 2 Br. Ch. Rep. 125. (*f*) Heath v. Parry, 3 Atk. 103. (*g*) Sleech v. Thoringdon, 2 Vez. 563.

But a mere bequeſt of *quantity*, whether of money, or of any other chattel, is a general legacy, as of a quantity of ſtock (*h*); and where the teſtator has not ſuch ſtock at his death, it is a direction (*h*) Purſe v. Snaplin, 1 Atk. 414. Sleech v.

to

Thoringdon, 2 Vez. 562. Bronſdon v. Winter, Ambl. 57.

to the executor to procure ſo much ſtock for the legatee (*a*). Perſonal annuities given by will (*b*) are general legacies, though this ſeems to have been doubted in one caſe (*c*).]

Biſhop of Peterborough v. Mortlock, 1 Br. Ch. Rep. 565. (*a*) Partridge v. Partridge, Ca. temp. Talb. 227. Bronſdon v. Winter, *ubi ſupra*. (*b*) Hume v. Edwards, 3 Atk. 693. Lewin v. Lewin, 2 Vez. 417. (*c*) Peacock v. Monk, 1 Vez. 133.

2 Chan. Ca. 25. 171. Vern. 31. 2 Salk. 416. pl. 3.

A ſpecifick legacy differs from a pecuniary legacy, or a ſum of money, in that the legatee is not, in caſe of deficiency of aſſets, to (*d*) abate in proportion, as pecuniary legatees muſt do.

(*d*) But though a ſpecifick legatee has a preference, and is not to abate in proportion with other legatees, where the eſtate falls ſhort, as to the payment of debts, yet he cannot in any caſe have more than the teſtator could or did deviſe to him; and therefore where a freeman of London deviſed a leaſe for years to *J. S.* who was evicted of a moiety thereof by the widow claiming it by the cuſtom; it was held, that the ſpecifick legatee ſhould have no ſatisfaction for this eviction out of the ſurplus, the teſtator having power to diſpoſe only of a moiety. 2 Vern. 111. [But where the reverſion of a leaſehold eſtate for three lives was deviſed to *A.* for life, afterwards to *B.*, and then to *B.*'s ſon, and a creditor of the teſtator filed a bill to charge the eſtate with his debts, Lord King ſaid, that as this was a ſpecifick deviſe, all the reſt of the teſtator's perſonal eſtate not ſpecifically deviſed, muſt be firſt applied to pay the debts; and if there were any other ſpecifick deviſe, the ſame ought to come in average with this, and pay its proportion; but if that would not ſerve, all muſt be ſold to pay the teſtator's debts. Duke of Devon v. Atkins, 2 P. Wms. 381.]

2 Vern. 688. Sayer and Sayer. Preced. Chan. 392. S. C. Preced. Chan. 393.

So, if a man deviſe his perſonal eſtate at *W.*, this is as much a ſpecifick legacy, as if he had enumerated the ſeveral particulars of it; and though the other legacies fall ſhort, yet the legatee muſt have this ſpecifick legacy entire.

But if the teſtator deviſe his perſonal eſtate at *A.*, and his perſonal eſtate at *B.*, and then deviſe a legacy out of his perſonal eſtate, and have no perſonal eſtate but what lies in thoſe two places, the pecuniary legacy muſt be paid out of theſe ſpecifick legacies thus particularly deviſed.

Preced. Chan. 393-4.

So, if after ſeveral ſpecifick legacies the teſtator deviſe a pecuniary legacy, or ſum of money, out of all his perſonal eſtate whatſoever; in this caſe the pecuniary legacy ſhall come out of the eſtate at large.

If a horſe, or term for years, which is ſpecifically deviſed to another, be taken in execution by creditors on a judgment obtained, (as they may be,) the ſpecifick legatee ſhall have recompence in equity againſt the executors, or reſiduary legatees, for the value, who are to have nothing till after the debts and legacies are paid.

Abr. Eq. 298. Lord Caſtleton v. Lord Fanſhaw.

J. S. having 4000*l.* ſecured to him by bond in the names of *A.* and *B.*, in truſt for himſelf, deviſed it to his daughter, (now married to the plaintiff,) and made her reſiduary legatee, and by the ſame will deviſed a leaſe he had in farm to *R. D.*, and there not appearing aſſets at his death to pay his debts, this farm deviſed to *R. D.*, was ſold for payment of debts; afterwards, by decree of this court, the 4000*l.* was adjudged to be aſſets to pay debts, and was brought into court, there to remain for that purpoſe. The plaintiff propoſed to have what remained of the 4000*l.* paid out of court to him, all debts being (as it was ſaid) paid, and the defendant *R. D.* oppoſed it till he had firſt had a ſatisfaction out of it for the value of the farm deviſed to him, and ſold for the payment of debts. The court held, that the deviſe of this ſum of money

money was a ſpecifick legacy, and therefore *R. D.* can have but a proportionable part of the value of his ſpecifick legacy out of it.

(H) Of abating, refunding, and giving Security for that Purpoſe.

PEcuniary legatees ſhall abate in proportion to the deficiency of aſſets; and therefore if the eccleſiaſtical court go about to compel an executor to pay a legacy without ſecurity to refund, a prohibition will be granted; for though an executor may pay a legacy without ſuch caution or ſecurity, yet he is not obliged to do it. Cro. Eliz. 467. Moor, 413. Owen, 72. Allen, 40.

So, if a man deviſe ſeveral legacies, as 100 *l.* to one, and 50 *l.* to another, *&c.* there, although he directs the legacy of 100 *l.* to be paid in the firſt place, yet, if the other legacies fall ſhort, then the legatee of the 100 *l.* muſt make a proportionable abatement of his legacy. Vern. 31. Brown and Allen.

So, if a legacy be given to executors for care and pains, yet this ſhall give ſuch legacy no preference, but the executors muſt abate in proportion. 2 Vern. 434. Fretwel and Stacey.

As to refunding and abating, it ſeems clear, that creditors may compel legatees in equity to refund when aſſets become deficient, although there was no proviſion made for refunding at the time the legacies were paid. Vern. 94. 2 Vent. 358. 360. 2 Vern. 205.

So, where *A.* being indebted to *B.* made *C.* his executor, and *C.* waſted the eſtate, and died, having deviſed ſeveral legacies, and made *D.* executor, which legacies *D.* paid, and *B.* having exhibited a bill againſt *D.*, the executor of *C.*, for his debt due from the firſt teſtator, and againſt the legatees in the will of *C.*, to compel them to refund their legacies, there not being ſufficient aſſets of the firſt teſtator, it was decreed accordingly (*a*); for a creditor may follow the aſſets in equity, into whoſe hands ſoever they come. Vern. 162. 1 P. Wms. 495. (*a*) 2 Vern. 205. laid down as a rule.

Alſo, one legatee may compel a pecuniary legatee to refund where the aſſets become deficient, though there was no proviſion made for refunding, and although he hath ſtill remedy againſt the executor, and may compel him to pay it out of his own purſe, if he voluntarily paid away the aſſets to the other legatees. Chan. Ca. 136. 248. 2 Chan. Ca. 132. Vent. 360.

But it ſeems to be agreed, that an executor who voluntarily pays a legacy, or aſſents to the deviſe thereof, cannot, either in favour of other legatees or creditors, compel the legatee to refund, but that in ſuch caſe he muſt bear the loſs himſelf. 2 Chan. Ca. 9. 145. Vern. 90. 453. 460. 2 Vern. 205.

But it is ſaid, that if an executor pays out the aſſets in legacies, and afterwards debts appear, of which he had no notice at the time of payment of the legacies; or if he had been compelled by a decree in equity to pay legacies; that in theſe caſes he may by bill in equity, compel the legatees to refund, although he took no caution or ſecurity for that purpoſe, Chan. Ca. 136. 2 Vern. 205. 1 P. Wms. 495.

[On

Davis v. Davis, Vin. Abr. tit. Deviſe (Q d), 35.

[On a bill by an executor againſt a legatee to refund a legacy voluntarily paid him by the executor, the aſſets falling ſhort to ſatisfy the teſtator's debts; it was decreed by Sir *J. Jekyll*, Maſter of the Rolls, that the defendant ſhould refund to the plaintiff; and that an executor may bring a bill againſt a legatee to refund a legacy voluntarily paid him, as well as a creditor; for the executor, paying a debt of the teſtator out of his own pocket, ſtands in the place of the creditor, and has the ſame equity againſt a legatee to compel him to refund.

Anon. 2 P. Wms. 495.

But if an executor had at firſt enough to pay all the legacies, and afterwards by his waſting the aſſets, occaſions a deficiency, in ſuch caſe a legatee who has recovered his legacy, ſhall not be compelled to refund, but ſhall retain the advantage of his legal diligence, which the other legatees neglected by not bringing their ſuit in time, before the waſting by the executor; whereas if the other legatees had commenced their ſuit before ſuch waſte committed, they might have met with the like ſucceſs, *et vigilantibus, non dormientibus jura ſubveniunt.*

Walcot v. Hall, 2 Cox's P. Wms. 495. note.

J. P. by will gave to the plaintiff 50 *l.*, to be paid to him at his age of twenty-one years, or day of marriage, the ſame to be put out at intereſt in the name of his executor, *C. P. H.*, *&c.* He then diſpoſed of the reſidue, and appointed *C. P. H.* executor, who proved the will, retained the 50 *l.* for the plaintiff's legacy, and afterwards became bankrupt, and obtained his certificate. The plaintiff having attained his age of twenty-one, filed his bill againſt the executor and the reſiduary legatees for payment of the legacy. The Maſter of the Rolls, Sir *L. Kenyon*, ſaid, the reſiduary legatees could not be liable; that the diſtinction was between the caſes where there was originally a deficiency of aſſets, and where the executor had waſted them; in the former caſe, a legatee who had been paid more than his proportion, muſt refund to the others; but here, the reſiduary legatees had received no more than they were entitled to, and the executor was therefore the only perſon to be reſorted to. And his Honour, being of opinion, that this demand, as againſt the executor, was barred by his certificate, diſmiſſed the bill.]

In Orr v. Kaines, 2 Vez. 194. Sir J. Strange is reported to uſe theſe words: "The rule, of which there are ſeveral caſes in Eq. Ca. Abr. is, that whenever an executor pays a legacy, the preſumption is, he has ſufficient to pay all legacies, and the court will oblige him, if ſolvent, to pay the reſt, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund; *although, if the executor proves inſolvent, ſo that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund.*"

(I) Of Reſiduary Legacies and Legatees.

Vide tit. Executors and Adminiſtrators.

THE teſtator's making his will, and appointing an executor, is a diſpoſition of all his perſonal eſtate, after debts and legacies paid, to ſuch executor, without more words; but if the teſtator appoints, that after his debts and legacies paid *J. S.* ſhall have the ſurplus, or what remains; then is *J. S* reſiduary legatee, and may ſue for and recover ſuch ſurplus or reſidue, and is alſo, upon the executor's refuſal to prove the will, entitled, from his intereſt therein, to adminiſtration, with the will annexed.

If

If a reſiduary legatee die before the debts are ſatisfied, ſo that it doth not appear to how much the ſurplus will amount, yet the executor or adminiſtrator of ſuch legatee ſhall have the whole reſidue of the perſonal eſtate which remains over, &c. and not the executor of the firſt teſtator. Carth. 52. *per Curiam.*

Alſo, if there be a reſiduary legatee, and the executor omit part of the teſtator's effects out of the inventory, or undervalue thoſe which he puts in, the reſiduary legatee may file a bill of diſcovery againſt him before he has paid the teſtator's debts. Palm. 409.

If a man deviſe all the reſt and reſidue of his perſonal eſtate, after debts and legacies paid, to *J. S.*, and ſeveral of the creditors are barred by the ſtatute of limitations, who notwithſtanding bring actions againſt the executor, and he refuſes to plead the ſtatute of limitations, yet equity will not, in favour of *J. S.* to whom the ſurplus is deviſed, compel the executor to plead the ſtatute. Abr. Eq. 305. Lord Caſtleton v. Lord Fanſhaw.

(K) Of the Payment of Legacies: And herein,

1. What ſhall be a good Payment, and to whom to be made.

AN executor, in the payment of a legacy, ought to be careful that he takes a proper receipt (*a*), or has ſufficient vouchers of the payment; and the rather, becauſe it is held to be ſuch an equitable demand as is not (*b*) barred by the ſtatute of limitations. Preced. Chan. 228.

[(*a*) The receipt by 36 Geo. 3. c. 52. muſt be on a ſtamp for every ſpecies of legacy. See tit. Stamps.] (*b*) Vern. 256.—But where after length of time a legacy was preſumed to have been paid, *vide* 2 Vern. 21. 484. [Jones v. Turberville, 2 Vez. jun. 11. But if the legatee allege that he knew not of his right, it ſeems, the preſumption cannot be raiſed. Ord. v. Smith, Sel. Ca. Ch. 11.]

Alſo, an executor ought to be careful that he pay it to the proper hand that has authority to receive it, and that without a decree or order of a court of equity he cannot pay it to the (*c*) father, or any other relation of an infant. Chan. Ca. 245.

(*b*) Where a father libelled in the ſpiritual court that his children's legacies, being infants, might be paid to him, and a prohibition granted. Godb. 243.

As, where a legacy of 100 *l.* was deviſed to an infant of about ten years of age, the executor paid this legacy to the father, and took his receipt for it; when the infant came of age, the father told him he had ſuch a legacy of his in his hands, but could not pay it immediately, but however would not have him trouble the executor about it, for that he would give it him; upon this the ſon reſted ſatisfied for about fourteen or fifteen years, and he and his father carried on a joint trade together, and then became bankrupts; and upon a commiſſion taken out againſt the ſon, this legacy, among other things, was aſſigned for the benefit of his creditors; and the plaintiff, the aſſignee of the commiſſion, brought his bill againſt the executor, to have an account and payment of the legacy; and for the defendant it was inſiſted, that this would be an extreme hardſhip on him, if he ſhould be obliged to pay it over again; that he had already fairly and honeſtly paid it to the father whilſt Abr. Eq. 300. Doyly v. Tollferry, 1 P. Wms. 285. S. C. Gilb. Rep. 103. S. C. 4 Burn's E. L. 321. S. C.

whilſt he was in good circumſtances, and if application had been made ſooner, he might have had his recompence over againſt the father; that the father was by nature guardian to his children, and ſuch payments to him have formerly been allowed good, though now indeed this court has thought fit to extend its care farther for ſuch children, and diſallowed ſuch payments; but the circumſtances of this caſe were ſuch, that the defendant, it was hoped, would not be anſwerable again for it. My Lord Chancellour ſaid, that if the father had not made his ſon ſuch promiſe of recompence, and the ſon had acquieſced all that time, the caſe might have been more doubtful; but this promiſe of his father drew him to forbear applying to the executor ſooner, and ſince his father had not, nor could now make good his promiſe, being a bankrupt likewiſe, the reaſon of the ſon's forbearance was at an end; and he thought the rule of this court, in not ſuffering parents to receive their children's legacies, was founded on very good reaſon; and therefore leſt this caſe might hereafter be cited as a precedent, when the circumſtances attending it were forgotten, and to diſcountenance and deter others from paying ſuch legacies to the parents, (though he did not deny the hardſhips of this particular caſe,) he decreed againſt the executor, which was affirmed on a rehearing.

Philips v. Paget, 2 Atk. 80.

[Mrs. *Paget* gives a legacy of 100*l.* to each of the three children of Mr. *Philips*, and makes the defendant her executor, leaving him the bulk of her eſtate, provided he pays the three legacies of 100*l.* within a year after her death, purſuant to her will. The defendant, within the time, pays into the children's own hands their legacies: the eldeſt of them was ſixteen years old at the time, the next fourteen, and the youngeſt nine only. The children now brought their bill againſt the defendant, to be paid their ſeveral legacies, ſuggeſting that their father had embezzled the money paid by the defendant during their infancy, and was inſolvent, and that this was a fraudulent payment to the father, and therefore it muſt be paid over again. The defendant in his anſwer denied he knew this money ever came to the father's hands. Lord Chancellour aſked the counſel for the defendant, if they knew any inſtance where an executor paying ſo large a ſum as 100*l.* into the hands of minors, has been allowed ſuch payments? Indeed, in caſes where legacies have been very ſmall, the payment has been allowed by the court. But in this caſe, notwithſtanding the ſum is above 100*l.*, yet, as the payment by the executor to the children themſelves is ſo fully proved, and not at all controverted by the plaintiffs, and their loſing the benefit of it is owing to the negligence and inſolvency of the father, his Lordſhip ſaid, he would not ſtrain the rules of the court to make the executor pay it over again; eſpecially, as he made this payment to ſave a forfeiture, it being an expreſs condition of his own taking under the will, that he ſhould diſcharge theſe legacies within a year after Mrs. *Paget*'s death. But the next day, the Lord Chancellour ſaid, that, upon looking into the caſes, he found this a very doubtful point; and unleſs the defendant would agree

to give the plaintiffs ſomething, he would not determine it, without taking time to conſider of it. The defendant, upon this recommendation of the court, agreed to pay in 50 *l.* to be divided between the three plaintiffs; and each ſide were to abide by their coſts; and it was made part of the decree, that the 50 *l.* were paid by conſent of all parties; and his Lordſhip directed each of the plaintiffs, upon receiving their reſpective ſhares, to releaſe their legacies under the will. The caſe of *Dagley* v. *Tolfery*, he ſaid, muſt have ſome other circumſtances; for the rule is laid down too ſtrictly, that in all caſes where executors pay infants' legacies to fathers, in order to deter executors from ſuch payments, they ſhall be paid over again. Lord *Cowper* confirmed the decree of the Maſter of the Rolls in that caſe; but he ſeems, even by this report of the caſe, to have had a remorſe of judgment at the time; for on looking into the regiſtrar's office, it appears, his Lordſhip ordered the depoſit to be divided between the parties. *Supr.* 429.

In *Rotheram* v. *Fanſhaw*, Lord *Hardwicke* ſaid, *arguendo*, that where a ſuit is inſtituted in the ſpiritual court for an infant's legacy, by a father, to have it paid into his hands, the court will grant an injunction; becauſe it will not allow the money of an infant to come into the father's hands. 3 Atk. 629.

B. T. by will gave ſeveral pecuniary legacies, and among the reſt, "to *Thomas Cooper* of —— *ſtreet*, *Weſtminſter*, one hundred "pounds, to be equally divided between himſelf and his family," and made —— *Winſtanley* and the defendant (his wife) executors, and the defendant reſiduary legatee, and died in 1768. In *November* 1769 *Winſtanley* paid the legacy to *Thomas Cooper*, who, at that time, had a wife and ſeven children, ſix of whom were adults, and the ſeventh an infant. The father lived till 1775, when he died, no demand having been made by any of his children of this legacy. *Henrietta*, the youngeſt child, came of age in 1777. In 1784 ſhe and the other children made a demand of this legacy; and in 1779 they filed their bill (after the death of *Winſtanley*) againſt the defendant as executrix and reſiduary legatee of the teſtator, for the legacy, inſiſting, that the payment to *Thomas Cooper* was not a good payment, and that, therefore, the defendant was liable to pay it over again. The Maſter of the Rolls ſaid, it is argued on the part of the plaintiffs, that the payment to the father of legacies given to his children, who are not of age, is a bad payment. In early times, it appears from the caſe of *Holloway* v. *Collins*, in the 26th and 27th *Car.* 2. 1 *Eq. Abr.* 300. that the payment to the father of a legacy to the child, was held good: but, ſince the caſe of *Dagley* v. *Tolfery*, the idea of the court has been, that it is not a good payment: and that even in the caſe of an adult child, it is not good, unleſs done by the conſent of the child, or made ſo by a ſubſequent ratification. In that caſe the rule was laid down, and was laid down very harſhly, as the teſtator, on his death-bed had given directions that the legacy ſhould be paid to the father, and there had been mutual accounts between the father and the child, and an acquieſcence for Cooper v. Thornton, 3 Br. Ch. Rep. 96. *Supr.* 429.

for near fifteen years. It appears, from the regiſtrar's book, that evidence was read, that the legacy was ordered by the teſtator to be paid to the father: but that circumſtance can make no difference, as I doubt much whether ſuch evidence ought to be read. It would be a dangerous thing to admit evidence that a legacy given to one perſon was ordered to be paid to another. From the regiſtrar's book of the year 1714, fol. 414, it appears, that the defendant was decreed to pay the plaintiff his legacy with coſts, but no intereſt; and from the book *A.* of the year 1715, fol. 40, that an appeal being brought before Lord *Cowper*, the decree was affirmed; but as it was thought a hard caſe, the depoſit was divided. I lay the matter out of the caſe, that it was directed to be paid to the father; and although it was ſo directed, and the money paid, and although the ſon acquieſced a great length of time, it ſhould be ſtill competent to him or his repreſentatives to demand it; becauſe a contrary determination would encourage ſuch payments, and becauſe the ſon muſt acquieſce, or purſue his father; or, which is the ſame thing, by bringing his ſuit againſt the executor, occaſion his purſuing the father; and that I take to be the ground on which Sir *J. Trevor* and Lord *Cowper* went; and if the legatee did not ſtand in that relation to the perſon to whom the legacy was paid, the bill would be diſmiſſed. The only other caſe is *Philips* v. *Paget (ſupra)*. It went off upon a compromiſe, ſo that we have no account of it but from Mr. *Atkins's* book. There, the executor was miſled by the teſtator's directions to pay the legacies within a given time. Then let us conſider the circumſtances of the preſent caſe, for I do not mean to interfere with the doctrine of *Dagley* v. *Tolfery*, that a payment to the father is bad. The preſent caſe is a ſtronger caſe for the executors than that of *Philips* v. *Paget*. Here, after ſeveral other legacies, all with the words "I give to," *&c.*, is the following, "*To* Thomas Cowper, "*to be divided between himſelf and his family.*" I ſhould do the harſheſt thing in the world to make the executor pay it over again. It is true, the teſtator has not inſerted the words *by him to be divided.* If he had, there could not have been a doubt: but if he meant the executors to divide, why did he mention *Thomas Cowper?* What did he mean by the word *himſelf?* That can only be applicable, if *Thomas Cowper* is to divide. Then it is not only to him and his children, but to his *family*, which is much more extenſive. It is to be paid to him, and he, as a truſtee, is to divide it. If any of the children had called upon him to have it ſecured, it muſt have been ſo. Therefore, if in *Philips* v. *Paget*, the executor was diſcharged, *a multo magis* he muſt be ſo here. Suppoſing it to be paid by *Winſtanley* in a manner that was wrong; for I muſt allow it to be wrong, if it was not meant to be paid to *Thomas Cowper*; *Cowper* died in 1775; from that time the plaintiffs might have called upon the executor without his being able to purſue the father. In 1777, the youngeſt came of age: why did they not then file their bill againſt *Winſtanley*, who did not die till after this bill was filed? For ſix years they took no ſtep. If they had brought their bill, they might have recovered againſt *Winſtanley*.

Supr. 429.

But

But, under the circumſtances of the caſe, I believe it was well paid, and that it was intended, that he ſhould receive it. If one was to give a legacy to the ſenior ſix clerk, to be divided between himſelf and the other ſix clerks, I think it ſhould be paid to the ſenior, and the executor not be put to inquire, who the other ſix clerks were. And that if it had been the caſe of a bequeſt of goods to *A.* to be divided between himſelf and family, *A.*, with the aſſent of the executor, might bring trover for the goods. His Honour therefore diſmiſſed the bill.

Where a teſtator bequeathed his perſonal eſtate to truſtees, in truſt to pay (*inter al.*) 500 *l.* to an infant, and directed, that ſuch of his legatees as might be infants at the time of his deceaſe, ſhould receive intereſt at the rate of 5 *l. per cent.* till their reſpective legacies ſhould be paid, which he deſired might be to the boys at the age of 21 years, *&c.*; it was holden, that the executors could not juſtify paying any part of the principal before that time to the infant, or to his uſe, except for expreſs neceſſaries.] Davies v. Auſten, 3 Br. Ch. Rep. 178.

If a legacy be given to a feme covert, it muſt be paid to the huſband: alſo, where a legacy was given to a feme covert who lived ſeparate from her huſband, and the executor paid it to the wife, and took her receipt for it, yet on a bill brought by the huſband, he was decreed to pay it over with intereſt. 2 Vern. 261.

Alſo it hath been adjudged, that if huſband and wife are divorced *a menſâ & thoro*, and a legacy is left to her, the huſband alone may releaſe it. Roll. Abr. 343. 2 Roll. Abr. 301. Moor, 665.

Cro. Eliz. 508. Noy, 45. Roll. Rep. 426. 3 Bulſ. 264. Moor, 683. Salk. 115. pl. 4. Ld. Raym. 73. 12 Mod. 891. 5 Mod. 69. But a perſon may by deed or will give any thing in truſt for the ſeparate uſe of a feme covert, and this ſhall be out of the power of her huſband. 2 Vern. 659.

A legacy of 1000 *l.* was given to one, after the death of her mother, when ſhe ſhould attain the age of 21 years; and the defendant was appointed truſtee for the raiſing and payment thereof out of certain lands; the legatee was drawn into an improvident match with one who ſoon after became a bankrupt, and the commiſſioners aſſigned all his effects, and gave him a certificate of his conformity; and the aſſignees brought a bill againſt the truſtee for this 1000 *l.*, who inſiſted that the aſſignees could be in no better condition than the huſband, and that if he were plaintiff he could not prevail without making a ſuitable proviſion on his wife; and that this legacy being liable to a double contingency, viz. the death of the mother, and the legatee's arriving at the age of 21 years, at the time of the bankruptcy, was not ſuch an intereſt as could be aſſigned. The court held, that though both contingencies have ſince happened, yet thoſe being ſince the aſſignment of the bankrupt's eſtate, and ſince a certificate of his having conformed himſelf in every thing to the acts, he was now diſcharged as a bankrupt; and this legacy could not paſs without a new aſſignment, which the commiſſioners could not make, their commiſſion being determined. Abr. Eq. 54. Jacobſon v. Peter Williams.

2. At what Time a Legacy is to be paid.

Godolph. Orph. Leg. 272. 2 Salk. 415. pl. 2.

By the civil law, executors have a year's time, from the death of the teſtator, to pay legacies: and in conformity to the civil law, the ſame rule hath been taken up, and is now followed, in the court of Chancery.

2 Vern. 31. 199. 283.

If a legacy is given to a child, payable at 21 years, and the child dies before, though his adminiſtrator ſhall have the legacy, yet he muſt wait for it till ſuch time as the child, if he had lived, would have come to the age of 21.

Abr. Eq. 299. 300. Laundy and Williams. 1 P. Wms. 478. S. C. So, 1 Atk. 556.

But where *A.* by will gave a legacy to *B.* at 21, and if he died before 21, then to the plaintiff; *B.* died before 21; and the only queſtion was, Whether the plaintiff was entitled to the legacy preſently, or muſt wait till *B.*, if he had lived, would have been 21? And on time taken to conſider of it, my Lord Chancellour was of opinion, the plaintiff was entitled to the legacy preſently (*a*); but that where a legacy is given to one to be paid at 21, ſo as to be an intereſt veſted in him preſently, though not payable till 21, if the party dies before that age, his executors or adminiſtrators ſhall not have it till the legatee, if he had lived, would be 21 years of age.

(*a*) For this *vide* Leon. 277-8. And. 33. 2 Roll. Rep. 134.

[The rule ſeems to be this—If a legacy be payable at 21, and the child die, his repreſentatives cannot claim till the time when the child would have arrived at 21, if the legacy does not bear intereſt, Harriſon v. Bickle, 1 Str. 238. Roden v. Smith, Ambl. 588., but, if it be with intereſt, they may claim immediately. Green v. Pigot, 1 Br. Ch. Rep. 105. Fonnereau v. Fonnereau, 1 Vez. 118.]

Cheſter v. Painter, 2 P. Wms. 335.

[A teſtator gave to *J. S.* the ſum of *l.* payable at 21, and in the mean time that he ſhould have the yearly ſum of *l.* which did not amount to the intereſt of the legacy given to him. *J. S.* died under 21, and his executors demanded the legacy preſently. But it was holden at the council, unanimouſly, that the executors of the legatee ſhould wait for their legacy until ſuch time as their teſtator ſhould, in caſe he had lived, have attained 21, it being unreaſonable, that the executors of *J. S.* ſtanding in his place, ſhould be in a better caſe than *J. S.* himſelf would have been, had he been living; and it was to be preſumed, that the firſt teſtator had made a computation of his eſtate, and conſidered when it would beſt bear and allow of the payment of this legacy; and there could be no reaſon given, why an uncertain accident ſhould accelerate the payment of this legacy before the time which was at firſt intended for that purpoſe.

Feltham v. Feltham, 2 P. Wms. 271.

One, having ſeveral daughters, charged his lands with 1000 *l.* to each of them, payable at their reſpective ages of 22, or marriage, which ſhould firſt happen; and if any of his ſaid daughters ſhould die before her portion became payable, the ſhare of her ſo dying ſhould go to the ſurvivors. One of the daughters died before 22, or marriage, and another of the daughters attains 22 years of age. By the court—This portion ariſes out of lands, and it would be an hardſhip on the heir (whom equity favours) to make it payable before the time it was intended. Now there can be no reaſon to make

make the additional portion payable before the original one; wherefore as the heir is to ſuffer by the raiſing of theſe portions, it may reaſonably be preſumed in favour of him, that the teſtator might compute within what time they might be paid, ſo that this additional portion ſhall not be paid before ſuch time as the daughter to whom it was given ſhould have come to the age of 22 years, if ſhe had lived.]

A legacy of 500 *l.* was given to the eldeſt ſon of *A.* to be begotten, to place him out apprentice; *A.* had a ſon born after the death of the teſtator, and on a bill brought by him for the legacy, it was decreed to be paid, though before ſuch time as he was fit to be placed out apprentice. 2 Vern. 431. Nevil and Nevil.

If legacies are given to *A.*, *B.*, and *C.*, being the teſtator's three coheireſſes, to be paid at their reſpective marriages, and if any of them die, her legacy to go to the ſurvivors; and one of them dies unmarried, the ſurvivors ſhall not receive her legacy before their reſpective marriages, for the condition, though not again repeated, ſhall go to the whole, as well to what accrued by ſurvivorſhip as to the original deviſe. 2 Vern. 620. Moor and Godfrey.

3. Where the Legatee ſhall have Intereſt, and Maintenance till the Legacy is paid.

If a legacy be deviſed generally, it is regularly to carry intereſt from the expiration of the firſt year after the death of the teſtator; but if the legatee, being of full age, neglects to (*a*) demand it at that time, he cannot have intereſt but from the time of the demand. 2 Salk. 415. pl. 2. & *vide* Vern. 251. 262.

(*a*) That a legacy differs from a debt, and muſt be demanded, otherwiſe the legatee not entitled to intereſt. Poph. 104.—So, though a bond was given for performance of the will. 1 Leon. 17.

But it is ſaid, that if a legacy be deviſed generally, and no time aſcertained for the payment, and the legatee be an infant, he ſhall be paid intereſt from the expiration of the firſt year after the teſtator's death, though no demand be made, becauſe no laches ſhall be imputed to him. 2 Salk. 415. pl. 2.

Alſo it is ſaid in *Salk.* that a legacy left payable at a (*b*) certain day, muſt (as it ſeems without demand) be paid with intereſt from that day, and that the intereſt allowed is 5 *l. per cent.* Salk 415. pl. 2. *per* Ld. Cowper.

(*b*) But in Preced. Chan. 161. it is held, that though a legacy be deviſed to be paid at a certain time, yet it ſhall not carry intereſt but from a demand made; otherwiſe, of a debt.

The plaintiff had a legacy deviſed to him, payable within a year after the death of the teſtator, who was his half-brother; the plaintiff knew nothing of the legacy, nor of the teſtator's death, till the executor publiſhed it in the *Gazette*, and then he demanded his legacy of the defendant the executor; and the only conteſt was, whether the plaintiff ſhould have intereſt from the time the legacy ſhould have been paid. And the court would not give any intereſt, not ſo much as from the time of the bill exhibited, nor would they give coſts even out of the aſſets, but the bare legacy. Preced. Chan. 11. Knapp and Powell.

Attorney General v. Thompſon, 1 Eq. Ca. Abr. 301.

[If a father deviſe legacies or portions to his daughters, or younger children, to be paid or payable at their reſpective ages of 21 years, or at any other time certain, without making any proviſion for their maintenance in the mean time, and die, in this caſe, they ſhall have intereſt for their portions from his death, till paid, becauſe the father was obliged to have provided for them, if he had lived; but if ſuch portions had been deviſed to them by a ſtranger, to be paid or payable at ſuch age, their legacies ſhould not carry intereſt in the mean time, becauſe he being a ſtranger, was under no ſuch obligation to provide for them.

Conway v. Longville, 1 Eq. Ca. Abr. 301.

So, where a father, by his will, gave 2000 *l.* a-piece to his two daughters, payable at 21, and charged on land and perſonal eſtate; and the perſonal eſtate was exhauſted in debts; Lord Chancellour held, they ſhould have a reaſonable maintenance out of the real eſtate until their legacies became payable, and allowed them 80 *l. per annum* each.

Incledon v. Northcote, 3 Atk. 438.

A teſtator deviſed his real eſtate, and a reſidue of his perſonal eſtate, in truſt for payment of all his debts, and ſubject thereto, for raiſing 5000 *l.* for ſuch child or children of his body iſſuing, as ſhould attain 21, to be paid to ſuch child or children, if but one, but if more than one, equally to be divided between them. Though the 5000 *l.* were given to ſuch children of the teſtator's body as ſhould attain the age of 21, and, conſequently, the legacy was not veſted, yet, Lord *Hardwicke* decreed intereſt. In the caſe of ſtrangers, he ſaid, whether the legacy be given abſolutely, and payable at 21, or not given until 21, the legatees can have no intereſt in the mean time; but in either of theſe deviſes, where they are given to children, the court will direct intereſt for their portions immediately; and it has been ſo done frequently.

Hearle v. Greenbank, 3 Atk. 716.

A teſtatrix bequeathed to her daughter 100 *l.* a-year, until the age of 10 years, and after, the further ſum of 50 *l.* a-year till ſhe attained the age of 21, *the ſaid ſums to be applied by her executors for the education and maintenance of her ſaid daughter according to their diſcretion.* She alſo bequeathed to her ſaid daughter 8000 *l.* to be paid her when ſhe ſhould attain the age of 21 years, but if her ſaid daughter ſhould die before the ſaid age, without iſſue living at her death, then ſhe bequeathed the ſaid 8000 *l.* to, &c. Lord *Hardwicke* was of opinion, that the daughter was not entitled to the intereſt of the 8000 *l.* The general rule is, he ſaid, where legacies are given, payable at a certain time, they carry no intereſt, for intereſt is for delay of payment, and, conſequently, till the day of payment comes, no intereſt is demandable. But I admit, where the legacy is given by a father to a child, though the legacy is not payable but at a certain time, yet the court allows intereſt. But in all theſe caſes, the ground the court goes upon, is giving intereſt by way of maintenance. Here, the teſtatrix has allotted maintenance for her daughter from the general fund of her perſonal eſtate. There is another thing obſervable, the contingency in the will of the daughter's dying before 21. I agree it is a condition ſubſequent, but ſtill it ſhews the view of the teſtatrix, and that it might never be her daughter's, and therefore to give her

her intereſt would be contrary to the intention of the teſtatrix. There are ſeveral caſes where the court has made a great ſtretch to give children intereſt on legacies, particularly *Acherley* v. *Vernon*, 1 *P. Wms.* 783. but that went upon particular circumſtances. Therefore, I am of opinion ſhe can have no more intereſt than the maintenance in the mean time.

A legacy was given to an infant, the teſtator having a great deal of money in bank ſtock. The executor was reſiduary legatee. A bill was brought in the Exchequer for the legacy. And the queſtion was, Whether it ſhould bear intereſt, and from what time? Chief Baron *Pengelly* and Baron *Hale*; it is a certain rule, that where a fund is certain, as where charged on land, it ſhall bear intereſt, becauſe it plainly appears the rents are received: ſo, the fund on which it is charged produces a profit here, it is equally certain, and therefore ſhould bear intereſt, and ſhould be from the teſtator's death. But this was oppoſed by *Carter* and *Comyns*, Barons, that it ſhould only bear intereſt from a year after the teſtator's death; for as legacies are to be paid after debts, the executor has that time to inquire, till which time they are not payable, ſo not to bear intereſt: which was agreed. A difference was offered to be made, that as there was a legacy to an infant, it could not be ſafely paid, and therefore could not bear intereſt. To which it was anſwered by the Chief Baron, that it might be ſafely paid into the hands of an infant, having proper evidence of the payment, as in *Wentworth's Executor*, 313. And by *Carter*; it may be paid into the hands of the guardian, having evidence; but if he takes ſecurity from the guardian which ſhould prove defective, there, as he doth not rely on the ſecurity the law gives, he muſt depend on that taken at his peril.

Bilſon v. Sanders, Bunb. 240. Sel. Ca. in Chan. 72.

The grandfather of the plaintiff, by will, after directing his debts and legacies to be paid, gives all the reſt and reſidue of his perſonal eſtate to his grandſon the plaintiff at his age of 21, and if he die before that age, then to the defendant *Freeman*, whom he makes his executor. The plaintiff brought his bill for the intereſt of the reſidue, to be paid to him during his infancy. The defendant *Freeman* by his anſwer inſiſted, that the plaintiff is not entitled to it, unleſs he attains his age of 21: but that it ought to accumulate: and if the plaintiff dies before 21, that it will belong to the defendant equally with the reſidue. The father of the plaintiff inſiſted, that the reſidue muſt be confined to what the teſtator left at the time of his death, and that the intereſt made after his death ought to be conſidered as an undiſpoſed part, and go to him as next of kin to the teſtator, according to the ſtatute of diſtribution: or if the court ſhould be againſt him in this point, that then he is entitled to receive it for the maintenance of the plaintiff. By the Lord Chancellour *Hardwicke*: I am of opinion, that the plaintiff is not entitled to the intereſt that ariſes from this reſidue; and though the words *reſt and reſidue* muſt be confined to what ſhall be found at the death of the teſtator, after his debts, funeral expences, and legacies are paid, yet, that the intereſt ought to accumulate till the plaintiff arrives at his age of 21, and as often as it

Butler v. Freeman, 3 Atk. 58.

amounts to a competent ſum to be placed out by a truſtee appointed by the Maſter. I am not quite ſo clear how the intereſt would go, if the accident ſhould happen of the plaintiff's dying before 21, whether to the repreſentative of the plaintiff, or to the defendant *Freeman*; but that is not neceſſary to be inquired into at this time. As to the father's claim, I am of opinion he has no right to the intereſt, becauſe the teſtator has given *all the reſt and reſidue* of his perſonal eſtate, ſo that he cannot be ſaid to have left any part undiſpoſed, and conſequently can have no title to it as next of kin under the ſtatute of diſtribution. For as the deviſe of the reſidue is contingent, it not veſting till the grandſon's age of 21, the intereſt is ſo likewiſe, and muſt accumulate in the mean time; nor can the father by the rules of this court entitle himſelf to it as maintenance for the infant, becauſe it is given by a grandfather to a grandſon upon a contingency of attaining his age of 21; and as nothing is ſaid how the produce of it ſhall be applied, he is not entitled as a grandſon to be maintained out of the produce. The law of nature obliges only fathers to maintain their children; and unleſs the child, from the mean circumſtances of the parent, is in danger of periſhing for want, the court will not direct the intereſt that ſhall be made of a contingent legacy to be applied for that purpoſe: ſo, that unleſs the parent is totally incapable, or under particular circumſtances, as having a numerous family of children, and is bordering upon neceſſity, the law of the land and of nature make it incumbent on the parent to maintain his child. In the caſe of *Acherley* and *Vernon*, 1 *P. Will.* 783, where the teſtator Mr. *Vernon* had left 6000*l.* to the plaintiff his niece, to be paid to her at her age of 21, and ſhe inſiſted that the intereſt of this money ought to be allowed for her maintenance; Lord *Macclesfield* was of opinion, that the intereſt in that caſe ought to follow the principal, for it was a veſted legacy, and payable at 21. But, there, it was a ſum of money ſeparated and detached from the reſt of the eſtate, and a veſted legacy; here, it is a contingent one, and not a ſpecifick ſum, but of the reſidue of his perſonal eſtates, which makes a difference between the caſes; and the father likewiſe in the preſent caſe is poſſeſſed of a good eſtate and in conſiderable circumſtances. Therefore his Lordſhip decreed the intereſt which has ariſen upon the reſidue of the teſtator's perſonal eſtate ſince his death, or which may ariſe, to be paid into the hands of a truſtee, to be laid out in real or government ſecurities as often as it ſhall amount to a competent ſum.

Heath v. Perry, 3 Atk. 101.

The teſtator by his will gave 1000*l.* a-piece to five brothers and ſiſters (but who were no relations to him), to be paid to them at their reſpective ages of 21, in caſe they ſhould reſpectively attain that age, and not otherwiſe; and if any of them ſhould happen to die before they attain their reſpective ages of 21, that then and in ſuch caſe the legacy or legacies of 1000*l.* ſo given to them reſpectively ſhould be void. The legatees brought a bill for intereſt on their legacies. By Lord *Hardwicke:* Caſes of this kind, how far a legatee, who is not entitled to the payment of the legacy immediately, ſhall have intereſt in the mean time, depend upon particular

cular circumſtances. Some upon relationſhip, ſome upon the neceſſities of legatees, and moſt of them upon the particular penning of wills; and there is hardly one caſe which can be cited that is a precedent for another. Some things are certain in theſe caſes; for if a legacy is given generally at marriage, or at 21, then the veſting and time of payment are the ſame, and ſhall not veſt till marriage, or 21. To go one ſtep further, where a legacy is actually veſted, as if given to an infant payable at 21, yet it ſhall not carry intereſt, unleſs ſomething is ſaid in the will that ſhews the teſtator's intention to give intereſt in the mean time. But all theſe caſes are ſubject to this exception, if it is in the caſe of a child; for then let a teſtator give it how he will, either at 21, or at marriage, or payable at 21, or payable at marriage, and the child has no other proviſion, the court will give intereſt by way of maintenance, for they will not preſume the father ſo unnatural as to leave a child deſtitute. But in the preſent caſe, the legatees are mere ſtrangers to the teſtator; and nothing ſhall be taken out of the eſtate for their benefit during their nonage.

It hath been reſolved, that if one gives a legacy charged upon land which yields rents and profits, and there is no time of payment mentioned in the will, the legacy ſhall carry intereſt from the teſtator's death, becauſe the land yields profit from that time. 2 P. Wms. 26.

But if a legacy be given out of a perſonal eſtate, and no time of payment mentioned in the will, this legacy ſhall carry intereſt only from the end of the year after the death of the teſtator. So, Loyd v. Williams, 2 Atk. 108.

If a legacy be given generally by a parent to a child, whether by way of portion or not, the court will give intereſt from the death to create a proviſion for its maintenance; and if payable at a certain age, and the child not otherwiſe provided for, the court will give intereſt in the mean time before that age. 1 Vez. 310.

If a legacy be given charged upon a dry reverſion, here, it ſhall carry intereſt only from a year after the death of the teſtator, a year being a convenient time for a ſale.

If a legacy be given out of a perſonal eſtate, conſiſting of mortgages carrying intereſt, or of ſtocks yielding profits half-yearly, it ſeems, in this caſe, the legacy ſhall carry intereſt from the death of the teſtator.

If a legacy be brought into court, and the legatee have notice of it, ſo that it is his fault not to pray to have the money, or that the money ſhould be put out, the legatee, in ſuch caſe, ſhall loſe the intereſt from the time the money was brought into court; but if the money was put out, the legatee ſhall have the intereſt which the money ſo put out did yield.

As to the *quantum* of intereſt, the determinations have been various: in the caſe of *Guillam* and *Holland*, Lord *Hardwicke* ſaid, where a portion is charged upon land, and the will doth not mention intereſt, the court will not give any more than 4 *per cent.* though the legal intereſt is 5 *per cent.*; and this rule hath alſo been extended to the caſes of legacies and portions charged upon perſonal eſtate. 2 Atk. 343.

In the caſe of *Incledon* and *Northcote*, Lord *Hardwicke* ſaid at firſt, as no more had been allowed for many years than 4 *per cent.* intereſt to children for maintenance, he did not care to break through the rule: but afterwards, in conſideration of the intereſt 3 Atk. 438.

of money being altered lately, mortgages being then at four and a half, and ſeveral at five *per cent.* he ordered the children ſhould have four and a half *per cent.* intereſt.

1 Vez. 171. In *Bryant* and *Speke*, Lord *Hardwicke* ſaid, the general rule is, that legacies out of real eſtate carry one *per cent.* lower than legal intereſt; but if out of perſonal, becauſe of the higher intereſt of money than land, they ſhall carry the legal intereſt, unleſs particular circumſtances induce the court to vary therefrom. And this, he ſaid, was in conformity to the eccleſiaſtical court, which gives legal intereſt upon legacies out of perſonal eſtate.

1 Vez. 308 (*a*) This diſtinction is now at an end. Whether the legacies are charged upon real or perſonal eſtate; it is now become the eſtabliſhed practice to allow only 4 *per cent.*— And note, although pecuniary legacies, not having the addition of the word ſterling, are to be paid according to the currency of the country, where the will was made, yet intereſt thereon is to be computed according to the courſe of the court, at 4 *per cent.*, and not according to the rate of intereſt in ſuch country. 2 Br. Ch. Rep. 47. 3 Br. Ch. Rep. 53.

In *Beckford* and *Tobin*, it was ſaid by the Lord Chancellour *Hardwicke*, that in general the court exerciſes as large a diſcretion as to the rate of intereſt upon legacies, where intereſt is not particularly given, as in any caſe; and that it is difficult to reduce it to a certain rule. The moſt general rule hath been, between intereſt of legacies charged on land, and on perſonal eſtate (*a*); and where nothing more, the court has ſaid, that land never produces profit equal to the intereſt of money, and will follow the courſe of things, and give intereſt, where charged on land, one *per cent.* lower than the legal intereſt. So, it was when the legal intereſt was at ſix; but in general, where a legacy is out of perſonal eſtate, the court gives five; and unleſs that is taken to be a ſort of rule, there will be no diſtinction between them.——Nevertheleſs, in the preſent caſe, the fund out of which the intereſt was to ariſe yielding no more than four, the court allowed but four *per cent.*

Ferrers v. Ferrers, Ca. temp. Talb. 2.

The Counteſs Dowager of *Ferrers* was, by ſettlement and will of her late huſband Earl *Robert*, entitled to a jointure eſtate of 1000*l.* a-year, but was kept out of poſſeſſion by Earl *Waſhington*, the ſon of Earl *Robert* by a former venter; and inſiſted upon the arrears, and intereſt, from the time of her huſband's death; comparing it to the caſe of arrears of an annuity, or rent-charge, which are decreed to be paid with intereſt. By *Talbot*, Lord Chancellour— The arrears of an annuity or rent-charge are never decreed to be paid with intereſt, but where the ſum is certain and fixed; and alſo where there is either a clauſe of entry, or *nomine pœnæ*, or ſome penalty upon the grantor which he muſt undergo, if the grantee ſued at law; and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms, and thoſe can be no other but decreeing the grantor to pay the arrears, with intereſt for the time, during which the payment was withheld: but intereſt for the rents and profits of an eſtate was never decreed yet, the ſame being entirely uncertain. And though it may be ſaid, that the lady is entitled to an eſtate of 1000*l.* a-year, yet that is not ſufficiently certain; being only a perception of the profits of an eſtate, which are not to be paid at any one certain time, but only as the tenants of the land bring them in, ſome at one time, ſome at another.

A legacy

A legacy was made payable at the age of 21 years. The legatee by his guardian brought a bill againſt the executor for maintenance, ſuggeſting that he had none. The executor demurred; for that the plaintiff was under age, and the legacy was not payable till 21, and therefore no cauſe of ſuit. But the demurrer was over-ruled. Renneſey v. Parrot, 1 Ch. Ca. 60.

The teſtator being ſeiſed of a real eſtate, and poſſeſſed of a perſonal eſtate, and having ſeveral children, deviſeth all his real and perſonal eſtate to his eldeſt ſon, charging the ſame with 1000*l.* a-piece to all his younger children, payable at their reſpective ages of 21; but in the will no notice is taken of maintenance for the younger children in the mean time. The younger children bring their bill, in order to recover intereſt, or ſome maintenance during their infancy. Upon which, the Maſter of the Rolls decreed, that the younger children ſhould recover maintenance. He obſerved, that theſe being veſted legacies, and no deviſe over, it would be extremely hard that the children ſhould ſtarve, when entitled to ſo conſiderable legacies, for the ſake of their executors or adminiſtrators, who in the caſe of their deaths would have the ſaid legacies: that in this caſe, the court would do, what in common preſumption the father (if living) would and ought to have done, which was, to provide neceſſaries for his children: that a court of equity would make hard ſhifts for the proviſion of children; as where younger children were left deſtitute, and the eldeſt an infant, equity would make ſuch a liberal allowance to the guardian of the eldeſt, as that he might thereout be enabled to maintain all the children; and for the ſame reaſon the court would likewiſe take a latitude in this caſe; that ſince intereſt was pretty much in the breaſt of the court, though the will were ſilent with regard to that, yet it ſhould be preſumed that the father, who gave theſe legacies, intended they ſhould carry intereſt, if the eſtate would bear it; for every one muſt ſuppoſe it to have been the intention of the father, that his children ſhould not want bread during their infancy: that for this reaſon it had been held, that though a legacy were deviſed over in caſe of the legatee's dying before 21, yet the infant legatee ought to have intereſt allowed him during his infancy, in order for his maintenance; with this difference only, that where the eſtate has appeared to be ſmall, the court, in whoſe diſcretion it always lies to determine the quantum of intereſt, has ordered the lower intereſt: and it ſeemeth, that if one, not a parent, gives a legacy to an infant, payable at 21, without any deviſe over, and the infant has nothing elſe to ſubſiſt on; the court will order part of this legacy, in order to provide bread for the infant, to be paid preſently, allowing intereſt for the ſame to the perſon paying it, out of the remaining principal; though this is done very ſparingly. Harvey v. Harvey, 2 P. Wms. 21.

Upon a bill for 100*l.* legacy given to a child, the defendant inſiſted upon an allowance of 16*l.* a-year, for keeping the legatee at ſchool. It was objected, that only the bare intereſt of the money ought to have been expended in his education, and not to have ſunk the principal, as in this caſe the defendant had done. But the Lord Keeper thought it fit and reaſonable to be allowed; and ſaid, the money laid out in the child's education was moſt advan- Barlow v. Grant, 1 Vern. 255.

advantageous and beneficial for the infant, and therefore he ſhould make no ſcruple of breaking into the principal, where ſo ſmall a ſum was deviſed, that the intereſt thereof would not ſuffice to give the legatee a competent maintenance and education; but in caſe of a legacy of 1000*l.* or the like, there it might be reaſonable to reſtrain the maintenance to the intereſt of the money.

1 Ch. Ca. Leech v. Leech, H. 26 & 27 C. 2. Prec. Ch. 195.

But if the legacy is deviſed over, it ſeemeth to be otherwiſe; and that the court in ſuch caſe will not diminiſh the principal, but only allow the intereſt thereof to the firſt legatee, until the time that the legacy ſhall become payable.

Brewin v. Brewin, E. 1702.

3 Atk. 399.

Alſo a legacy in the hands of the father given to his children by a relation or other, ſhall not be diminiſhed by the father; becauſe he is obliged to maintain his own children: as in the caſe of *Darley* and *Darley*. A bill was brought by the plaintiff for two legacies of 50*l.* each, left to himſelf and his ſiſter under the will of their grandfather, and for the intereſt that had been made thereof. The ſiſter's legacy he claims by aſſignment from her. The defendant, being executor to the father, inſiſts he is not obliged to account to the plaintiff for principal or intereſt, one hundred and five pounds being expended for putting him out apprentice, and much more than fifty pounds in the maintenance and clothing of the ſiſter. By the Lord Chancellour *Hardwicke*: where legacies are given to a child by a relation, a father cannot make uſe of ſuch legacy in maintenance of the child, but muſt provide for him out of his own pocket; nor can he ſet him out in the world, or put him out an apprentice, or clerk, with the money ariſing from the legacy; and if he does, he ſhall not be allowed it. And he ordered intereſt to be computed on the legacies given to the plaintiff and his ſiſter, from the time they reſpectively attained their ages of 21, at 5 *per cent.* and that what ſhould be found due for principal and intereſt of theſe legacies be paid by the defendant to the plaintiff, he having admitted aſſets of the father for that purpoſe.

Hughes v. Hughes, 1 Br. Ch. Rep. 386.

T. C. by his will veſted his eſtates in truſtees, to pay certain annuities, and ſubject thereto, to pay the reſt and reſidue of the rents and profits, dividends and intereſts, for and towards the maintenance and education of all and every the child and children of his three daughters, (excepting ſuch of his grandſons as ſhould be in poſſeſſion of real eſtates before deviſed,) ſhare and ſhare alike, until the youngeſt of his ſaid grandchildren ſhould attain his or her age of 21 years; and in caſe of the death of any of his grandchildren (before the youngeſt ſhould have attained the age of 21 years) who ſhould have married, and have iſſue, the child or children ſhould be entitled to the ſhare of the parent ſo dying. Upon the hearing of the cauſe, Lord Chancellour refuſed to direct the Maſter to conſider of a proper allowance for the maintenance of the younger children of the teſtator's daughters; holding the reſidue of the rents, *&c.* to be an accumulating fund for the benefit of the children, and to be paid to them, when the eſtate became diviſible; and that, until it appeared that the parents were incapable of maintaining the children, he could not order any part of the rents, *&c.* of the eſtates to be ſo applied.

It

It was afterwards moved, on the part of the defendants, that the minutes of the decree ſhould be amended by inſerting a reference to the Maſter to conſider of a proper allowance to the parents for the maintenance of the children. It was ſtated that *J. S.* the huſband of one of the daughters, had by her ſeven children, whom, though without allowance, he might ſupport agreeably to his own rank, he could not in proportion to the additional fortunes derived from the teſtator. That the rule was, that wherever a maintenance was given by the will, the child ſhould have it, and a caſe was cited, where the direction was, that a ſum for maintenance ſhould be paid to the father; and Lord *Thurlowe* ordered a future maintenance to be allowed, and upon further application, ordered a ſum to be paid for the maintenance of the children, prior to the firſt application. The Lord Chancellour ſaid, the practice was, to refer it to the Maſter to inquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance; and this practice did not vary where a maintenance was directly given by the will, unleſs in caſes where it was given to the father, under which circumſtances it was a legacy to him. His Lordſhip therefore referred it to the Maſter to inquire into the ability of the parents to maintain the children: and afterwards, upon petition, ſums were ordered to be allowed for the purpoſe to *J. S.*, who was reported not of ability to maintain his children. But, although the Maſter made the allowance from the date of the decree, the Lord Chancellour ordered it to the date of the report.

A grandfather, having given ſeveral legacies, bequeathed the reſidue to his grandchildren at 21, and the produce, in the meanwhile, to truſtees for their maintenance, and appointed four truſtees, of whom the father was one. *J. S.*, one of the truſtees, had expended 400 *l.* in the maintenance of the children, previous to any report as to the ability of the parent to maintain them. The queſtion was, Whether he ſhould be allowed the ſum ſo advanced, and, whether any maintenance ſhould be allowed the children before the report? For the truſtees, it was inſiſted, that the words of the will were imperative upon the truſtees to allow a maintenance, and that this had been done in the caſe of *Fitzgerald* v. *Carey*, *Mich.* 1770. Lord Chancellour ſaid, although where there has been a bigotted father, who would not educate the child in the proteſtant religion, the allowance has been made to the truſtees, it was contrary to all rules, that the intereſt, veſted in the children, ſhould be applied to their maintenance in the lifetime of the parent: that this would amount to a gift to the parent of ſo much as ſhould be neceſſary for the maintenance, and the father being a truſtee can make no difference. He therefore ordered the reference to be only as to the ability of the parent, and what would be neceſſary for the future maintenance of the children. But afterwards, by conſent of the children in *England* and adult, their proportions were ordered to be paid.

Andrews v. Partington, 3 Br. Ch. Rep. 60.

Lord *Clive* deviſed a ſpecifick landed eſtate to truſtees for a term of years, with remainder to his ſon *Robert* (his ſecond ſon) for

Clive v. Walſh, 1 Br. Ch. Rep. 146.

for life, with remainders over. The truſts of the term were, to raiſe a maintenance till 21, then to pay him an annuity of 1000 *l.* till he ſhould attain the age of 25 years, when the eſtate was to veſt in poſſeſſion, and to apply the ſavings, to form a perſonal fund for other purpoſes. He then gave his perſonal eſtate to truſtees; he gave to *Robert* and each of his younger ſons 30,000 *l.*, and to each of his daughters 20,000 *l.*, at 25; in the meanwhile to raiſe maintenances till 21, and from thence to pay 1200 *l. per annum* to the boys till 25. Lady *Clive* filed a bill to have the two allowances for the ſecond ſon during his minority. Lord Chancellour—There is not ſufficient in the will to extract any thing from it, but what is expreſſed. The truſt of the term is to raiſe maintenances, but there is a further intent to take the profits till 25, and convert them into a perſonal fund for other purpoſes, and to provide an annuity till that age. The perſonal eſtate is to be laid out in good ſecurities, and out of it he provides 30,000 *l.* for *Robert*, he having then no other younger ſon: no intereſt is to be allowed, but a maintenance; ſo that *Robert* is, as to that maintenance, in contemplation, as well as the other younger ſons. The argument that he ſhall not have this, becauſe he has another proviſion, would apply equally to the annuities from 21 till 25, and no one could ſay he was not to have the two annuities. He has given more by way of maintenance to the ſon, to whom he has given a larger eſtate. It muſt be referred to the Maſter, what allowance ſhould be made, and the reſt muſt accumulate for the uſe of *Robert*.

(L) Of the Executor's Aſſent to a Legacy.

Godolph. Orph. Leg. 148. Off. Ex. 27. (*a*) And therefore, if a legatee takes poſſeſſion of the thing deviſed, without the aſſent of the executor, he may have an action of treſpaſs againſt him. Dyer, 254. Keilw. 118.

ALthough the teſtator diſpoſes of goods and chattels, and ſums of money, to legatees, yet they all paſs to the executor, and he has them in nature of a truſtee, and he alone has a (*a*) title in law to them, and nothing paſſes to the legatee, nor can any legatee take any thing to him deviſed without the executor's aſſent; for were it otherwiſe, it might be in the power of a legatee to ſubject an executor to a *devaſtavit*, which would diſcourage all perſons from taking upon them the office of an executor.

Off. Ex. 29. Godolph. 148. Plow. 525. (*b*) And is like an attornment of a tenant to the grant of a reverſion. March, 137.—And therefore a ſmall matter will amount to an aſſent. Vern. 90. 460. 2 Vent. 358. —And which the legatee may compel the executor to do in the ſpiritual court. March, 127.

But this matter of aſſent is only (*b*) a perfecting act for the ſecurity of the executor, for it is the will of the teſtator which gives the intereſt to the legatee, and therefore the law does not require any exact form in which it is to be made. Hence any expreſſion or act done by the executor, which ſhews his concurrence or agreement to the thing deviſed, will amount to an aſſent.

As,

As, if the executor ſays to the legatee, *I wiſh you joy of the thing deviſed to you*, or *I am content that you have it according to the will*; or, if one offers the executor money, or ſeems willing to purchaſe a horſe, &c. deviſed to *J. S.*, and the executor directs him to the legatee; or, if the executor himſelf offers the legatee money for the horſe, &c. theſe and the like acts amount to an aſſent. Plow. 53. 5 Co. 29. 4 Co. 18. March, 138.

Hence it hath been held, that if a ſpecifick legacy be deviſed, as three gowns, &c., and the legatee take money in ſatisfaction of them, that this amounts, firſt to a conſent of the executor to the legacy, or deviſe of them, and then it is a ſale of them by the legatee or deviſee to the executor for the money *eo inſtanti*. Hill. 5 Ann. Beckett and Ball.

And as an aſſent is but a perfecting act, the executor cannot, after he has once given it, revoke the ſame; neither can it be given on (*a*) condition, or on any limitation or reſtriction whatſoever. March, 136. Cro. Jac. 614, 615. 2 Vent. 360.

(*a*) If the executor deliver to the legatee the goods bequeathed to him, to re-deliver them to him again at ſuch a day, this is a good aſſent, and the words of re-delivery are void. Leon. 130, 131.

If *A.* deviſe a term to *B.* for life, remainder to *C.*, and the executor aſſent to the deviſe to *B.*, this will amount to an aſſent to the deviſe over to *C.*, and veſt the intereſt in him accordingly. March, 136. 8 Co. 96.

If one is himſelf both executor and deviſee, and he enters generally, without claim or demonſtration of election, he ſhall have the thing deviſed as executor, which is the firſt and general authority, unleſs he elects to take it as deviſee. 10 Co. 47. Plow. 520. Dyer, 367. Cro. Eliz. 223. 2 Co. 37.

As, where a man, poſſeſſed of a long term for years, deviſed it to his wife for life, remainder to truſtees for his ſon's life, &c. and made his wife executrix; it was held, that the wife took the term wholly as executrix, in the firſt place, till ſhe agreed to the deviſe; but it being proved that ſhe ſaid, *ſhe would take the term according to the will*, it was held by the court to be a ſufficient aſſent. Lev. 25. Garret and Liſter.

So in a like caſe, where the wife ſaid, *that the ſon was to have the eſtate after her*, and this was reſolved to be a ſufficient aſſent. Lev. 25.

An executor may aſſent before probate of the will, and if there be two or more executors, the aſſent of any one of them will be ſufficient: alſo, it is ſaid, that an infant executor may aſſent, eſpecially, if he be above the age of 17 years. 5 Co. 29. Cro. Eliz. 602. March, 136. &c. & *vide* tit. Executors and Adminiſtrators.

If a man deviſe a term to a child *in ventre ſa mere*, provided it be a ſon, and if not a ſon, to *J. S.*, and the child happen to be a daughter, though the executor aſſents, yet the daughter cannot take, becauſe here is a condition precedent that never happened, and the executor's aſſent is not material where there is no deviſe. Comb. 437. 8. Eſtwart v. Warry, adjudged on a ſpecial verdict.

(M) Legacies, in what Court, and how properly recoverable.

Vide tit. Juriſdiction of the Courts Eccleſiaſtical, and tit. Executors and Adminiſtrators.

IT is clearly agreed, that the eccleſiaſtical court having juriſdiction over all teſtamentary matters, they have, as incident thereto, conuſance of legacies, and that it is the only proper court where legacies are to be ſued for and recovered, except in thoſe caſes where the courts of equity claim a concurrent juriſdiction with them.

Dyer, 151. Palm. 120. Cro. Jac. 279. 364. Cro. Car. 16. 2 Roll. Abr. 285. 2 Show. 50. pl. 36.

But this juriſdiction is confined to gifts of goods and chattels; and therefore if a man, by will, gives lands to be ſold for payment of debts or legacies, theſe legacies cannot be ſued for in the eccleſiaſtical courts, but only in a court of equity; becauſe it is not a legacy merely of goods and chattels, but ariſes originally out of lands and tenements.

Cro. Jac. 279. Brown. 34. Bulſ. 153. Sid. 279. Lev. 179. 2 Keb. 8.

But if a rent be deviſed out of a term for years, the eccleſiaſtical courts may hold plea thereof; for the term for years being only a chattel, is teſtamentary, and conſequently the rent deviſed thereout.

Yelv. 38. Goodwyn and Goodwyn, and a prohibition granted accordingly.

If the legatee takes a bond from the executor for payment of the legacy, and afterwards ſues him in the ſpiritual court for the legacy, a prohibition will be granted; for, by taking the obligation, the nature of the demand is changed, and it becomes a debt or (*a*) duty recoverable in the temporal courts.

(*a*) That by giving a bond for payment of a legacy at a certain day, it thereby becomes a duty, and is not to be conſidered as a legacy. 2 Vern. 31. —— But by Juſtice Dodderidge, an obligation given for payment of a legacy does not totally deſtroy the nature thereof, but the legatee has it ſtill in his election either to ſue for it in the temporal or eccleſiaſtical court. 2 Roll. Rep. 160.

Sid. 45. Raym. 23. [That aſſumpſit will lie for a legacy upon a promiſe

Alſo, though the temporal courts do not directly take conuſance of legacies, ſo as to allow of an action for the recovery of them, yet may the executor make himſelf liable to an action at common law, as by his promiſe of payment; in which caſe an *aſſumpſit* will lie.

by an executor in conſideration of aſſets, was determined in Atkins v. Hill, Cowp. 284. Hawkes v. Saunders, *Id.* 289. But theſe caſes ſeem to be quite overturned by a ſubſequent caſe of Decks v. Strutt, 5 Term Rep. 690. It is true, that in this laſt caſe, it was ſtated that the executor made no expreſs promiſe to pay, whereas in the two former caſes an *actual* promiſe was admitted; yet the arguments of two of the three judges who decided the laſt caſe, proceed upon general grounds, and deny the juriſdiction of the common law courts over the ſubject of legacy, as well where there has been an expreſs, as where only an implied promiſe.]

2 Lev. 3. Vent. 120. S. C. Davies and Reyner. Sel. Caſ. Evid. 59. 11 Mod. 91. pl. 15. See 2 Burn's Eccleſ. Law, 690.

As, where in *aſſumpſit* the plaintiff declared that *J. S.* deviſed a legacy to him, and made the defendant executor, and the plaintiff intending to ſue him for the legacy, the defendant, in conſideration of forbearance, promiſed to pay him; the defendant pleaded divers bonds and judgments, and *nul aſſets ultra;* upon which the plaintiff demurred, and had judgment without argument; for it is not material whether he had aſſets or no, for he is charged upon his own promiſe, in conſideration of forbearance, and a forbearance of ſuit for a legacy is a ſufficient conſideration.

And

And although the ſpiritual court, having juriſdiction of wills and teſtaments, have, as incident thereto, juriſdiction of legacies, yet, if a temporal matter be pleaded in bar of an eccleſiaſtical demand, they muſt proceed in the eccleſiaſtical court according to the common law, otherwiſe they will be prohibited. Roll. Abr. 298, 299. Hob. 12. 12 Co. 65. Hetley, 87. 2 Inſt. 608. Sid. 161.

Therefore, if payment be pleaded in bar of a legacy, and there be but one witneſs, which the eccleſiaſtical court will not admit, becauſe their law requires two witneſſes, there, the temporal courts will prohibit them, becauſe it is a matter temporal that bars the eccleſiaſtical demand. Cro. Eliz. 88. 666. Show. 158. 173. Vent. 291. Richardſon and Deſborow, adjudged. 3 Mod. 283. Ld. Raym. 220. 346. 2 Ld. Raym. 1161. 1172. 1211. 2 Salk. 547. pl. 1. Shotter and Friend, adjudged. Carth. 142. S. C. adjudged.——But it is not ſufficient ground for a prohibition to ſuggeſt that the ſpiritual court objected to the credibility of a witneſs, nor to ſuggeſt that the plaintiff had only one witneſs to prove the fact, unleſs the party allege that he offered ſuch proof, and it was refuſed for inſufficiency. Carth. 143, 144.

It is holden by my Lord Chief Juſtice *Holt*, that a deviſee may maintain an action at common law againſt a tertenant for a legacy deviſed out of land; for where a ſtatute, as the ſtatute of wills, gives a right, the party, by conſequence, ſhall have an action at law to recover it. 2 Salk. 415. pl. 1. 6 Mod. 26. S. P. *per* Holt, and 279. S. P. *per* Twiſden, Juſtice. 2 Ld. Raym. 937.

[But the uſual remedy in ſuch like caſes is in equity. 3 Salk. 223.

It is ſaid, that where the eccleſiaſtical court, and a court of equity have a concurrent juriſdiction, whichever is firſt poſſeſſed of the cauſe has a right to proceed; and the ſame of all other courts. Toth. 114. Pr. Ch. 548. 2 Atk. 420. However, where the huſband hath ſued in the ſpiritual court for a legacy given to the wife, the court of Chancery hath granted an injunction to ſtay proceedings; becauſe the ſpiritual court cannot compel him to make a ſettlement upon her.

So, where a perſonal legacy was given to an infant; it was holden, that the ſame is more properly cognizable in Chancery than in the eccleſiaſtical court; and if the matter had proceeded to ſentence in the eccleſiaſtical court, yet it was proper to come into Chancery for the executor's indemnity; for in the Chancery, legatees are to give ſecurity for the money, but not in the ſpiritual court; and the Chancery will ſee the money put out for the children. 1 Vern. 26.

So, where there is a truſt, or any thing in the nature of a truſt, notwithſtanding the eccleſiaſtical court hath an original juriſdiction in legacies, yet the Chancery will grant an injunction to ſtay the proceedings in the eccleſiaſtical court, truſts being properly cognizable only in equity. And an executor being in equity conſidered as a truſtee for the legatee, with reſpect to his legacy; and as truſtee, in certain caſes for the next of kin, as to the undiſpoſed ſurplus; hence the true ground of equitable juriſdiction in theſe caſes. 1 Atk. 491. 1 P. Wms. 575. 541.

So, where a will is ſuppreſſed or deſtroyed, the ſuit for a perſonal legacy may be in equity in the firſt inſtance, without reſorting to the ſpiritual court; otherwiſe it would put the plaintiff 3 Atk. 361.

upon

upon great difficulties: for in the ſpiritual court, the plaintiff muſt prove it a will in writing, and muſt likewiſe prove the contents in the very words, and muſt alſo prove the whole will, though the remainder of it doth not at all belong to, or regard his legacy; which the temporal courts do not put a perſon upon doing. Much more, when the legacy is charged both upon perſonal and real eſtate; for as to the real eſtate, there is no occaſion to reſort to the eccleſiaſtical court at all.

1 Roll. Abr. 919. Legacies may be recovered in the ſpiritual court againſt *an adminiſtrator with the will annexed*, or againſt *an executor of his own wrong*.

1 Ch. Ca. 121. An executor may in ſome caſes be compelled to give ſecurity to pay a legacy; as, where 1000 *l.* were deviſed to a perſon, to be paid at the age of 21 years; upon a bill exhibited againſt the executors, ſuggeſting a *devaſtavit*, and praying that he might give ſecurity to pay the legacy when due, it was decreed accordingly.

Swinb. a. 40. Law of Ex. 187. A teſtator deviſed 800 *l.* to an infant, to be paid by the executor when the infant ſhould attain the age of 21 years. The infant by his guardian exhibited a bill, that the executor might give ſecurity for the payment of the money. It was decreed accordingly.

Pr. Ch. 71. A teſtator bequeaths his perſonal eſtate to his wife for life, and that ſhe ſhould leave at her death to be equally diſtributed between her kindred and his own. If the eſtate be ſo ſmall, that ſhe cannot live upon it without ſpending the ſtock, it ſeems, ſhe ſhall not be obliged to give ſecurity; otherwiſe, ſhe ſhall.

2 Roll. Abr. 285. If a perſon poſſeſſed of a leaſe for years, deviſe that his executor out of the profits thereof ſhall pay to every one of his daughters 20 *l.* at their full age, the executor may be ſued in the ſpiritual court to put in ſurety to pay the legacies, and no prohibition ſhall be granted; for this is to iſſue out of a chattel.

1 Atk. 505. But where 500 *l.* were given to the grand-daughter to be paid at 21, or marriage; and if ſhe died before either of thoſe contingencies happened, then to go over to another; it was ſaid by Lord *Hardwicke*, as the legacy was deviſed over, nothing veſted in the grand-daughter till one of the contingencies ſhould happen; and therefore ſhe was not entitled to have the legacy ſecured.

Strange v. Harris, 3 Br. Ch. Rep. 365. The court of Chancery will now, immediately upon the coming in of the executor's anſwer, order ſo much as he admits to have in his hands of the teſtator's property to be paid into the Bank. It was formerly thought neceſſary for the plaintiff to ſhew that the executor had abuſed his truſt, or that the fund was in danger from the inſolvent circumſtances of the executor.]

Libel.

A Libel is (*a*) defined a malicious defamation, expreſſed either in printing or writing, or by ſigns, pictures, *&c.* tending either to blacken the memory of one who is dead (*b*), or the reputation of one who is alive, and thereby expoſing him to public hatred, contempt, and ridicule. Hawk. P.C. c. 73. § 1. 5 Mod. 165. 12 Mod. 221. Ld. Raym. 418 4 Read. Stat. 149. 155.

(*a*) It is termed *Libellus famoſus ſeu infamatoria ſcriptura*, and from its pernicious tendency has been held a publick offence at the common law; for men not being able to bear the having their errors expoſed to publick view, were found by experience to revenge themſelves on thoſe who made ſport with their reputations; from whence aroſe duels and breaches of the peace; and hence written ſcandal has been held in the greateſt deteſtation, and has received the utmoſt diſcouragement in the courts of juſtice. Lamb. Sax. Law, 64. Bract. lib. 3. c. 36. 3 Inſt. 174. 5 Co. 125. [2 Stra. 791. (*b*) But an indictment for a libel reflecting on the memory of a deceaſed perſon cannot be ſupported, unleſs it ſtate that it was done with a deſign to bring contempt on his family, or to ſtir up the hatred of the king's ſubjects againſt his relations, and to induce them to break the peace in vindicating the honour of the family. Rex v. Topham, 4 Term Rep. 126.]

But for the better underſtanding the nature of this offence, I ſhall conſider,

(A) What ſhall be ſaid a Libel: And herein,

1. How far it is neceſſary that it ſhould be in Writing.
2. What Degree of Defamation will amount to a Libel.
3. What Certainty in the Matter and Application will make it a Libel.
4. Whether any Proceedings in a Court of Juſtice will amount to a Libel.
5. Whether any Thing of this Kind can be juſtified.

(B) Who ſhall be ſaid a Libeller: And herein,

1. Who ſhall be ſaid the Author or Compoſer of a Libel.
2. Who the Publiſher.

(C) The Offenders how puniſhed.

(A) What ſhall be ſaid a Libel: And herein,

1. How far it is neceſſary that it ſhould be in Writing.

THIS ſpecies of defamation is uſually termed *written ſcandal*, and hereby receives an aggravation, in that it is preſumed to have been entered upon with coolneſs and deliberation, and to continue 5 Co. 125. Ld. Raym. 416. 12 Mod. 2193.

continue longer, and propagate wider and farther than any other ſcandal.

5 Co. 125. Skin 123. pl. 2. Raym. 431. 3 Keb. 378.

But it is clearly agreed, that not only written or printed ſcandal comes within the notion of a libel, but it may be alſo applied to any defamation whatſoever, expreſſed either by ſigns or pictures; as, by fixing up a gallows at a man's door, or elſewhere; or by painting him in a ſhameful and ignominious manner, as, by expoſing a man and his wife by a ſkimmington or riding, though a ſpecial cuſtom is alleged for ſuch practice.

Hawk. P.C. c. 73. § 3.

And ſince the chief cauſe for which the law ſo ſeverely puniſhes all offences of this nature, is the direct tendency of them to a breach of the publick peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would be impoſſible to reſtrain by the ſevereſt laws, were there no redreſs from publick juſtice for injuries of this kind, which, of all others, are moſt ſenſibly felt; and ſince the plain meaning of ſuch ſcandal, as is expreſſed by ſigns or pictures, is as obvious to common ſenſe, and as eaſily underſtood by every common capacity, and altogether as provoking, as that which is expreſſed by writing or printing, why ſhould it not be equally criminal?

2. What Degree of Defamation will amount to a Libel.

5 Co. 125. Keb. 293. Moor, 627. Roll. Abr. 37.

As every perſon deſires to appear agreeable in life, and muſt be highly provoked by ſuch ridiculous repreſentations of him, as tend to leſſen him in the eſteem of the world, and take away his reputation, which, to ſome men, is more dear than life itſelf: hence it hath been held, that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but alſo ſuch as ſet him in a ſcurrilous, ignominious light (*a*); for theſe equally create ill blood, and provoke the parties to acts of revenge, and breaches of the peace.

[(*a*) As, that he hath the itch, and ſtinks of brimſtone. Villers v. Manſley, 2 Wilſ. 403. So, where the mayor of Northampton ſent the Lord Halifax a licence for keeping a publick-houſe. 1 Str. 422.]

Hard. 470. Skin. 123. pl. 2. [2 Wilſ. 403.]

Hence it hath been held, that words, though not ſcandalous in themſelves, yet if publiſhed in writing, and tending in any degree to the diſcredit of a man, are libellous, whether ſuch words defame private perſons only, or perſons employed in a publick capacity, in which latter caſe they are ſaid to receive an aggravation, as they tend to ſcandalize the government, by reflecting on thoſe who are intruſted with the adminiſtration of publick affairs, which doth not only endanger the publick peace, as all other libels do, by ſtirring up the parties immediately concerned in it to acts of revenge, but alſo have a direct tendency to breed in the people a diſlike of their governors, and incline them to faction and ſedition.

5 Co. 125. 2 Roll. Rep. 86. Hawk. P.C. c. 73. § 7.

Bid. 219. pl. 4. Keb. 773. pl. 8. The King v. Py.

As, where a perſon delivered a ticket up to the miniſter after ſermon, wherein he deſired him to take notice, that offences paſſed now without control from the civil magiſtrate, and to quicken the civil magiſtrate to do his duty, &c. this was held to be a libel, though no magiſtrates in particular were mentioned, and though

though it was not averred that the magiſtrates ſuffered thoſe vices knowingly.

A., a gunſmith, publiſhed an advertiſement in a common newſpaper, that he had invented a ſhort kind of gun, that ſhot as far as others of a longer ſize, and that he was made gunſmith to the Prince of *Wales;* and *B.*, another gunſmith, counter-advertiſed, *That whereas*, &c. reciting the former paragraph, *he deſired all gentlemen to be cautious, for that the ſaid* A. *durſt not engage with any artiſt in town, nor ever did make ſuch an experiment, except out of a leather gun, as any gentleman might be ſatisfied at the* Croſs-Guns *in* Long-Acre, *the ſaid* B.*'s houſe.* And the court held, that though *B.* or any other of the trade might counter-advertiſe what was publiſhed of *A.*, yet that that ſhould have been done without any general reflections on him in the way of his buſineſs; that the advice to *all gentlemen to be cautious*, was a reflection on his honeſty, as if he would deceive the world by a fictitious advertiſement, and the allegation that he would not engage with an artiſt, was ſetting him below the reſt of his trade, and calling him a bungler in general terms, and not relative to the precedent matter; and that the words, *except out of a leather gun*, was charging him with a lie, the word *gun* being vulgarly uſed for a lie, and *gunner* for a liar; and that therefore theſe words were libellous, and gave judgment accordingly; and herein the court held, that words, though not ſcandalous in themſelves, yet being publiſhed in writing, and tending any way to the party's diſcredit, were actionable; and that all words were to be conſtrued *ſecundum ſubjectam materiam*, and to be underſtood by the court in the ſame ſenſe that others do.

Paſch. 4 Geo. 2. in B. R. Harman v. Delaney. Barnard. K. B. 289. Fitzgib. 121. 2 Stra. 898. S. C.

[An order was made by a corporation, and entered in their books, ſtating that *A. B.* (againſt whom a jury had found a verdict with large damages, in an action for a malicious proſecution for perjury, which verdict had been confirmed in *C. B.*) was actuated by motives of publick juſtice, *&c.* in preferring the indictment. This was adjudged to be a libel reflecting on the adminiſtration of juſtice, for which an information was granted againſt the members who made the order.]

Rex v. Watſon, 2 Term Rep. 199.

But though every ſpecies and degree of calumny and detraction of this kind are deemed odious in the eye of the law, and puniſhable either by civil action or criminal proſecution, in moſt caſes, at the election of the party injured; yet the court of King's Bench, whoſe juriſdiction herein is founded upon the neceſſity of preventing quarrels and ill blood, and which deals with this offence as of dangerous conſequence to, and deſtructive of, the peace of the nation, always exerciſes a diſcretionary power in granting an information for an offence of this nature, and will, in many caſes, leave the party to his ordinary remedy; as, where the application is made (*a*) after a great length of time: ſo (*b*), where the matter complained of as a libel happens to be true: ſo (*c*), where the granting the information would be a diſcouragement to learned inquiries; or, (*d*) where the matter complained of was intended for reformation, not defamation.

(*a*) As, in the caſe of the King v. Knight, Trin. 9 G. 2. in B. R. where the party, after two terms, three ſeſſions, and one aſſizes, applied, the court refuſed to grant an information; though it was agreed, had the application been recent, an information would have been granted. (*b*) As, in the caſe of an apothecary, who perſonated

ated Dr. Crow, wrote in his name, and took a fee, which being publiſhed in a publick advertiſement, a motion was made for an information againſt the publiſher; but the truth of what was advertiſed being made out, the court left the proſecutor to his ordinary remedy. Hil. 1 G. 1. The King v. Bickerſton. Str. 498. Andr. 290. Barnard. K. B. 13. [Where the libel contains pointed charges, which, if falſe, may be denied by the party complaining, an information will not be granted, unleſs the party complaining denies ſuch pointed charges on oath. Rex v. Miles, Dougl. 284. Rex v. Haſwell, *Id.* 387. But an exculpatory affidavit is not neceſſary, where the party libelled is abroad, at a great diſtance, or the ſubject-matter of the charge is general imputation, or an accuſation of criminal language holden in parliament. See the laſt caſe.] (*c*) As, for the publiſhing in a newſpaper, that Ward's pill and drop had done great miſchief in twelve different caſes, and that they were a compound of poiſon and antimony, &c. 8 G. 2. The King v. Roberts. (*d*) As, where a perſon in a private letter to the party expoſtulates with him about ſome vices, of which he apprehends him guilty, and deſires him to refrain from them; or where a perſon ſends ſuch letter to a father, in relation to ſome faults of his children; which are ſaid to be not at all libellous, being acts of friendſhip, not deſigned for defamation, but reformation. 2 Brownl. 151, 152. 2 Burn's Eccleſ. Law, 779. But ſuch matters publiſhed in a newſpaper, though the pretence be reformation, are, it ſeems, libellous, as was agreed 9 G. 2. The King v. Knight.

The King v. Enes, 5 Geo. 2. in B. R. Andr. 229. [Rex v. Maſters, Say. Rep. 122. S. P.]

So, where a man advertiſed in a publick newſpaper, that his wife had eloped from him, and cautioned all perſons from truſting her; an information for a libel being moved for, it was denied, becauſe it was the only way the huſband could take to ſecure himſelf.

The King v. Jenneaur, Paſch. 8 Geo. 2. in B. R.

So, where it was advertiſed in one of the daily papers, that Lady *Mordington* kept an aſſembly in *Moorfields*, and it being counter-advertiſed, by my lord's order, that the perſon calling herſelf Lady *Mordington* was an impoſtrix, and that there was no ſuch perſon, except his wife, who always lived with him; the court refuſed to grant an information; for though ſhe be called an impoſtrix, yet that relates to her as aſſuming the title of Lady *Mordington*, which ſhe is alleged not to have any right to; and therefore, in this reſpect, ſhe may well be called an impoſtrix.

The King v. Bayley, Hil. 8 G. 2. in B. R. Andr. 229.

A writing was directed to General *Wills*, and the four principal officers of the guards, to be preſented to his majeſty for redreſs: the paper contained the defendant's caſe, that he furniſhed the guard at *Whitehall* with fire and candle, for which the government owed him 350 *l.*, that he obtained a warrant for his money, and Captain *Carr* (the proſecutor) told him, that if he would aſſign the warrant, he would procure him the money: the warrant was aſſigned, and the money paid to *Carr*, who refuſed paying it to the defendant: and the queſtion was, if an information ſhould be granted? And the court held it no libel, but a repreſentation of an injury, drawn up in a proper way for redreſs, without any intention to aſperſe the proſecutor; and though there be a ſuggeſtion of a fraud, yet that is no more than what is in every bill in Chancery, which was never held libellous, if relative to the ſubject-matter.

Cro. Jac. 91.

Here it may be proper to inſert the remarkable caſe of Parſon *Prick*, who in a ſermon recited a ſtory out of *Fox's Martyrology*, that one *Greenwood*, being a perjured perſon, and a great perſecutor, had great plagues inflicted on him, and was killed by the hand of God; whereas in truth he was never ſo plagued, and was himſelf preſent at that ſermon; and he thereupon brought his action upon the caſe, for calling him a perjured perſon; and the defendant pleaded not guilty. And this matter being diſcloſed upon the evi-

dence, *Wray*, Chief Juſtice, delivered the law to the jury, that it being delivered but as a ſtory, and not with any malice or intention to ſlander any perſon, he was not guilty of the words maliciouſly, and ſo was found not guilty *.

* *Qu.* If the ſtory was not in the book?

3. What Certainty in the Matter and Application will make it a Libel.

It ſeems to be now agreed, that not only ſcandal expreſſed in an open and direct manner, but alſo ſuch as is expreſſed in allegory and (*a*) irony amounts to a libel; and that the judges are to underſtand it in the ſame manner as others do, without any ſtrained endeavours to find out loop-holes, or to palliate the offence, which in ſome meaſure would be to encourage ſcandal; as where a writing in a taunting manner, reckoning up ſeveral acts of publick charity done by one, ſays, *You will not play the* Jew, *nor the hypocrite*, and ſo goes on, in a ſtrain of ridicule, to inſinuate, that what he did was owing to his vain-glory; or where a writing pretending to recommend to one the characters of ſeveral great men for his imitation, inſtead of taking notice of what they are generally eſteemed famous for, pitched on ſuch qualities as their enemies charge them with the want of; as by propoſing ſuch a one to be imitated for his courage, who is known to be a great ſtateſman, but no ſoldier; and another to be imitated for his learning, who is known to be a great general, but no ſcholar, *&c.* which kind of writing is as well underſtood to mean only to upbraid the parties with the want of theſe qualities, as if it had directly and expreſsly done ſo.

(*a*) 11 Mod. 86. pl. 5. See 4 Read. Stat. Law, 151. Barnard. K. B. 305. 2 Sef. Caſ. 30. 5 Co. 125. That a libel may be as well by deſcriptions and circumlocutions as in expreſs terms. Poph. 252. Hob. 215. Hawk. P.C. c. 73. § 4.

And from the ſame foundation it hath alſo been reſolved, that a defamatory writing expreſſing only one or two letters of a name in ſuch a manner that from what goes before, and follows after, it muſt needs be underſtood * to ſignify ſuch a perſon in the plain, obvious, and natural conſtruction of the whole, and would be perfect nonſenſe if ſtrained to any other meaning, is as properly a libel as if it had expreſſed the whole name at large; for it brings the utmoſt contempt upon the law, to ſuffer its juſtice to be eluded by ſuch trifling evaſions; and it is a ridiculous abſurdity to ſay, that a writing which is underſtood by every the meaneſt capacity, cannot poſſibly be underſtood by a judge and jury.

Hawk. P.C. c. 73. § 5. Hurt's caſe. * And on application for an information, ſome friend to the party complaining ſhould by affidavit ſtate the having read the libel, and underſtanding and believing it to mean the party.

But it is ſaid, that no writing whatſoever is to be eſteemed a libel, unleſs it reflect upon ſome particular perſon; and that a writing full of obſcene ribaldry (*b*), without any kind of reflection on any one, is not puniſhable at all by any proſecution at common law; but the author may be bound to his good behaviour, as a ſcandalous perſon of evil fame.

Hawk. P.C. c. 73. § 9. [(*b*) But this is not law: obſcene books are puniſhable as libels. Rex v. Curl, 2 Str. 788. Rex v. Wilkes, 4 Burr. 2527. So, books reflecting upon chriſtianity. Rex v. Woolſton, 2 Str. 834. Fitzg. 64. So, a treatiſe on hereditary right was holden to be a libel, though it contained no reflection on any part of the then government. Reg. v. Bedford, Gilb. Rep. K. B. 297. 11 St. Tr. 121.]

But a ſcandal publiſhed of three or four, or any one or two of them, is puniſhable, at the complaint of one or more, or all of them.

Poph. 252. 254. [Rex v. Bedingfield, 2 Burr. 984.]

The defendant was charged in an information with writing a libel againſt the Proteſtant religion and biſhops, *innuendo* the biſhops of *England;* he was found guilty; and in arreſt of judgment it was offered, that the biſhops libelled were not *Engliſh* biſhops, nor could the *innuendo* ſupport ſuch conſtruction; but the court took upon them to underſtand the libel in that ſenſe, and over-ruled the exception.

3 Mod. 619. The King v. Baxter. 12 Mod. 139. Ld. Raym. 879.

An information was prayed for publiſhing a paper containing an account of a murder on a *Jewiſh* woman and her child, by certain *Jews* lately arrived from *Portugal*, and living near *Broad-ſtreet*, becauſe the child was begotten by a Chriſtian; and the affidavit ſet forth, that ſeveral perſons mentioned therein, who were recently arrived from *Portugal*, and lived in *Broad-ſtreet*, were attacked by multitudes in ſeveral parts of the city, barbarouſly treated, and threatened with death, in caſe they were found abroad any more: it was objected, that no information could be granted in this caſe, becauſe it did not appear who in particular the perſons reflected on were; and for this was cited *The King* verſus (*a*) *Orme, Trin.* 11 *W.* 3., where an indictment was exhibited for a libel called *The Ladies Invention*, and alleged to be to the ſcandal of ſeveral ladies unknown; and after verdict for the king, judgment was arreſted, becauſe it did not appear who the perſons reflected on were. *Sed per Cur.* Admitting that an information for a libel may be improper, yet the publication of this paper is deſervedly puniſhable in an information for a miſdemeanor, and that of the higheſt kind; ſuch ſort of advertiſements neceſſarily tending to raiſe tumults and diſorders among the people, and inflame them with an univerſal ſpirit of barbarity againſt a whole body of men, as if guilty of crimes ſcarcely practicable, and wholly incredible; and in this caſe was cited the caſe of *The King* and *Franklin*, where, though only the word *Miniſters* was uſed in the libel, yet, by ſuitable averments (*b*) in the information, and proof made of them to the jury, they found thoſe miniſters to be miniſters of ſtate to his preſent majeſty, and the defendant guilty.

The King v. Oſborne, Trin. 5 G. 2. in B. R. Sel. Caſ. 260 2 Barnard. K. B. 138. 166. Kel. 230. pl. 183.

(*a*) 3 Salk. 224. pl. 5. Ld. Raym. 486. Libel ſpelt badly, yet held well 2 Sel. Caſ. 29. pl. 33.

[(*b*) As to the manner of making the averments, ſee Rex v. Horne, Cowp. 672.]

4. Whether any Proceedings in a Court of Juſtice will amount to a Libel.

It ſeems to be clearly agreed, that no proceeding in a regular courſe of juſtice will make the complaint amount to a libel; for it would be a great diſcouragement to ſuitors to ſubject them to publick proſecutions, in reſpect of their applications to a court of juſtice; and the chief intention of the law in prohibiting perſons to revenge themſelves by libels, or any other private manner, is to reſtrain them from endeavouring to make themſelves their own judges, and to oblige them to refer the deciſion of their grievances to thoſe whom the law has appointed to determine them.

Dyer, 285. 2 Inſt. 228. Yelv 117. 2 Bulſ. 269. Godb. 340. Palm. 145. 188. Vent. 23. Hawk. P. C. c. 73. § 8.

Therefore it hath been reſolved, that no falſe or ſcandalous matter contained in (*a*) a petition to a committee of parliament, or in (*b*) articles of the peace exhibited to juſtices of peace, are libellous. (*b*) 4 Co. 14. 1 Hawk. P. C. c. 73. § 8.

(*a*) 1 Lev. 240. Sid. 414. 2 Keb. 832.

[So, where a charge was, that the defendant in a certain affidavit before the court, had ſaid that the plaintiff in a former affidavit againſt the defendant had ſworn falſely; the court held, that this was not libellous; for in every diſpute in a court of juſtice, where one by affidavit charges a thing, and the other denies it, the charges muſt be contradictory, and there muſt be affirmation of falſehood; this therefore being neceſſary in the courſe of legal proceeding, no action will lie for it.] Aſtley v. Younge, 2 Burr. 817.

Alſo, it is held, that no preſentment of a grand jury can be a libel, not only becauſe perſons who are ſuppoſed to be returned without their own ſeeking, and are ſworn to act impartially, ſhall be preſumed to have proper evidence for what they do, but alſo becauſe it would be of the utmoſt ill conſequence any way to diſcourage them from making their inquiries with that freedom and readineſs which the publick good requires. Moor, 627. Hawk. P. C. c. 73. § 8.

Alſo, it is holden by ſome, that no want of juriſdiction in the court to which ſuch a complaint ſhall be exhibited will make it a libel; becauſe the miſtake of the court is not imputable to the party, but his counſel. But herein it is ſaid by *Hawkins*, that if it ſhall manifeſtly appear from the whole circumſtances of the caſe, that a proſecution is entirely falſe, malicious, and groundleſs, and commenced not with a deſign to go through with it, but only to expoſe the defendant's character, under the ſhew of a legal proceeding, there can be no reaſon why ſuch mockery of publick juſtice ſhould not rather aggravate the offence than make it ceaſe to be one, and make ſuch ſcandal a good ground of an indictment at the ſuit of the king, as it makes the malice of their proceeding a good foundation of an action on the caſe at the ſuit of the party, whether the court had a juriſdiction of the cauſe or not. 2 Keb. 832. 4 Co. 14. Hawk. P. C. c. 73. § 8.

5. Whether any Thing of this Kind can be juſtified.

It ſeems to be clearly agreed, that in an indictment or criminal proſecution for a libel the party cannot juſtify that the contents thereof are true, or that the perſon upon whom it is made had a bad reputation; ſince the greater appearance there is of truth in any malicious invective, ſo much the more provoking it is; for, as my Lord *Coke* obſerves, in a ſettled ſtate of government the party grieved ought to complain for every injury done him, in the ordinary courſe of law, and not by any means to revenge himſelf by the odious courſe of libelling or otherwiſe. 5 Co. 125. Hob. 253. Moor, 627. Hawk. P. C. c. 73. § 6.

Alſo, it ſeems now ſettled, that no ſcandal in writing is any more juſtifiable in a civil action brought by the party to vindicate the injury done him, than in an indictment or information at the ſuit of the crown; for though in actions for words, the law, through compaſſion, admits the truth of the charge to be pleaded as a juſtification, yet this tenderneſs of the law is not to be extended The King v. Roberts, Mich. 8 Geo. 2. in B. R. agreed *per Cur.* in a caſe for pub-

liſhing a libel on Mr. Branley, recorder of Warwick. Str. 498. S. P.

tended to written ſcandal, in which the author acts with more coolneſs; and deliberation gives the ſcandal a more durable ſtamp, and propagates it wider and farther; whereas in words men often in a heat and paſſion ſay things which they are afterwards aſhamed of, and though they ſeem to act with deliberation, yet the ſcandal ſooner dies away, and is forgotten; and therefore from the greater degree of miſchief and malice attending the one than the other, though the law allows the party to juſtify in an action for words, yet it doth not for written ſcandal; from whence it follows, that the only favour truth affords in ſuch a caſe is, that it may be ſhewn in mitigation of damages in an action, and of the fine upon an indictment or an information.

3 Wooddeſ. 180. (*a*) Bull. N. P. 8.; where 1 Saund. 120. and 2 Burr. 807. are cited; but thoſe were juſtifications rather from the occaſion, than the truth, of the ſuppoſed libels, the one being a parliamentary, and the other a judicial proceeding. So, in the caſe, 4 Co. 12. b. &c. which was an action of *ſcandalum magnatum* on the ſtatute, the plea was a relation of circumſtances to extenuate and explain the ſcandal, which is conſidered as a very diſtinct defence from alleging the truth of it. Poph. 67. 69. 2 Mod. 366. 1 Freem. 223. (*b*) J'Anſon v. Stewart, 1 Term Rep. 748.

[However, it is advanced in a very uſeful compilation (*a*), that the defendant may juſtify in an action for a libel, as in a common action of ſlander. And with reſpect to libels charging a man with an indictable offence, it ſeems now the prevailing doctrine, that the defendant may plead in bar the truth of the defamatory paper: ſuch a plea was allowed on demurrer (*b*) in the Common Pleas; and the cauſe being removed into the King's Bench, that court reverſed indeed the former judgment, on account of the plea's being too general and indiſcriminate; but no notice appears to have been taken of the queſtion at large, except that one of the learned judges remarked, that "if the plaintiff had been a "common ſwindler, (as alleged,) the defendant ought to have "indicted him; but he had no right to libel him in that way;" which may be thought to give ſome countenance to what now perhaps may be called the old opinion. Still a libel may be very ſcandalous, and very pernicious in its effects, without charging the party libelled with an indictable offence. In that caſe, ſaith a very ſenſible writer, as I know of no determination, that the truth of the libel may be pleaded in juſtification, I am at liberty to obſerve, the prevalence of ſuch an opinion would not be very ſeaſonable, nor very conducive to the peace and welfare of ſociety.

In an indictment or information for a libel, where iſſue is joined on not guilty, the ſtatute of 32 *G.* 3. *c.* 60. declares and enacts, that the jurors may give a general verdict on the whole matter, and the judge ſhall not require them to find the defendant guilty, merely on the proof of publiſhing, and on the ſenſe aſcribed to the ſuppoſed libel in ſuch complaint or information. But the ſtatute does not expreſs that the truth of the ſcandal ſhall be a defence, and is wholly ſilent as to actions of *ſcandalum magnatum*, or for a libel.]

(B) Who ſhall be ſaid a Libeller: And herein,

1. Who ſhall be ſaid the Author or Compoſer of a Libel.

IT has been already obſerved, that a libel may be expreſſed not only by printing or writing, but alſo by ſigns or pictures; but it ſeems that ſome of thoſe ways are eſſentially neceſſary; and it is laid down in *Lamb*'s caſe, that every perſon convicted of a libel muſt be the contriver, procurer, or publiſher thereof. 9 Co. 59. Moor, 813. Lamb's caſe.

[If a defendant has owned himſelf to be author of a book, *errors of the preſs and ſmall variations excepted*, it is ſufficient to entitle the proſecutor to have the book read, and the defendant ſhall be put to ſhew, that there were material variances.] Rex v. Hall, 1 Str. 416.

It hath been ſtrongly urged, that he who writes a libel, dictated by another, is not guilty of the compoſing and making thereof, becauſe it appears that another is the author or contriver: but herein the court held, that the writing being the eſſential part of a libel, the reducing it into writing, in the firſt inſtance, was a making, and differed from a tranſcribing; and, according to the report of this caſe, in 5 *Mod.* it was held, that if (*a*) one dictates, and another writes, both are guilty of making it, for he ſhews his approbation of what he writes. So, if one repeats, another writes a libel, and a third approves what is written, they are all makers of it, as all who concur and aſſent to the doing of an unlawful act are guilty; and murdering a man's reputation by a libel, may be compared to murdering a man's perſon, in which all who are preſent and encourage the act are guilty, though the wound was given by one only. Carth. 405. 5 Mod. 163. to 167. Ld. Raym. 729. Salk. 281. pl. 8. Comb. 359. The King v. Paine. (*a*) But in Carth. 406. is ſaid that he who dictated cannot be indicted for this libel, becauſe he did not write it, and that therefore if the writer could not, the crime would go unpuniſhed.

Alſo, it hath been held, that tranſcribing and collecting libellous matter is highly criminal, though it be not found that the party compoſed or publiſhed it; for his having it in readineſs for that purpoſe when occaſion ſerved, or its falling into ſuch hands after his death as may publiſh it, might be injurious to the government*. Carth. 407. 2 Salk. 417. 646. pl. 13. Ld. Raym. 414. 12 Mod. 218. The King v. Bear.—* It will not be a publication of a libel, if he takes a copy of it, if he never publiſhes it. Com. Dig. tit. Libel, (B. 2). Though he takes a copy, or reads it by command of his father or maſter. R. Mo. 813. So, if a man delivers by miſtake a paper out of his ſtudy, it is not a publication, though it be a libel. R. 5 Mod. 167.

It is ſaid by *Holt*, Chief Juſtice, that when a libel appears under a man's hand-writing, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the compoſer, it is hard to find that he is not the very man. 2 Salk. 419. Ld. Raym. 417. 12 Mod. 220, 221.

And it is ſaid to have been reſolved by the court, that in libels *making* is the *genus*, compoſing or contriving is one *ſpecies*, writing a ſecond *ſpecies*, and procuring to be written a third *ſpecies*; and finding a man guilty of writing only, is finding him guilty of one *ſpecies* of making. 2 Salk. 419. Ld. Raym. 418. 12 Mod. 220.

But yet in ſome caſes the writing of a libel may be a lawful or innocent act, as by the clerk that draws the indictment, or by a ſtudent 2 Salk. 418. Ld. Raym. 416, 417.

12 Mod. 220. Comb. 359.

ſtudent who takes notes of it, becauſe it is not done *ad infamiam* of the party; but, abſtractly conſidered, the writing a copy of a libel is writing a libel, becauſe ſuch copy contains all things neceſſary to the conſtitution of a libel, *viz.* the ſcandalous matter, and the writing: and it has the ſame pernicious conſequence, for it perpetuates the memory of the thing, and ſome time or other comes to be publiſhed.

2. Who the Publiſher.

9 Co. 59. Moor, 627. Hawk. P. C. c. 73. § 10. Fitz. 47.

It ſeems to be agreed, that not only he who publiſhes a libel himſelf, but alſo he who procures another to do it, is guilty of the publication; and it is held not to be material, whether he who diſperſes a libel knew any thing of the contents or effects of it or not, for that nothing would be more eaſy than to publiſh the moſt virulent papers with the greateſt ſecurity, if the concealing the purport of them from an illiterate publiſher would make him ſafe in diſperſing them.

12 Vin. Abr. 229. pl. 5. The King v. Nutt, Hil. 2 G. 2. ſo ruled on evidence at Guildhall, *per* Raymond, C. J. Fitzgib. 47.

And on this foundation it hath been conſtantly ruled of late, that the buying of a book or paper, containing libellous matter, in a bookſeller's ſhop, is ſufficient evidence to charge the maſter with the publication, although it does not appear that he knew of any ſuch book being there, or what the contents thereof were; and it will not be preſumed, that it was brought and ſold there by a ſtranger; but the maſter muſt, if he ſuggeſts any thing of this kind in his excuſe, prove it.

Barnard. K. B. 306. 2 Seſ. Caſ. 33. pl. 38. [Rex v. Almon, 5 Burr. 2687. Proof that the defendant gave a bond to the ſtamp-office for the duties on the advertiſements in a newſpaper under the ſtatute 29 Geo. 3. c. 50. § 10., and had occaſionally applied to the ſtamp-office reſpecting the duties, was holden to be ſufficient evidence of his being the publiſher. 4 Term Rep. 126.]

9 Co. 59. Moor, 813. Hawk. P. C. c. 73. § 13.

The reading of a libel in the preſence of another without knowing it before to be a libel, or the laughing at a libel read by another, or the ſaying that ſuch a libel is made of *J. S.*, whether ſpoken with or without malice, amounts not to a publication of it.

Moor, 627. Hawk. P. C. c. 73. § 14.

Alſo, it is held, that he who repeats part of a libel in merriment, without any malice or purpoſe of defamation, is no way puniſhable: but of this *Hawkins* makes a doubt, for that jeſts of this kind are not to be endured, and the injury to the reputation of the party grieved is no way leſſened by the merriment of him who makes ſo light of it.

Moor, 813. 9 Co. 59. Hawk. P. C. c. 73. § 10.

But it ſeems to be agreed, if he who hath either read a libel himſelf, or hath heard it read by another, do afterwards maliciouſly read or repeat any part of it in the preſence of others, or lend or ſhew it to another, he is guilty of an unlawful publication of it.

5 Co. 125. 15 Vin. Abr. 88. pl. 3. (*a*) But it has been ſince ſaid, that the not delivering it to a magiſtrate was only puniſhable in the Star-chamber, and that the bare having a libel in one's cuſtody was no offence. 1 Vent. 31.

It is ſaid by my Lord *Coke*, in the caſe *de libellis famoſis*, to have been reſolved, that if one finds a libel, (and would keep himſelf out of danger,) if it be compoſed againſt a private man, the finder may either burn it, or preſently (*a*) deliver it to a magiſtrate: but if it concern a magiſtrate, ar other publick perſon, the finder ought preſently to deliver it to a magiſtrate, to the intent that by examination and induſtry the author may be found out and puniſhed.

—But

——But *vide* 2 Salk. 418. Carth. 409, 410. 12 Mod. 220. Ld. Raym. 417. where it is ſaid to be evidence of his being the author or publiſher.

It ſeems to be a matter of doubt, whether the ſending an abuſive letter, filled with provoking language, to another, will bear an action as for a libel, becauſe here is no publication. But it ſeems to be clearly agreed, that the ſending ſuch letter, without other publication, is an offence of a publick nature, and puniſhable as ſuch, inaſmuch as it tends to create ill blood, and cauſes a diſturbance of the publick peace; and if the bare making of a libel be an offence, whether it be publiſhed or not, as it ſeemeth to be holden, ſurely the ſending of it to the party reflected on muſt be a much greater crime.

4 Inſt. 180. 3 Inſt. 174. Hob. 62. 215. 12 Co. 34. Poph. 136. Raym. 201. Mod. 58. Sid. 444. Lev. 139. 240. Keb. 931. Skin. 123. pl. 2.

And on this foundation the court of King's Bench granted an information againſt a perſon for ſending an abuſive letter to Mr. *Bernardiſton*, therein calling him raſcal and fool; although he ſwore that he wrote this to the party himſelf, and never made it publick, being only a piece of private reſentment. But the court held, that this method provoked perſons to duelling; that the writing and ſending was a good publication, and that the intent of the party ſhall not be explained by himſelf.

The King v. Pillborough, Mich. 5 G. 2. in B. R. 2 Bernard. K. B. 102. 2 Kel. 58. pl. 2.

If one deliver a paper full of reflections on any perſon, in nature of a petition to a committee of parliament, to any other perſons except the members of parliament, he may be puniſhed as the publiſher of a libel, in reſpect of ſuch diſperſing thereof among thoſe who have nothing to do with it.

Sand. 133. Lev. 240. Sid. 414. Keb. 832.

But it hath been held, that the bare printing of a petition to a committee of parliament, (which would be a libel againſt the party complained of, if it were made for any other purpoſe than as a complaint in a court of juſtice,) and delivering copies thereof to the members of the committee, ſhall not be looked upon as the publication of a libel, inaſmuch as it is juſtified by the order and courſe of proceedings in parliament, whereof the king's courts will take judicial notice.

Hawk. P.C. c. 73. § 15. and the authorities *ſupra*. *Vide* Hardr. 470.

[If a man ſends a libel to *London* to be publiſhed, it is his act in *London*, if the publication be there.]

Rex v. Middleton, 1 Str. 77.

(C) The Offenders how puniſhed.

THERE can be no doubt but that a perſon who writes or publiſhes a libel is ſubject to the action * of the party injured, in which damages ſhall be recovered; and that being convicted on an indictment or information, he ſhall pay ſuch fine, and alſo ſuffer ſuch corporal puniſhment, as to the court in diſcretion ſhall ſeem proper, according to the heinouſneſs of the crime, and the circumſtances of the offender †.

Cro. Car. 175 —* In an action for a libel, it muſt be laid to be of and concerning the plaintiff. Lowfield v. Bancroft, P. 5 Geo. 2. Stra. 934. —— † A libeller may be fined and bound to his good behaviour, on his confeſſion in court. Rex v. Middleton, 9 Geo. Fort. 201. ——At common law, on conviction upon indictment, he may be fined and impriſoned, according to the nature of the offence. 5 Co. 125. 3 Inſt. 174. Cro. Car. 175. 504.—Or may be put in the pillory. 5 Co. 125. b.

Limitation of Actions.

(A) Of the Limitation of Actions at Common Law, and before the Statute 32 *H.* 8. *c.* 2.

(B) Of the Limitation of Real Actions purſuant to 32 *H.* 8. *c.* 2. and 21 *Jac.* 1. *c.* 16.

(C) Of the Limitation of Time in regard to Actions on Penal Statutes.

(D) Of the Limitation of Time in regard to Perſonal Actions, purſuant to the 21 *Jac.* 1. *c.* 16.: And herein,

1. Of Actions of Aſſault and Battery.
2. Of Actions of Slander.
3. Of Actions ariſing upon Contract and founded *in maleficio*: And herein,
   1. *Of what Nature or Degree the Action muſt be ſo as to be barred by the Statute.*
   2. *Whether a Truſt or Equitable Demand be within the Statute.*
   3. *At what Time the Right of Action ſhall be ſaid to have accrued, before which the Statute can be no Bar.*
   4. *In what Court the Demand muſt be made, or what Courts are bound by the Statute.*

(E) Of the Exceptions in the Statute 21 *Jac.* 1. *c.* 16. and what will ſave a Bar thereof: And herein,

1. What Actions are within the Savings of the Statutes.
2. Of the Exception in relation to Infants, *&c.*
3. Of the Exception in relation to Accounts between Merchants.
4. Of the Exception with relation to Perſons beyond Sea.
5. Where no Executor or Adminiſtrator to ſue or be ſued.
6. Where no Juriſdiction to ſue in, or where hindered by ſome Authority.

7. Where

7. Where the ſuing out a Writ will ſave the Bar of the Statute.
8. Where a Debt barred by the Statute ſhall be ſaid to be revived.

(F) Of the Manner of pleading, and taking Advantage of the Statute of Limitations.

(A) Of the Limitation of Actions at Common Law, and before the Statute 32 *H.* 8. *c.* 2.

IT ſeems that by the common law there was no ſtated or fixed time as to the bringing of actions; for though it be ſaid by (*a*) *Bracton*, that *omnes actiones in mundo infra certa tempora limitationem habent;* yet my Lord *Coke* (*b*) ſays, that the limitation of actions was by force of divers acts of parliament; alſo, ſays he, this general poſition of *Bracton*'s admitted of ſeveral exceptions.

(*a*) Bract. lib. 2. fol. 228.
(*b*) 2 Inſt 95. Co. Lit. 115. 4 Co. 10, 11.

But we find that by the ancient law there was a ſtated time for the heir of the tenant to claim after the death of his anceſtor, elſe he loſt his land, according to the feudal text, *Præterea ſi quis infeudatus major quatuordecim annis, ſua incuria, vel negligentia, per ann. & diem ſteterit, quod feudi inveſtituram a proprio domino non petierit, tranſacto hoc ſpatio, feudum amittat & ad dominum redeat.*

Spelm. Gloſſ. 32.

The fixing upon this period of a year and a day, upon ſeveral other occaſions, ſeems to have been deduced from this ancient rule, and on this occaſion was pitched upon, becauſe the ſervices appointed ſeem to be annually computed; and therefore the feud was ordered to be taken up within ſuch time as ſuch annual ſervices became due, elſe it was loſt and returned to the lord. The ſame time that was appointed to the tenant to claim from the lord, was alſo appointed to make his claim upon any diſſeiſor; and if no ſuch claim was made, the diſſeiſor, dying ſeiſed, caſt the right of poſſeſſion upon the heir. And this was to keep the ſame uniformity of time through the law; as alſo that the lord might be at a certainty who he might take for his tenant, and admit upon every deſcent; and ſince the heir of the tenant anciently loſt the whole land, in caſe he did not take it up within time, it was fit the tenant ſhould loſe the right of poſſeſſion in caſe he did not claim within the ſame time upon the diſſeiſor, that the heir of ſuch diſſeiſor might be in peace, in caſe the perſon that had right did not make his claim upon him, and that from thenceforth the lord might receive him into his feud; and as upon the ancient plan of the feudal conſtitution, if the heir did not take up the feud within a year and a day, a deſertion and dereliction was preſumed; ſo alſo, if the diſſeiſee did not claim within the ſame time, the right of poſſeſſion was relinquiſhed.

Spelm. Gloſſ. *annus & dies* 32, 33.

Before

But for the ancient limitations, *vide* Co. Lit. 114. b. 315. a. 2 Inſt. 94, 95. 2 Roll. Abr. 811. Hale's Hiſt. of the Law, 122. 2 Keb. 45.

Before the 32 *H.* 8. *c.* 2. certain remarkable periods were fixed upon, within which the titles upon which men deſigned to be relieved muſt have accrued: thus in the time of *H.* 3. by the ſtatute of *Merton*, *c.* 8. the limitation in a writ of right which was then from the time of King *Henry* 1. by that ſtatute is reduced to the time of King *Henry* 2.; and as to aſſiſes of *Mortdaunceſtor*, they were thereby reduced from the laſt return of King *John* out of *Ireland*, which was 12 *Johannis;* and aſſiſes of *novel diſſeiſin*, *a prima tranſfretatione regis in Normaniam*, which was 5 *Hen.* 3. and which before that had been *poſt ultimum reditum Henric.* 3. *de Britannia;* and this limitation was alſo afterwards by the ſtatutes *Weſtm.* 1. *c.* 39. and *Weſtm.* 2. *c.* 46. reduced to a narrower compaſs, the writ of right being limited to the firſt coronation of *Rich.* 1.

(B) Of the Limitation of Real Actions purſuant to 32 *H.* 8. *c.* 2. and 21 *Jac.* 1. *c.* 16.

2 Inſt. 95.

THE limitations above-mentioned being, as hath been remarked, ſet periods, in proceſs of time, of neceſſity grew too large; whereby, as my Lord *Coke* obſerves, many ſuits, troubles, and inconveniencies did ariſe; and therefore a more direct and commodious courſe was taken, which was to endure for ever, and calculated ſo to impoſe diligence on, and vigilancy in him that was to bring his action, ſo that by one conſtant law certain limitations might ſerve both for the time preſent and for all times to come.

And this was effected by 32 *H.* 8. *c.* 2. by which it is enacted, "That no perſon ſhall from henceforth ſue, have, or maintain "any writ of right, or make any *preſcription*, *title*, or *claim* to or "for any manors, lands, tenements, rents, annuities, commons, "penſions, portions, corodies, or other hereditaments of the "poſſeſſion of his or their anceſtor or predeceſſor, and declare "and allege any further ſeiſin or poſſeſſion of his or their anceſtor "or predeceſſor, but only of the ſeiſin or poſſeſſion of his anceſtor "or predeceſſor, which hath been, or now is, or ſhall be ſeiſed "of the ſaid manors, lands, tenements, rents, annuities, com-"mons, penſions, portions, corodies, or other hereditaments, "within *threeſcore* years next before the *teſte* of the ſame writ, or "next before the ſaid preſcription, title, or claim, ſo hereafter to "be ſued, commenced, brought, made, or had."

And it is further enacted by the ſaid ſtatute, § 2. "That no "manner of perſon ſhall ſue, have, or maintain any *aſſiſe* of *Mort-"daunceſtor*, coſenage, ayle, writ of entry upon diſſeiſin done to "any of his anceſtors or predeceſſors, or any other *action poſſeſſory* "upon the poſſeſſion of any of his anceſtors or predeceſſors, for "any manors, lands, tenements, or other hereditaments, of any "further ſeiſin or poſſeſſion of his or their anceſtor or prede-"ceſſor, but only of the ſeiſin or poſſeſſion of his or their anceſtor "or predeceſſor, which was or hereafter ſhall be ſeiſed of the "ſame manors, lands, tenements, or other hereditaments, within

"*fifty*

" *fifty* years next before the *teſte* of the original of the ſame writ " hereafter to be brought."

And it is further enacted, by § 3. of the ſaid ſtatute, " That no " perſon ſhall ſue, have, or maintain any *action* for any manors, " lands, tenements, or other hereditaments, of or upon his or " their *own ſeiſin or poſſeſſion* therein, above *thirty* years next be- " fore the *teſte* of the original of the ſame writ hereafter to be " brought."

And further, by § 4. " That no perſon ſhall hereafter make " any *avowry* or *cognizance* for any rent, ſuit, or ſervice, and allege " any ſeiſin of any rent, ſuit, or ſervice, in the ſame avowry or " cognizance in the poſſeſſion of any other, whoſe eſtate he ſhall " pretend or claim to have, above *fifty* years next before the " making of the ſaid avowry or cognizance."

And it is further enacted by the ſaid ſtatute, § 5. " That all " *formedons* in *reverter*, *formedons* in *remainder*, and *ſcire facias* up- " on *fines* of any manors, lands, tenements, or other hereditaments, at any time hereafter to be ſued, ſhall be ſued and taken " within *fifty* years next after the title and cauſe of action fallen, " and at no time after the fifty years paſſed."

Alſo by the ſaid ſtatute, § 6. it is enacted, " That if any per- " ſon do ſue any of the ſaid actions or writs for any manors, " lands, tenements, or other hereditaments, or make any avowry, " cognizance, preſcription, title or claim, of or for any rent, " ſuit, ſervice, or other hereditaments, and cannot prove that he " or they, or his or their anceſtors or predeceſſors, were in actual " poſſeſſion or ſeiſin of and in the ſame manors, lands, tenements, " rents, ſuits, ſervices, annuities, commons, penſions, portions, " corodies, or other hereditaments, at any time or times (*a*) with- " in the years before limited and appointed in this preſent act, " and in manner and form as is aforeſaid, if the ſame be traverſed " or denied by the party, plaintiff, demandant, or avowant, or by " the party, tenant, or defendant; that then, and after ſuch trial " therein had, all and every ſuch perſon and perſons, and their " heirs, ſhall from thenceforth be utterly barred for ever of all " and every the ſaid writs, actions, avowries, cognizance, pre- " ſcription, title, or claim hereafter to be ſued, had or made, of " and for the ſame manors, lands, tenements, hereditaments, or " other the premiſes, or any part of the ſame, for the which the " ſame action, writ, avowry, cognizance, preſcription, title or " claim, hereafter ſhall be at any time had, ſued, or made."

(*a*) In 8 Co. 65. the ſtatute is recited thus: That no perſon or perſons ſhall hereafter make any avowry or conuſance for any rent, ſuit, or ſervice in the ſame avowry or conuſance, in the poſſeſſion of his or their anceſtor or predeceſſor, &c. above *forty* years next before the making of the ſaid avowry or conuſance. [And ſo it is 4 Vol. 268.]

in Comyns' Digeſt, tit. Temps, (G. 3). But Mr. Reeves ſtates it to be *fifty* years.

Note—This ſtatute hath the uſual ſavings for infants, feme coverts, perſons in priſon, and beyond ſea.

In the conſtruction of this ſtatute it hath been holden,

That in a (*b*) formedon in reverter or remainder, or on a *ſcire facias* on a fine of ſuch nature, the demandant need not mention the ſtatute in order to make out his title, but the tenant, if he would take advantage of it, muſt plead it. rent. Moor, 31. pl. 102. Roll. Rep. 50.

(*b*) So, in avowry for Dyer, 315. b. pl. 191.

It

4 Co. 8. And. 16. Lit. Rep. 342.

It hath been held, that this ſtatute, being in reſtraint of the common law, ought to be conſtrued ſtrictly; and that therefore it does not extend to a *formedon in deſcender* (*a*)*, *ceſſavit*, nor *reſcous*.

(*a*) Not to a *ceſſavit* for two reaſons. 1. Becauſe this writ is not compriſed within the ſtatute. 2. Becauſe the ſeiſin of ſervices is not material nor traverſable in this writ. Moor, 44. pl. 135.——Whether it extends to a penſion in the ſpiritual court, *vide* 3 Keb. 366. 392. Vent. 265.——* See *infra*, the ſtatute of 21 Jac. 1. c. 16.

See Co. Lit. 115. a.

3 Co. 64. b. Copper and Foſter, adjudged. Brownl. 169. S. C. [Mo. 31. S. P. According to Sir W. Jones, this exemption

If *A.* by deed indented, make a feoffment in fee to *B.* and his heirs, rendering 10 *s. per ann.* to *A.* and his heirs, of which rent *A.* or his heirs have not been ſeiſed within forty years, yet the heirs of *A.* may diſtrain, *&c.*, for the ſtatute muſt be intended in ſuch caſes (*b*) only where before the ſtatute the avowant was obliged to allege a ſeiſin; and that was, where the ſeiſin was ſo material, and of ſuch force, that though it was by encroachment, yet it could not be avoided in an avowry.

of rent ſhould be underſtood with this qualification; that the *certainty* of the rent ſhould appear in the deed; becauſe otherwiſe the *quantum* or *quality* of the rent is no more aſcertained by the deed, than if there was not one exiſting. Therefore if the rent is created by reference to ſomething out of the deed, as by reſerving ſuch rent as the perſon reſerving pays over, without expreſſing what that is, and the latter rent not having commenced by deed is one, of which ſeiſin is the proper proof; in ſuch a caſe, ſeiſin, as Sir W. Jones thought, is equally requiſite to both rents, and, conſequently, both ought to be equally deemed within the limitation of this ſtatute. Sir W. Jon. 238.]——(*b*) So, this ſtatute extends not to a new rent created by act of parliament. Cro. Car. 80, 81. 214. Lit. Rep. 42. Hetl. 28. 36. Jon. 235.

2 Vern. 235. Collins and Goodall.

To a bill in Chancery, to be relieved touching a rent charged upon lands by a will, the defendant pleaded the ſtatute of limitations, and that there had been no demand or payment in forty years; and it was held, that this ſtatute concerns only cuſtomary rents between lord and tenant, and not any rent that commences by grant, or whereof the commencement may be ſhewn.

Co. Lit. 115. a. 2 Inſt. 95. 4 Co. 10. Bevil's caſe. 8 Co. 65. 9 Co. 36. 4 Lev. 21.

The ſtatute does not extend to the ſervices of (*c*) eſcuage, homage, and fealty; for a man may live above the time limited by the act; neither doth it extend to any other ſervice which by common poſſibility may not happen or become due within ſixty years, as, to cover the hall of the lord, or to attend the lord in the war, *&c.*

(*c*) But although homage, fealty, and eſcuage be out of the ſtatute 32 H. 8. c. 2. yet are they within the ancient ſtatute. 2 Inſt. 96.

2 Inſt. 96. 4 Co. 8. b. Winch. 32. Hutt. 52. 2 Roll. Rep. 392.

And where the tenure is by homage, fealty, and eſcuage incertain, and by ſuit of court or rent, or any other annual ſervice, the ſeiſin of the ſuit or rent, or any other annual ſervice, is a (*d*) good ſeiſin of the homage, fealty, or eſcuage, or other accidental ſervices, as was wardſhip, heriot ſervice, or the like.

(*d*) That ſeiſin of a ſuperior ſervice is a ſeiſin of all inferior ſervices which are incident thereto. 4 Co. 8. b.—— So, ſeiſin of fealty is a ſufficient ſeiſin of homage and eſcuage; for when the tenant does fealty, he ſwears to do all other ſervices. 4 Co. 8. a.——So, ſeiſin of homage is a ſeiſin of all other ſervices, as well inferior as ſuperior, becauſe in the doing thereof the tenant takes upon himſelf to do all ſervices. 4 Co. 8. ——But ſeiſin of one annual ſervice is no ſeiſin of another annual ſervice; for in that caſe it is the folly of the lord, if he hath not an actual ſeiſin of the other ſervice itſelf, when it becomes due yearly. 4 Co. 9. a.

[This ſtatute, ſo far as regards *advowſons*, is

By the 1 *Mar.* c. 5. it is enacted, "That the 32 *H.* 8. *c.* 2. ſhall "not extend to any writ of right of advowſon, *quare impedit*, or "aſſiſe of *darrein preſentment*, nor *jure patronatus*, nor to any writ "of

" of right of ward, writ of raviſhment of ward for the wardſhip " of the body, or for the wardſhip of any caſtles, honours, ma- " nors, lands, tenements, or hereditaments holden by knight's- " ſervice, but that ſuch ſuits may be brought as before the mak- " ing the ſaid act."

no longer of any uſe; it being enacted by 7th Ann. c. 18. that no uſurpation ſhall diſplace the eſtate of the patron, and that he may preſent on the next avoidance, as if there had not been any uſurpation; which proviſion, in effect, takes away all limitations of ſuits about the right of patronage.]

By the 21 *Jac.* 1. *c.* 16. for quieting men's eſtates, and avoiding ſuits, it is enacted, " That all writs of *formedon in de-* " *ſcender*, *formedon in remainder*, and *formedon in reverter*, at " any time hereafter to be ſued or brought of or for any ma- " nors, lands, tenements, or hereditaments, whereunto any per- " ſon or perſons now hath or have any title, or cauſe to have or " purſue any ſuch writ, ſhall be ſued and taken within twenty " years next after the end of this preſent ſeſſion of parliament; " and after the ſaid twenty years expired, no perſon or perſons, " or any of their heirs, ſhall have or maintain any ſuch writ of " or for any of the ſaid manors, lands, tenements, or heredita- " ments; and that all writs of *formedon in deſcender*, *formedon in* " *remainder*, *formedon in reverter*, of any manors, lands, tene- " ments, or other hereditaments whatſoever, at any time here- " after to be ſued or brought by occaſion or means of any title, " or cauſe hereafter happening, ſhall be ſued and taken within " *twenty* years next after the title and cauſe of action firſt de- " ſcended or fallen, and at no time after the ſaid twenty years; " and that no perſon or perſons that now hath any *right or title of* " *entry* into any manors, lands, tenements, or hereditaments, " now held from him or them, ſhall thereinto enter, but within " *twenty* years next after the end of this preſent ſeſſion of parlia- " ment, or within *tweny* years next after any other title of entry " accrued; and that no perſon or perſons ſhall at any time here- " after make any entry into any lands, tenements, or heredita- " ments, but within *twenty* years next after his or their right or " title, which ſhall hereafter firſt deſcend or accrue to the ſame; " and in default thereof, ſuch perſons ſo not entering, and their " heirs, ſhall be utterly excluded and diſabled from ſuch entry " after to be made; any former law, &c.

" Provided, That if any perſon or perſons that is or ſhall be " entitled to ſuch writ or writs, or that hath or ſhall have ſuch " right or title of entry, be or ſhall be, at the time of the ſaid " right or title firſt deſcended, accrued, come, or fallen, within " the age of one-and-twenty years, feme covert, *non compos mentis*, " impriſoned, or beyond the ſeas; that then ſuch perſon and per- " ſons, and his, her, and their heir and heirs, ſhall or may, notwith- " ſtanding the ſaid twenty years be expired, bring his or her action, " or make his or her entry, as he or ſhe might have done before this " act, ſo as ſuch perſon and perſons, or his, her, or their heir and " heirs, ſhall within *ten* years next after his, her, and their full age, " diſcoverture, coming of ſound mind, enlargement out of priſon, " or coming into this realm, or death, take benefit of and ſue " forth the ſame, and at no time after the ſaid ten years."

In the conſtruction of this ſtatute it hath been holden,

Salk. 285. pl. 19. That the poſſeſſion of one joint-tenant is the poſſeſſion of the other, ſo far as to prevent this ſtatute.

Salk. 285. pl. 19. That a (a) claim or entry to prevent the ſtatute of limitations muſt be upon the land, unleſs there be ſome ſpecial reaſon to the contrary.

(a) And by 4 & 5 Ann. c. 16. upon ſuch claim or entry, an action muſt be commenced within one year next after the making of ſuch entry and claim, and proſecuted with effect, otherwiſe of no force to avoid the ſtatute.

Lutw. 781. Hunt and Bourn. Salk. 339. pl. 5. 2 Salk. 422. pl. 7. S. C. That if a perſon be barred of his *formedon*, he is not thereby hindered to purſue his right of entry which afterwards accrues to him, no more than a perſon, who has ſeveral remedies, and diſcharges one of them, is excluded thereby from purſuing the others.

2 Salk. 421. pl. 5. ſaid to have been twice ſo ruled by Holt. If *A.* has had poſſeſſion of lands for twenty years without interruption, and then *B.* gets poſſeſſion, upon which *A.* is put to his ejectment; though *A.* is plaintiff, yet the poſſeſſion of twenty years ſhall be a good title in him, as if he had ſtill been in poſſeſſion; becauſe a poſſeſſion for twenty years is like a deſcent which tolls entry, and gives a right of poſſeſſion, which is ſufficient to maintain an ejectment.

Salk. 423. pl. 10. That if one tenant in common receives the whole profits for twenty years, or more, yet this does not bar his companion; for the ſtatute of limitations never runs againſt a man but where he is actually ouſted or diſſeiſed.

Moor, 410. It has been ruled that copyholds are within the ſtatute of limitations, becauſe an act made for the preſervation of the publick quiet, and no ways tending to the prejudice of the lord or tenant.

Comp. Incumb. 429. But eccleſiaſtical perſons are not bound by any of the ſtatutes of limitations, becauſe it would be a ſide-wind to evade the ſtatutes made to prohibit their alienations.

[In the year 1772, an attempt was made to limit the claims of the church; but happily failed.

Neither was the crown bound by any of theſe ſtatutes, the ancient doctrine being *nullum tempus occurrit regi*. But by a late ſtatute, the crown is barred from recovering any eſtate or hereditaments, (other than liberties or franchiſes,) where the title did not firſt accrue within the laſt ſixty years.]

9 Geo. 3. c. 16. § 1. 10.

(C) Of the Limitation of Time in regard to Actions on Penal Statutes.

All popular actions were limited to a certain time by 7 H. 8. c. 3. which is repealed by this ſtatute.

BY the 31 *Eliz. c.* 5. § 5. it is enacted, "That all actions, ſuits, "bills, indictments, or informations, which ſhall be brought "for any forfeiture upon any ſtatute penal, made or to be made, "whereby the forfeiture is or ſhall be limited to the *queen*, her "heirs and ſucceſſors *only*, ſhall be brought within *two* years after "the offence committed, and not after two years; and that all "actions, ſuits, bills, or informations, which ſhall be brought "for any forfeiture upon any penal ſtatute, made or to be made, "except

" except the ſtatute of tillage, the benefit and ſuit whereof is or " ſhall be by the ſaid ſtatute limited to the *queen*, her heirs or " ſucceſſors, and *to any other that ſhall proſecute* in that behalf, " ſhall be brought by any perſon that may lawfully ſue for the " ſame within *one* year next after the offence committed; and in " default of ſuch purſuit, that then the ſame ſhall be brought for " the queen's majeſty, her heirs or ſucceſſors, any time within " the *two* years *after that year ended*; and if any action, ſuit, bill, " indictment, or information, ſhall be brought after the time ſo " limited, the ſame ſhall be void: And it is provided, that where " a ſhorter time is limited by any penal ſtatute, the proſecution " muſt be within that time."

By the 18 *Eliz. c.* 5. § 1. it is enacted, " That upon every in- " formation that ſhall be exhibtited on any penal ſtatute, a ſpe- " cial note ſhall be made of the very day, month, and year of the " exhibiting thereof into any office, or to any officer which law- " fully may receive the ſame, without any antedate thereof to " be made; and that the ſame information be accounted and " taken to be of record from that day forward, and not before; " and that no proceſs be ſued out upon ſuch information, until " the information be exhibited in form aforeſaid, *&c.* and that " every clerk, making out proceſs contrary to this act, ſhall for- " feit 40*s.*"

It is further enacted by 21 *Jac.* 1. *c.* 4. § 3. " That no officer " ſhall receive, file, or enter of record, any information, bill, " plaint, count, or declaration, grounded on any penal ſtatute " (being within the proviſion of the ſaid ſtatute of 21 *Jac.* 1.), until " the informer or relator hath firſt taken a (*a*) corporal oath be- " fore ſome of the judges of the court, that he believes, in his " conſcience, the offence was committed within a year before " the information or ſuit within the county where the ſaid in- " formation or ſuit was commenced," *&c.*

(*a*) It hath been adjudged, that if an officer receive an information without ſuch previous oath, yet the proceedings on it are not erroneous. Cro. Car. 316. *& vide* 2 Inſt. 192. 4 Inſt. 272.——But *quære*, whether the court on motion will not ſet aſide ſuch proceſs as having iſſued contrary to the directions of the ſtatute? Salk. 376. pl. 19.——* In actions the oath is not now uſed; and *quære*, if in criminal proſecutions?*

In the conſtruction of theſe ſtatutes it hath been holden, That the 21 *Jac.* 1. *c.* 4. does not extend to any offence created ſince that ſtatute; ſo that proſecutions on ſubſequent penal ſtatutes are not reſtrained thereby, but that ſtatute is to them as it were repealed *pro tanto*. Salk. 372. pl. 13. 5 Mod. 425.

That if an offence prohibited by any penal ſtatute be alſo an offence at common law, the proſecution of it, as of an offence at common law, is no way reſtrained by any of theſe ſtatutes. Hob. 270. 4 Mod. 144.

That if an information *tam quam* be brought after the year on a penal ſtatute, which gives one moiety to the informer, and the other to the king, it is nought only as to the informer, but good for the king. Cro. Car. 331. Cro. Jac. 366. *& vide* Daliſ. 60.

That if a ſuit on a penal ſtatute be brought after the time limited, the defendant need not plead the ſtatute, but may take advantage of it on the general iſſue †. Show. Rep. 353.—†For the ſtatute ſays the ſame ſhall be void, conſequently, the party does not owe the penalty demanded, the informer, in ſuch caſe, not having a right to demand the penalty.

Cro. Eliz. 645. Noy, 71.

That the party grieved is not within the reſtraint of theſe ſtatutes, but may ſue in the ſame manner as before.

3 Leon. 237. Show. Rep. 354. and Carth. 233. S. P. That where the penalty is given to the party alone, this is out of the ſtatute 31 Eliz. c. 5. but *per* Holt, if given to the king and party ſeparately, it ſeems within the ſtatute; but hereof the other judges doubted.

Show. 353, 354.

It ſeems doubtful, whether a ſuit by a common informer on a penal ſtatute, which firſt gives an action to the party grieved, and in his default, after a certain time, to any one who will ſue, be within the reſtraint of theſe ſtatutes.

Carth. 232. Culliford v. Blandford. Show. Rep. 353. S. C. [Upon a writ of error, all the judges in the Exchequer-chamber, held, that a *latitat* is a kind of original in the King's Bench. 2 Ld. Raym. 833.

It has been held by three judges, that the ſuing out a *latitat* within the year was a ſufficient commencement of the ſuit to ſave the limitation of time on a penal ſtatute, becauſe the *latitat* is the original of *B. R.* and may be continued on record as an original. But *Holt* held otherwiſe, for the action being for a penalty given by a ſtatute, the plaintiff might have brought an action of debt by original in *B. R.*, becauſe the ſtatute gives the action; and he held, that there was a difference between a civil action and an action given by ſtatute; for in the firſt caſe the ſuing out a *latitat* within the time, and continuing it afterwards, will be ſufficient; but in the other caſe, if the party proceeds by bill, he ought to file his bill within time, that it may appear ſo to be upon the record itſelf.

Accordingly, in two ſubſequent caſes, it was holden to be a good commencement of the ſuit in a penal action. Bridges v Knapton, and Hardiman v. Whitaker, cited in 2 Burr. 950. 3 Burr. 1423. Cowp. 454. But if it be replied to a plea of the ſtatute of limitations, the defendant, in order to maintain his plea, may aver the *real* time of ſuing it out, in oppoſition to the *teſte*. 2 Burr. 950. 3 Burr 1423.]

Trin. 3 Car. 2. in C. B. Greenwood v. Scott.

In debt *qui tam* on the ſtatute 1 *H.* 5. *c.* 4. for practiſing as an attorney during the time he was under-ſheriff, the point was on the 31 *Eliz. c.* 5. which limits informers and plaintiffs in popular actions to a year; the defendant in this caſe was taken upon a *teſtatum cap.* that bore *teſte* 13 *January*, when his office expired in *November* was twelvemonth before, and ſo a year and two months after his offence; but by antedating the original, and making it of *Mich.* term before, it was brought within the year; and *North* and *Wyndham* ſaid it was well warranted by the practice of the court, and therefore they would make no rule to ſtop the filing of the original; but *Atkins* was againſt it, and ſaid it was nothing but a practice to evade the ſtatute of 31 *Eliz. c.* 5.

2 Hawk. P. C. c. 26. § 50.

Serjeant *Hawkins* makes it a queſtion, Whether the clauſe in 31 *Eliz. c.* 5. § 4. by which it is enacted, *That nothing in the ſaid act contained ſhall extend to champerty, king's cuſtoms, or foreſtalling*, &c. *but that every ſuch offence may be laid in any county, any thing in the ſaid act to the contrary notwithſtanding*, doth except the ſaid offences out of the above recited clauſe, relating to the time within which ſuits on penal ſtatutes muſt be brought; for the words above mentioned, *viz. but that every ſuch offence may be laid in any county*, ſeem to reſtrain the generality of the precedent words, which ſay, that nothing in the act contained ſhall extend to ſuch offences.

(D) Of the Limitation of Time in regard to Perſonal Actions, purſuant to the 21 *Jac.* 1. *c.* 16.: And herein,

1. Of Actions of Aſſault and Battery.

BY the 21 *Jac.* 1. *c.* 16. "All actions of treſpaſs of aſſault, "battery, wounding, impriſonment, or any of them, ſhall be "commenced and ſued within *four* years next after the cauſe of "ſuch actions or ſuits, and not after."

It ſeems, that if a man brings treſpaſs for beating his ſervant *per quod ſervitium amiſit*, this is not ſuch an action as is within this branch of the ſtatute, being founded on the ſpecial damage. Salk. 206. pl. 5. 5 Mod. 74. Ld. Raym. 831.

If to an action of aſſault, battery, and impriſonment, the defendant pleads, as to the aſſault and impriſonment, the ſtatute of limitations, without anſwering particularly to the battery, otherwiſe than by uſing the words *tranſgreſſio prædicta*, it is ſufficient, for theſe words are an anſwer to the whole *. Lev. 31. * But the general form and beſt mode of pleading is, to ſay, not guilty of the treſpaſs aforeſaid, &c.

In treſpaſs for aſſault and battery, the defendant pleaded *non culp. infra ſex annos* by miſtake, and not according to the ſtatute, which is but four years; and upon demurrer it was adjudged an ill plea; for if it be conſidered as at common law, there was no ſuch plea; if on the ſtatute, the act is not purſued; and the defendant could not take iſſue on it, for *quod eſt culp. infra ſex annos* is an iſſue immaterial, becauſe it may be the jury might find him not guilty *infra quatuor annos*, but guilty *infra ſex annos*. 2 Salk. 423. pl. 11. Blackmore v. Tidderl. 6 Mod. 240. S. C. 2 Ld. Raym. 1099. S. C.

2. Of Actions of Slander.

By the 21 *Jac.* 1. *c.* 16. § 3. it is enacted, "That all actions "on the caſe for words ſhall be commenced and ſued within *two* "years next after the words ſpoken, and not after."

In the conſtruction of this branch of the ſtatute it hath been holden,

That an action of *ſcandalum magnatum* is not within the ſtatute. Lit. Rep. 342. 3 Keb. 645.

That it extends not to actions for ſlander of title, for that is not properly ſlander, but a cauſe of damage, and the ſlander intended by the ſtatute is to the perſon. Cro. Car. 141. Law and Harwood, adjudged. Ley, 82. Palm. 530. Jon. 196. S. C. adjudged.

That if the words are of themſelves actionable, without the neceſſity of alleging ſpecial damage, although a loſs enſues, yet in this caſe the ſtatute of limitations is a good bar; but if the words at the time of the ſpeaking of them are not actionable, but a ſubſequent loſs enſues, which entitles the plaintiff to his action, in ſuch caſe the ſtatute is no bar. Sid. 95. Saunders v. Edwards. Raym. 61. S. C. & *vide* 3 Mod. 111. S. C. cited.

Sid. 95. Salk. 206. pl. 5. S. P. And that it was incumbent upon the plaintiff to prove the ſpecial damage; otherwiſe the action would not have lain for the words.

As, for calling a woman whore, by which ſhe loſt her marriage ſeven years afterwards, the ſtatute is no bar; for it is not the words, but the ſpecial damage, which is the cauſe of action in this caſe.

Cro. Car. 163. Topſal and Edwards, adjudged on the branch of this ſtatute that ſays, that for ſlanderous words the plaintiff ſhall have no more coſts than damages, &c.

Alſo, for calling a man thief, and procuring him to be indicted and impriſoned for felony, and the defendant is found guilty of the whole; the ſtatute in this caſe ſeems no bar, for the action is not for words barely, but is an action upon the caſe in nature of a conſpiracy.

Sid. 95.

That if an action for words be founded upon an indictment, or other matter of record, it is not within the ſtatute, but ſuch action may be brought at any time.

Keb. 820. 918. Lidiate and Buttle.

In an action for words, the defendant pleaded *non locutus eſt verba prædicta infra duos annos;* and upon a ſpecial demurrer it was objected, that it ought to have been *non culp. infra duos annos;* for, as it is, it may be, the defendant ſpoke the ſubſtantial words of the ſlander, and yet did not ſpeak all the words; and yet the plaintiff could not have a verdict upon this iſſue; as, in an action of debt for 10 *l.*, if the defendant ſays *non debet* the 10 *l.*, without adding *nec aliquem inde denarium*, it would be naught: but the court held the caſes not alike; for in an action of debt, every penny that ſtands in demand is of equal weight; but here the action is founded upon the ſubſtantial words only, and the *verba prædicta* ſhall refer only to them; and it was held well enough.

3. Of Actions ariſing upon Contract and founded *in maleficio*: And herein,

1. *Of what Nature or Degree the Action muſt be ſo as to be barred by the Statute.*

By the 21 *Jac.* 1. *c.* 16. § 3. it is enacted, "That all actions "of treſpaſs *quare clauſum fregit*, all actions of treſpaſs, detinue, "action *ſur* trover, and replevin for the taking away of goods and "cattle, all actions of account, and upon the caſe, other than "ſuch accounts as concern the trade of merchandize between "merchant and merchant, their factors or ſervants, all actions "of debt grounded upon any lending or contract without ſpe-"cialty, all actions of debt for arrearages of rent, and all actions "of aſſault, menace, battery, wounding, and impriſonment, or any "of them, which ſhall be ſued or brought at any time after the "end of the then ſeſſion of parliament, ſhall be commenced and "ſued within the time of limitation hereinafter expreſſed, and "not after; that is to ſay, the ſaid actions upon the caſe, (other "than for ſlander,) and the ſaid actions of account, and the ſaid "actions for treſpaſs, debt, detinue, and replevin for goods or "cattle, and the ſaid action of treſpaſs *quare clauſum fregit*, with-

"in

" in three years next after the end of the then ſeſſion of parliament, or within *ſix* years next after the cauſe of ſuch actions or ſuit, and not after; and the ſaid actions of treſpaſs, of aſſault, battery, wounding, impriſonment, or any of them, within one year next after the end of the then ſeſſion of parliament, or within *four* years next after the cauſe of ſuch actions or ſuit, and not after; and the ſaid action upon the caſe for words, within one year after the end of the then ſeſſion of parliament, or within *two* years next after the words ſpoken, and not after.

" Nevertheleſs, that if in any the ſaid actions or ſuits judgment be given for the plaintiff, and the ſame be reverſed by error, or a verdict paſs for the plaintiff, and upon matter alleged in arreſt of judgment, the judgment be given againſt the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the ſaid actions ſhall be brought by original, and the defendant therein be outlawed, and ſhall after (*a*) reverſe the outlawry, that in all ſuch caſes, the party plaintiff, his heirs, executors, or adminiſtrators, as the caſe ſhall require, may commence a new action or ſuit from time to time, within a year after ſuch judgment reverſed, or ſuch judgment given againſt the plaintiff, or outlawry reverſed, and not after.

(*a*) Whether reverſed by plea or writ of error, not material, Cro. Car. 294-5.

" *Provided*, That if any perſon or perſons, that is or ſhall be entitled to any ſuch action of treſpaſs, detinue, action *ſur* trover, replevin, actions of accounts, actions of debt, actions of treſpaſs for aſſault, menace, battery, wounding, or impriſonment, actions upon the caſe for words, be or ſhall be, at the time of any ſuch cauſe of action, given or accrued, fallen or come, within the age of twenty-one years, feme covert, *non compos*, impriſoned, or beyond the ſeas; that then ſuch perſon or perſons ſhall be at liberty to bring the ſame actions, ſo as they take the ſame within ſuch times as are before limited, after their coming to or being of full age, diſcovert, of *ſane* memory, at large, and returned from beyond the ſeas, as other perſons having no ſuch impediment ſhould have done."

Winch. 82. Jon. 312.

Here we ſhall conſider and ſet down ſuch caſes, about which there hath been any conteſt, as to the actions being grounded on a contract or lending, as the ſtatute ſpeaks; thoſe by (*b*) ſpecialty, as all others of a ſuperior nature, being plainly excepted out of the ſtatute.

(*b*) But though a bond or ſpecialty be out of the ſtatute, yet it ſeems to be the practice at this day, where an action is brought on a bond of twenty years ſtanding, and on which no intereſt has been paid for that time, to admit the defendant on a plea of *ſolvit ad diem*, to give this matter in evidence, which, from the length of time, will be preſumptive proof of payment. ——So, in Chancery, an obligee on a bond of twenty years ſtanding was refuſed any relief. Chan. Rep. 78. 88. 106. [*Vide* tit. Evidence, 2 Vol. 660.]

And to this purpoſe it hath been adjudged, that an action of debt on the 2 & 3 *E.* 6. *c.* 13. for not ſetting out tithes, is not within the ſtatute, the action being grounded on an act of parliament, which is the higheſt record.

Cro. Car. 513. Talory and Jackſon. Sand. 38. 2 Keb. 462.

2 Sand. 66. Sid. 305. 415. Keb. 95.

Hutt. 109. Freeman and Stacy. Sand. 38. S. C. cited

So, it hath been adjudged, that an action of debt for the arrearages of rent reſerved on a leaſe by indenture is out of the ſtatute, the leaſe by indenture being equal to a ſpecialty.

2 Sand. 66. S. C. cited, and S. P. admittod; and there ſaid, that the ſtatute extends to rent reſerved on parol leaſes only.

Sand. 37. Jones v. Pope. Lev. 191. S. C. adjudged. 2 Keb. 93. S. C. and Sid. 305. S. C where it is ſaid, that an action on the caſe, for an eſcape is within the ſtatute; and by Wyndham, debt upon a tally is not within the ſtatute.

Alſo it hath been adjudged, that an action of debt for an eſcape is not within the ſtatute, not only becauſe it is founded *in maleficio*, and ariſes on a contract in law, which is different from thoſe actions of debt on a lending or contract mentioned in the ſtatute, but alſo becauſe it is grounded on the 1 *R.* 2. *c.* 12. which firſt gave an action of debt for an eſcape (*a*), there being no remedy for creditors before but by action on the caſe.

(*a*) For this *vide* 2 Inſt. 383 and title Eſcape.

Mod. 245. Cockram v. Welby, 212. and 2 Show. Rep. 79. S. C. 2 Mod 212. S. C.

So, it hath been adjudged, that this ſtatute cannot be pleaded to an action of debt brought againſt a ſheriff for money by him levied on a *fieri facias*, becauſe the action is founded *in maleficio*, as alſo upon the judgment on which the *fieri facias* iſſued, which is a matter of record.

2 Sand. 64. Sid. 415. Lev. 273. 2 Keb. 462. 497. 533. S. C.

It hath been adjudged, that an action of debt on an award under the hand and ſeal of the arbitrator, though the ſubmiſſion was by parol, is not within the ſtatute; for though in ſtrictneſs the award cannot be ſaid to be equal to a ſpecialty, yet by being under hand and ſeal it becomes matter of that notoriety, that it cannot be liable to any of the inconveniencies the ſtatute was made to prevent; ſuch as perjury in witneſſes, and the oppreſſion of defendants when their witneſſes are dead, or vouchers loſt. Alſo, it was never intended that the ſtatute ſhould extend to all kinds of actions of debt, but only to thoſe which aroſe on a *contract* or *lending*.

Hutt. 109. Sherwin and Cartwright. Lit. Rep. 341. S. C. adjudged. Sand. 37. 2 Sand. 64. S. C. cited, and admitted to be law.

It hath been adjudged, that the ſtatute does not extend to the writ *de rationabili parte bonorum*, founded on the cuſtom of *Nottingham*, although it conclude in the *detinet*; for this is an original writ in the regiſter; and though it conclude in the *detinet*, is yet a different action to the common action of detinue mentioned in the ſtatute, which being frequent in practice, is the detinue plainly intended by the ſtatute, and not this, which, being founded on a cuſtom, ſeldom happens; and as the ſtatute is in derogation of the common law, it ought to be conſtrued ſtrictly.

2 Keb. 536. Lev. 273.

An action of debt for a fine of a copyholder is not within the ſtatute.

2 Vern. 540. *per curiam.*

If a man recovers a judgment or ſentence in *France* for money due to him, the debt muſt be conſidered here only as a debt by ſimple contract, and the ſtatute of limitations will run upon it.

2 Lev. 166. 3 Keb 645. Comb. 70.

It ſeems, that to an *aſſumpſit* brought by the aſſignees of a bankrupt for a debt due to the bankrupt, this ſtatute is a good bar; for though the aſſignment is by force of an act of parliament, yet the aſſignees ſtand only in the place of the bankrupt, and can have no other right or remedy than he had.

It

It hath been adjudged, that this ſtatute is a good plea in bar to an *aſſumpſit* brought by an attorney for his fees; for though the attorney be of record, yet his fees are not. 3 Lev. 367. Ld. Raym. Oliver and Thomas.

It hath been adjudged, that this ſtatute is a good bar to an action brought againſt the drawer of a bill of exchange; and that ſuch bill is not of as high a nature as a ſpecialty, (*a*) neither is it within the exception in the ſtatute relating to merchants' accounts. Carth. 3. Renew v. Axton. (*a*) Carth. 226. adjudged.

2. *Whether a Truſt or Equitable Demand be within the Statute.*

It ſeems clearly agreed, that, though the ſtatutes of limitations bind the courts of equity, yet a truſt (*b*) is not within theſe ſtatutes. March, 129. 2 Salk. 224. pl. 12.

[(*b*) But the rule of equity, that the ſtatute of limitations does not bar a *truſt* eſtate, holds only as between *ceſtuy que truſt*, and *truſtees*, not between *ceſtuy que truſt* and *truſtee* on one ſide, and *ſtrangers* on the other; for that would be to make the ſtatute of no force at all; becauſe there is hardly any eſtate of conſequence without ſuch truſt, and ſo the act would never take place: therefore, where a *ceſtuy que truſt* and his truſtee are both out of poſſeſſion for the time limited, the party in poſſeſſion has a good bar againſt them both. *Per* Lord Hardwicke, in the caſe of Llewellin v. Mackworth, 2 Eq. Ca. Abr. 579. pl. 8. See too Townſhend v. Townſhend, 1 Br. Ch. Rep. 554.]

And therefore, where the plaintiff, who was the ſon and executor of Ch. Juſt. *Heath*, who was made chief juſtice at *Oxon* during the difference between the king and parliament, but never ſat at *Weſtminſter-hall*, exhibited a bill againſt the defendants, prothonotaries of the *K. B.* at that time, to have an account of the money, *&c.* received by them during that time by an implied truſt *virtute officii;* to which the defendants pleaded the ſtatute of limitations; the plea was, upon argument, over-ruled. Chan. Ca. 20. Sir Edward Heath v. Henley, *& al.* 2 Ld. Raym. 1204.

So, where the plaintiff exhibited a bill to have an account of money received by the defendant from his father, (whoſe executor he was,) who gave it to him to compound for his eſtate, ſequeſtered for delinquency at *Goldſmiths-hall;* it was ordered accordingly, the court declaring it a truſt, and therefore not within the ſtatute of limitations. 2 Chan. Ca. 26. Sheldon v. Weldman.

So, where my Lady *Hollis* lent 100 *l.*, and in the note which was given for it mention was made, that it ſhould be diſpoſed of as my Lady ſhould direct; and a bill being exhibited for it, the court held it a *depoſitum* or truſt, and decreed payment of it; though otherwiſe it had been barred by the ſtatute of limitations. 2 Vent. 345.

A charity is not barred by length of time, nor within the ſtatute of limitations. 2 Vern. 399.

So, it hath been held, that a legacy is not within the ſtatute of limitations. Vern. 256.

It ſeems to be the doctrine of courts of equity, that mortgages are not within the ſtatute of limitations; yet, where a man comes in at an old hand, it hath been ſometimes decreed, that the poſſeſſor ſhould account no farther than for the profits made in his own time, to diſcourage the ſtirring in ſuch dormant titles. Alſo the courts have allowed length of time to be pleaded in bar, where the mortgaged eſtate hath deſcended as a fee without entry or claim from the mortgagor, and where the poſſeſſor would Chan. Ca. 102. but now by the 7 Geo. 2. c. 20. the redemption of mortgages is expreſsly limited to 20 years, which *vide*

tit. Mortgages. [And therefore, to a bill to redeem a mortgage, if the mortgagee has been in poſſeſſion twenty years, the ſtatute of limitations may be pleaded. Aggas v. Pickerell, 3 Atk. 225. And indeed a demurrer has been allowed in this caſe, where the poſſeſſion has appeared upon the face of the bill, 3 P. Wms. 287. note B. 1 Vern. 418. Bunb. 54. though later caſes ſeem to be to the contrary. Aggas v. Pickerell. *ubi ſupra*. Deloraine v. Smith, 3 Br. Ch. Rep. 634.]

would be entangled in a long account; and in theſe caſes the ſtatute of limitations hath been mentioned as a proper direction to go by.

3. *At what Time the Right of Action ſhall be ſaid to have accrued, before which the Statute can be no Bar.*

Godb. 437. [Fenton v. Emblers, 1 Bl. Rep. 353.]

This ſtatute cannot be a bar, unleſs the ſix years are expired after there hath been complete cauſe of action; as, if a man promiſe to pay 10 *l.* to *J. S.* when he comes from *Rome*, or when he marries, and ten years after *J. S.* marry, or come from *Rome*, the right of action accrues from the happening of the contingency, from which time the ſtatute ſhall be a bar, and not from the time of the promiſe.

Godb. 437. Shutford v. Buroughs, adjudged.

So, in an action on the caſe, wherein the plaintiff declared, that in conſideration that he would forbear to ſue the defendant for ſome ſheep killed by his (the defendant's) dog, the defendant promiſed to make him ſatisfaction upon requeſt, and that ſuch a time he requeſted, *&c.*; it was held, that the right of action accrued from the requeſt, and not from the time of killing the ſheep; and that therefore the defendant could not plead the ſtatute of limitations, the requeſt being within ſix years, though the killing the ſheep, and promiſe of ſatisfaction, was long before.

Lev. 48. Webb and Martin. Sid. 65. Keb. 177. S. C.

So, in *aſſumpſit*, in conſideration that the plaintiff would deliver to the defendant ſuch a deed, the defendant promiſed, that he would re-deliver it to him on requeſt; and alſo in conſideration that he had, upon requeſt, delivered to him another deed, the defendant promiſed to pay him 40 *l.*, and alleges, that he had delivered to him the firſt deed, and although at ſuch a day afterwards he made requeſt, yet he had not re-delivered the firſt deed, nor paid the 40 *l.*: the defendant pleads the ſtatute of limitations, and that he did not promiſe within ſix years before the action brought; whereupon the plaintiff demurs; for the cauſe of action, as to the firſt deed, did not ariſe upon the promiſe, but upon the refuſal after requeſt; and the requeſt was within ſix years; and ſo held the court.

2 Salk. 422. pl. 9. 2 Ld. Raym. 838. Gould and Johnſon. [So, in equity. 3 Atk. 70.] (*a*) For this *vide* 1 Vent. 191. 3 Keb. 613. 7 Mod. 99. Wortley Mountague

So, in *aſſumpſit*, in conſideration that the plaintiff, at the defendant's requeſt, would receive *A.* and *B.* into his houſe *ut hoſpites*, and diet them, the defendant promiſed, *&c.*, *non aſſumpſit infra ſex annos* was pleaded; the plaintiff demurred, and held no plea; for the defendant cannot in ſuch caſe plead *non aſſumpſit infra ſex annos* (*a*), but *actio non accrevit infra ſex annos*; for it is not material when the promiſe was made, if the cauſe of action be within ſix years, and the dieting might be long afterwards.

An executor, ſeveral years before the action brought, left ſome houſehold ſtuff in the houſe, by the conſent of the heir, who uſed them

them after; and within ſix years of the action brought, the executor demands the goods, and the heir refuſed to let him have them; whereupon trover was brought, and the ſtatute of limitations pleaded. And *per cur.*, the uſer before the demand was no converſion, nor evidence of it, for it was the conſent of the executor till then, and the demand being within ſix years, the refuſal which enſued it, and is the only evidence of a converſion in the caſe, was within the ſix years; and (*a*) where a trover is before ſix years, and a converſion after, the ſtatute cannot be pleaded. v. Lord Sandwich. (*a*) But for this *vide* Cro. Car. 245-6. 333. Jon. 252. 3 Mod. 111.

In an action upon the caſe againſt an executor, the plaintiff declares, that upon a marriage treaty it was agreed between the plaintiff and teſtator, that he ſhould pay to the plaintiff 100 *l.*, and whilſt that ſhould be unpaid he ſhould pay the plaintiff 10 *l. per annum*, which agreement was made *anno* 1618, and the action was brought for all the arrears by the ſpace of 28 years. The defendant pleaded the ſtatute of limitations; and on demurrer it was held, that all could not be barred by the ſtatute; and therefore the plaintiff had judgment. Allen, 62. Harvey and Thorne adjudged, nobody appearing for the defendant.

Treſpaſs for impriſoning the plaintiff, and detaining him in priſon from 32 *Car.* 2. till the 3d of *April* 4 *Jac.* 2. The defendant pleaded as to all till 32 *Car.* 2. ſuch a day, *non culp. infra quatuor annos*, and as to the reſt, a plaint, and *capias* iſſued; the plaintiff demurred. *Et per curiam*, though the impriſonment be complained of as one continued impriſonment, yet the defendant may divide the time, and plead the ſtatute as to part; and the plaintiff may reply the continuance; therefore as to this, judgment was given againſt the plaintiff upon his demurrer, but for him as to the reſt, becauſe the *capias* was awarded by the court *ex officio*, and it did not appear that the defendant meddled in it. 2 Salk. 420. pl. 3. Coventry v. Apſley, & *vide* 3 Mod. 110. Comb. 26.

In caſe of ſeamen, the duty does not ariſe from the contract, but from the ſervice done; and therefore though the contract be above ſix years, if any part of the ſervice be within that time, it is out of the ſtatute. 6 Mod. 26.

[A bill of exchange was drawn payable at a certain future period, for the amount of a ſum of money lent by the payee to the drawer at the time of drawing the bill. The payee was allowed to recover the money on an action for money lent, although ſix years had elapſed, ſince the time when the loan was advanced; the ſtatute of limitations beginning to operate only from the time when the money was to be repaid, that is, when the bill became due.] Witterſheim v. Counteſs Dowager of Carliſle, 1 H. Bl. Rep. 631.

4. *In what Court the Demand muſt be made, or what Courts are bound by the Statute.*

It is clearly agreed, that the ſtatute of limitations is a good plea in a court of equity; but it ſeems the ſafeſt way for him who pleads it, in his anſwer, alſo to ſay, that he has paid the money, becauſe otherwiſe the court ſuppoſes a truſt between the plaintiff and March, 129. 2 Salk. 424. pl. 13.

and defendant, and that the money is a *depoſitum* in the hands of the defendant for the benefit of the plaintiff; and the ſtatute of limitations, as has been obſerved, does not reach truſts.

Gardner v. Griffith, 2 P. Wms. 403. Boteler v. Allington, 3 Atk. 458.

[To a bill, on an equitable title to a preſentation to a living, ſeeking to compel the defendant to reſign, plenarty ſix months before the bill was filed may be pleaded in bar; the ſtatute of *Weſtminſter* the ſecond being conſidered for this purpoſe as a ſtatute of limitation, in bar of an equitable as well as of a legal demand. But if a *quare impedit* is brought before the ſix months are expired, though the bill is filed after, it may in ſome caſes be a ground for the court to interfere, and, conſequently, plenarty would not in ſuch caſes be pleadable in bar.

South Sea Company v. Wymondſell, 3 P. Wms. 143.

If a bill charges a fraud, and that the fraud was not diſcovered till within ſix years before the filing of the bill, the ſtatute of limitations is not a good plea, unleſs the defendant denies the fraud, or avers, that the fraud, if any, was diſcovered within ſix years before filing the bill.

But even at law, fraud will not prevent the ſtatute of limitations from operating, though diſcovered by the plaintiff within ſix years before the commencement, unleſs it can be ſhewn that the defendant was conuſant of it. Bree v. Holbech, Dougl. 655.

Bicknell v. Gough, 3 Atk. 558.

Upon a bill for diſcovery of a title, charging fraud, and praying poſſeſſion, the ſtatute of limitations alone is not a good plea to the diſcovery; for the defendant muſt anſwer to the charge of fraud.

Mackworth v. Clifton, 2 Atk. 51.

Although the ſtatute of limitations is a bar in equity to the claim of a debt, it is not to a diſcovery when the debt became due; for if that is ſet forth, it will appear to the court, whether the time limited by the ſtatute is elapſed.

Hollingſhead's caſe, 1 P. Wms. 742.

The ſtatute of limitations may be pleaded to a bill of revivor, if the proper repreſentative does not proceed within ſix years after abatement of a ſuit, provided there has been no decree.]

6 Mod. 25, 26. 76. 2 Salk. 424. pl. 12. 3 Keb. 366. 392.

But it ſeems to be agreed, that the ſtatute of limitations is no plea in the court of Admiralty, or ſpiritual court, where they proceed according to their law, and in a matter in which they have conuſance.

6 Mod. 26.

Therefore it hath been agreed, that for a ſuit upon a contract *ſuper altum mare*, no prohibition ſhould go upon their refuſal of a plea of the ſtatute of limitations.

2 Salk. 424. pl. 12.

So it has been held not to be pleadable to a proceeding in the ſpiritual court, *pro violenta manuum injectione ſuper clericum*, becauſe the proceeding is *pro reformatione morum*, and not for damages.

2 Salk. 424. pl. 12. 6 Mod. 25.

It has been doubted, whether, to a ſuit in the Admiralty for mariners' wages, this ſtatute is a good plea; becauſe it is ſaid, that this is a matter properly determinable at common law; and the allowing the Admiralty juriſdiction therein, only a matter of indulgence.

But this is now ſettled by the 4 and 5 *Ann. c.* 16. by which it is enacted, "That all ſuits and actions in the court of Admiralty "for

" for ſeamen's wages, ſhall be commenced and ſued within ſix " years next after the cauſe of ſuch ſuits or actions ſhall accrue, " and not after."

[With reſpect to certain ſuits in the ſpiritual court, it is enacted by *ſt.* 27 *G.* 3. *c.* 44. that " no ſuit for defamatory words ſhall be " commenced in any of the eccleſiaſtical courts, unleſs the ſame " ſhall be commenced within ſix calendar months from the time " when ſuch defamatory words ſhall have been uttered." And by § 2. " no ſuit ſhall be commenced in any eccleſiaſtical court for " fornication, or incontinence, or for ſtriking or brawling in any " church or church-yard, after the expiration of eight calendar " months from the time when ſuch offence ſhall have been com- " mitted."]

(E) Of the Exceptions in the Statute 21 *Jac.* 1. *c.* 16. and what will ſave a Bar thereof: And herein,

1. What Actions are within the Exceptions of the Statutes.

AS to this it hath been adjudged, that the laſt proviſo in the ſtatute not only extends to thoſe actions therein enumerated, but alſo to an *aſſumpſit*, though not mentioned, and to all other actions on the caſe, being of equal miſchief, and plainly within the intention of the legiſlature. Cro. Car. 245. 333. 2 Saund. 120. 2 Mod. 71. Sid. 453.

Debt upon eſcape is out of the ſtatute; Saund. 37. but an action on the caſe for an eſcape is not. Sid. 305. So is debt for not ſetting out of tithes; for theſe are not grounded upon any contract. Cro. Car. 515. Hutt. 109.

2. Of the Exception in relation to Infants, &c.

As to this it hath been holden, that the ſtatute being general, infants had been included, had they not been particularly excepted. Lev. 31.

It hath been holden, that if an infant, during his infancy, by his guardian brings an action, the defendant cannot plead the ſtatute of limitations; although the cauſe of action accrued ſix years before, and the words of the ſtatute are, *That after his coming of age*, &c. 2 Saund. 121.

It hath been held in Chancery, that if one receives the profits of an infant's eſtate, and ſix years after his coming of age he brings a bill for an account, the ſtatute of limitations is as much a bar to ſuch a ſuit, as if he had brought an action of account at common law; for this receipt of the profits of an infant's eſtate is not ſuch a truſt as, being a creature of the court of equity, the ſtatute ſhall be no bar to; for he might have had his action of account againſt the defendant at law, and therefore no neceſſity to come into this court for the account; for the reaſon why bills for an account are brought here, is from the nature of the demand, Abr. Eq. 304. Lockey v. Lockey.

mand, and that the party may have a diſcovery of books, papers, and the party's oath, for the more eaſy taking of the account, which cannot be ſo well done at law. But if the infant lies by for ſix years after he comes of age, as he is barred of his action of account at law, ſo ſhall he be of his remedy in this court.

3. Of the Exception in relation to Merchants' Accounts.

Jon. 401. 2 Sand. 124, 125. Lev. 287. 2 Keb. 622. Lev. 298. Vent. 90. Mod. 70. 270. 2 Mod. 312. 2 Vern. 456.

As to the exception relating to merchants, it hath been a matter of much controverſy, whether it extends to all actions and accounts relating to merchants and merchandize, or to actions of account open and current only, the words of the ſtatute being, *That all actions of treſpaſs*, &c. *all actions of account and upon the caſe, other than ſuch accounts as concern the trade of merchants;* ſo that by the words, *other than ſuch actions*, not being ſaid actions of account, it has been inſiſted that all actions concerning merchants are excepted.

Vide the authorities *ſupra.*

But it is now ſettled, that accounts open and current only are within the ſtatute; and that therefore, if an account be ſtated and ſettled between merchant and merchant, and a ſum certain agreed to be due to one of them, if in ſuch caſe, he to whom the money is due, does not bring his action within the time limited, he is barred by the ſtatute.

Carth. 226.

So, it hath been adjudged, that by the exception in the ſtatute concerning merchants' accounts, no other actions are excepted but actions of account.

Carth. 226.

Alſo it hath been adjudged, that bills of exchange for value received, are not ſuch matters of account as are intended by the exception in the ſtatute of limitations.

Catling v. Skoulding, 6 Term Rep. 189.

[But, though the exception in the ſtatute is ſo far limited to tranſactions merely between merchant and merchant, that where there is no item of account at all within ſix years before the action brought, the plaintiff will be precluded, unleſs he can ſhew that the accounts were between merchant and merchant, *&c.*; yet a mutual account of any ſort between a plaintiff and defendant, though neither of them of the deſcription of merchant, for any item of which credit has been given within ſix years, is evidence of a promiſe to pay the balance, and will take the caſe out of the ſtatute of limitations. But where all the items of an open, unliquidated account are on one ſide, the laſt item which happens to be within ſix years ſhall not draw after it thoſe that are of longer ſtanding.]

Cotes v. Harris, Bull. N. P. 149.

4. Of the Exception in relation to Perſons beyond Sea.

Cro. Car. 245. 333. Jon. 252. Lev. 143. 3 Mod. 311. 2 Lutw. 950. 2 Salk. 420. pl. 1.

It ſeems to have been agreed, that the exception as to perſons being beyond ſea, extends only where the creditors or plaintiffs are ſo abſent, and not to debtors or defendants, becauſe the firſt only are mentioned in the ſtatute; and this conſtruction hath the rather prevailed, becauſe it was reputed the creditor's folly, that he

he did not file an original, and outlaw the debtor, which would have prevented the bar of the ſtatute.

But as the creditors being beyond ſea is ſaved by the 21 *Jac.* 1. *c.* 16. ſo now by the 4 and 5 *Ann. c.* 16. it is enacted, "That if "any perſon or perſons, againſt whom there is or ſhall be any "cauſe or ſuit of action for ſeamen's wages, or againſt whom "there ſhall be any cauſe of action of treſpaſs, detinue, action "*ſur* trover, or replevin, for taking away goods or chattels, or of "action of account, or upon the caſe, or of debt grounded upon "any lending or contract without ſpecialty, of debt for arrear- "ages of rent, of aſſault, menace, battery, wounding, and im- "priſonment, or any of them, be or ſhall be, at the time of any "ſuch cauſe or ſuit of action given or accrued, fallen or come, "beyond the ſeas, that then ſuch perſon or perſons, who is or "ſhall be entitled to any ſuch ſuit or action, ſhall be at liberty to "bring the ſaid actions againſt ſuch perſon and perſons after their "return from beyond the ſeas, within ſuch times as are limited "for the bringing of the ſaid actions by the 21 *Jac.* 1. *c.* 16." Show. 98. Carth. 136.

[This exception is not confined to *Engliſhmen*, who may occaſionally go beyond ſea, but is general, and extends to foreigners, who are conſtantly reſident abroad. Strithorſt v. Græme, 2 Bl. Rep. 723.

As the ſtatutes of 21 *Jac.* and 4 and 5 *Ann.* are both expreſs, that the party to be excuſed muſt be *beyond ſea*, of courſe *Scotland* is not included in the exception. King v. Walker, 1 Bl. Rep. 286.

If a plaintiff be in *England* at the time the cauſe of action accrues, the time of limitation begins to run, ſo that if he, or, if he die abroad, his perſonal repreſentative, do not ſue within ſix years, the ſtatute attaches; and this, though the perſonal repreſentative were abroad at the time of the teſtator's or inteſtate's death. Smith v. Hill, 1 Wilſ. 134.

The abſence of one of ſeveral co-plaintiffs will not prevent the ſtatute of limitations from attaching, for it lays the others under no diſability of ſuing.] Perry v. Jackſon, 4 Term Rep. 516.

5. Where no Executor or Adminiſtrator to ſue or be ſued.

If *A.* receives money belonging to a perſon who (*a*) afterwards dies inteſtate, and to whom *B.* takes out adminiſtration, and brings an action againſt *A.*, to which he pleads the ſtatute of limitations, and the plaintiff replies, and ſhews that adminiſtration was committed to him ſuch a year, which was *infra ſex annos;* though ſix years are expired ſince the receipt of the money, yet not being ſo ſince the adminiſtration committed, the action is not barred by the ſtatute. Salk. 422. pl. 4. Curry v. Stephenſon, Skin. 555. pl. 3. S. C. 4 Mod. 376. S. C. Carth. 335. S. C. in which laſt book it is

ſaid, that Holt was of opinion, that the adminiſtrator ſhould have ſix years from the time of granting adminiſtration, according to Stanford's caſe cited in Saffin's caſe, Cro. Jac. 60, 61. but in the principal caſe there was judgment againſt the plaintiff on another point. [(*a*) *Note*; This ſtatement of the facts of the caſe of Curry v. Stephenſon is incorrect. It appears from Skinner's Report, that the money was not received by *A.* until *after* the death of the inteſtate: ſo that, before adminiſtration was granted, there was no perſon who could claim it; and the ſtatute begins to operate only from the time a right to demand the thing in queſtion veſts in ſome one. In Stanford's caſe the fine was not levied till *after* the death of the inteſtate. Had the money been received in the lifetime of the perſon who died inteſtate, that perſon would have had a right of action againſt *A.* veſted in him, and from that period the time of limitation would have commenced; and the ſtatute would have been a bar. For, when once the time of limitation has begun to run, it ſuffers no interruption from the death of the claimant, nor does it revive in favour of any perſon upon whom the right of claim may devolve.]

2 Salk. 424. pl. 13. * See Stra. 907. the next case.

It is said in general, that where one brings an action before the expiration of six years, and dies before judgment, the six years being then expired, this shall not prevent his executor *.

Trin. 5G. 2. Wilcox and Huggins. Barnard. K. B. 335. Fitzgib. 170. 2 Stra. 907.

But if an executor sues upon a promissory note to the testator, and dies before judgment, and six years from the original cause of action are actually expired, and the executor of the executor brings a new action in four years after the first executor's death, the statute of limitations shall be a bar to such action; for though the debt does not become irrecoverable, by an abatement of the action after the six years elapsed by the plaintiff's death, yet the executor should make a recent prosecution, to which the clause in the statute, that provides a year after the reversal of a judgment, &c. may be a good direction; or shew that he came as early as he could, because there was a contest about the will, or right of administration; for the statute was made for the (*a*) benefit of defendants, to free them from actions when their witnesses were dead, or their vouchers lost.

(*a*) That the statute of limitations was one of the best of statutes, and the pleading thereof no disparagement to any body. *Per* Holt, C. J. 7 Mod. 12. [It is a noble, beneficial act. *Per* Wilmot, J. 1 Bl. Rep. 287. It is allowed to be pleaded in the courts both of C. P. and K. B. after an order for time to plead on the terms of pleading issuably. Rucker v. Hannay, 3 Term Rep. 124. *Vide* Studholme v. Hodgson, 2 Term Rep. 390. *contr.*]

Knight v. Bate, Cowp. 738.

[Where a statute for allotting waste lands within a manor, directed all disputed claims to be tried by a feigned issue, and limited the time of bringing the action to six months; it was holden, that an action brought against a copyholder, within time, if abated by his death, must be revived against the heir within six months after the plaintiff had notice of the descent, though the heir were not admitted till long after that time.]

2 Vern. 695.

If there is no executor against whom the plaintiff may bring his action, he shall not be prejudiced by the statute of limitations, nor shall any laches in such case be imputed to him.

6. Where no Jurisdiction to sue in, or where hindered by some Authority.

Keb. 157. Lev. 31. 111. Carth. 137. 2 Salk. 420. pl. 1. (*b*) In Plow. 9. b. that things happening by an invincible necessity, though they be against the common law, or an act of parliament, shall not be prejudicial.—Therefore to say the courts were shut, is a good excuse, on voucher of record. Bro. tit. Failure of Record.—So, in the times of domestick war, when the courts of justice are shut, a descent shall not take away an entry, though the disseisin was in times of peace; for then the disseisee would be without all remedy, there being no courts open to bring his action in. Co. Lit. 249. (*c*) In some books it is said, that the defendant rejoined, and set forth the act of oblivion, and that for confirmation of judicial proceedings; and for this reason also the replication was held ill. Keb. 157. Lev. 111.

It seems agreed, that there being no courts, or the courts of justice being shut, is no plea to avoid the bar of the statute of limitations; as, where after the civil war an *assumpsit* was brought, and the defendant pleaded the statute of limitations; to which the plaintiff replied, that a civil war had broke out, and that the government was usurped by certain traitors and rebels, which hindered the course of justice, and by which the courts were (*b*) shut up, and that within six years after the war ended he commenced his action; this replication was held ill (*c*); for the statute being general, must work upon all cases which are not exempted by the exception.

3 Lev. 283.

And in confirmation of this doctrine we find, that an act of parliament was made 1 *W.* & *M.* whereby it is enacted, that from the

the 10th of *December* (which was the day that King *James* departed, till the 12th of *March* 1688, when King *William* assumed the government) shall not be accounted any part of the time within which any person by virtue of the statute of limitations might bring his action; but that he shall have so much allowance of time as is from the 10th of *December* to the 12th of *March* for bringing his action.

It is clearly agreed, that the defendant's being a member of parliament, and entitled to privilege, will not save a bar of the statute; because the plaintiff might have filed an original without being guilty of any breach of privilege. Lev. 31. 1 Sit. Carth. 136, 137.

It is said, that if a man sues in Chancery, and, pending the suit there, the statute of limitation attaches on his demand, and his bill is afterwards dismissed, the matter being properly determinable at common law; in such case, the court will preserve the plaintiff's right, and will not suffer the statute to be pleaded in bar to his demand. Vern. 73, 74. But it seems, that there must be some equitable circumstances attending his case; and therefore in 2 Chan. Ca. 217. it is said, that unless the plaintiff was stayed by some act of the court, as injunction, &c., the court will not interpose.

If the statute of limitations be pleaded to an action, the plaintiff to save his action may reply, that he had commenced (*a*) the suit in an inferior court within the time of limitation, and that it was removed to *Westminster* by *habeas corpus*; and this shall be allowed by a favourable construction of the statute of limitations; although in strictness the suit is commenced in the court above, when it is removed by *habeas corpus*. Sid. 228. 3 Keb. 263. Beven and Chapman. Lev. 143. S. C. but same point does not appear.

(*a*) The plaintiff must aver, that the cause of action in the court below, and that removed, is the same. Cro. Car. 294. But a difference in value is not material. Vent. 252.

So, in a like case, where debt was brought in the Palace-court, and after some proceedings there, the six years expired, the defendant sued a *habeas corpus*, and removed the cause into *B. R.*, where the plaintiff declared *de novo*; and the defendant pleaded, that the cause of action did not accrue within six years before the *teste* of the *habeas corpus*; this was held to be a good plea; but that the plaintiff might reply the suit below, and shew that to have been within the six years; not that this suit was a continuance of the suit below, but that the plaintiff had rightfully and legally pursued his right; and it should not be in the power of the defendant to defeat or hinder him of a remedy without any default *. 2 Salk. 424. pl. 13. Matthews v. Phillips.

* So, of a plaint in the sheriff of London's court. Stra. 719. Ld. Raym. 1427.

7. Where the Suing out a Writ will save the Bar of the Statute.

It is clearly agreed, that the suing out an original will save a bar of the statute of limitations, and that thereupon the defendant may be outlawed; and that if beyond sea at the time of the outlawry, though it shall be reversed after his return, yet the plaintiff may bring another original by (*b*) *journies accounts*, and thereby take advantage of his first writ. Carth. 136. Salk. 420. pl. 1. 3 Mod. 311.

(*b*) For this *vide* Lutw. 260.

Sid. 53. 60. Carth. 233. Salk. 421. 1 Str. 550. 2 Str. 734. Ld. Raym. 1441. 2 Burr. 961.

Alſo, it is agreed, that the ſuing out a *latitat* is a ſufficien commencement of a ſuit, to ſave the limitation of time, becauſe the *latitat* is the original of *B. R.* and may be continued on record as an original writ.

2 Keb. 46. Bottle and Wood.

Alſo, it hath been ruled, that to a plea of the ſtatute of limitations the plaintiff may reply, that he ſued out a *latitat*, and continued it down by a *vicecomes non miſit breve*, without concluding *prout patet per recordum;* for the *latitat* roll is only for the private uſe of the court, and no record.

Style, 178. 2 Keb. 369. S. C. cited.

So, it ſeems, the plaintiff may reply, that he ſued out a *latitat* of ſuch a term, without ſetting forth the day of the *teſte;* and that in ſuch caſe it ſhall have relation to the firſt day of the term.

[But in this caſe, the defendant may in his rejoinder ſhew the true day on which the *latitat* was ſued out, in oppoſition to the *teſte*. Johnſon v. Smith, 2 Burr. 950.]

Carth. 144. 2 Salk. 420. pl. 2. Lutw. 101. 254. 3 Mod. 33.

But though the ſuing out of an original, or *latitat*, will be a ſufficient commencement of a ſuit, yet the plaintiff, in order to make it effectual, muſt ſhew that he hath (*a*) continued the writ to the time of the action brought.

(*a*) That the attorney's writing the continuances on the writ in his chambers, is ſufficient. Sid. 53. Keb. 140. [The continuances, it ſeems, may be entered at any time. Bates *qui tam* v. Jenkinſon, E. 24 G. 3. cited in 6 Term Rep. 618.]

Carth. 144. Rudd v. Berkenhead. 2 Salk 420. pl. 2 S. C.

As, in *aſſumpſit* for fees due to an attorney, the defendant pleaded, *non aſſumpſit infra ſex annos;* the plaintiff replied, that on ſuch a day two years before he had ſued out an attachment of privilege againſt the defendant; upon which writ *taliter proceſſum fuit*, that the defendant (on ſuch a day) in *Hilary* term *anno* 2 *Will. &c.* appeared, and the plaintiff declared againſt him *modo & forma, &c.* And upon demurrer to this replication it was held ill; becauſe the plaintiff did not ſet forth any continuance of this writ of attachment, *(per vic. non miſit breve,)* which was ſued out two years before; for it is impoſſible that the defendant ſhould appear in *Hilary* term *anno* 2 *Will.* to a writ returnable two years before, and no other writ is ſet forth by the plaintiff; but if the plaintiff, after the *taliter proceſſum fuit*, had ſhewn the laſt attachment, and the return thereof, upon which, in truth, the defendant did appear, it had been well enough without ſhewing any of the continuances.

Salk. 421. Green v. Rivett.

An *indebitatus aſſumpſit* was laid ſeveral ways; the defendant pleaded, *actio non, quia dicit quod billa prædict. exhibit. fuit* 20 *die Junii, & non antea & quod ipſe ad aliquod tempus infra ſex annos ante exhibitionem billæ prædict. non aſſumpſit, &c.* The plaintiff replied a bill of *Middleſex* teſted *die Lunæ prox. poſt tres ſeptimanas, &c.* returnable the ſame day; whereupon was returned *non eſt inventus*, and continued down by *vic. non miſit breve & præcept. ſicut alias.* To this it was demurred, and judgment given for defendant; for there cannot be ſuch a bill of *Middleſex* as this, which is returnable the very day of the *teſte;* and the ſtatute of limitations, on which the ſecurity of all men depends, is to be favoured.

[An

[An attachment of privilege is not a continuance of a bill of *Middlesex*. Smith v. Bower, 3 Term Rep. 662. Leadbeater v. Markland, 2 Bl. Rep. 1131.

Although a suit actually commenced, though informally or irregularly, will have the effect of preventing the operation of the statute; yet the plaintiff must shew that the first writ was (*a*) returned; for until the return of the writ the court is not in possession of the cause. (*a*) Harris v. Woolford, 6 Term Rep. 617. Bull. N. P. 151.

A bill may be filed against an attorney in the vacation, in order to prevent the statute from attaching.] Lane v. Wheat, B. R. M. 23 Geo. 3. Dougl. 313. n.

8. Where a Debt barred by the Statute shall be said to be revived.

It is clearly agreed, that if after the six years the debtor acknowledges the debt, and promises payment thereof, that this revives it, and brings it out of the statute; as, if a debtor by promissory note, or simple contract, promises within six years of the action brought that he will pay the debt; though this was barred by the statute, yet it is revived by the promise; for as the note itself was at first but an evidence of the debt, so that being barred, the acknowledgment and promise is a new evidence of the debt, and being proved, will maintain an *assumpsit* for recovery of it. Salk. 28. pl. 16. 29. 19. Carth. 470. 5 Mod. 425, 426. 2 Show. 126. pl. 104. 2 Vent. 151.

Also, it hath been adjudged, that a conditional promise will revive a debt barred by the statute of limitation; as, where to an *assumpsit* by an executor for goods sold and delivered by the testator, the defendant pleaded the statute; and upon evidence it appeared, that the defendant within six years, being applied to by the executor for the debt, said, *If you prove that I had the goods, I will pay you;* which being fully proved at the trial, it was held that this conditional promise revived the debt; and that though made to the executor, after the death of the testator, it was sufficient to maintain the issue; (*b*) because the promise did not give any new cause of action, but only revived the old cause, and was of no other use but to prevent the bar by the statute of limitations. Com. 53. S. C. Carth. 470. Heylin v. Hastings. Salk. 29. pl. 19. S. C. 5 Mod. 425. S. C. cited. (*b*) Where the plaintiff declared as executor, on a promise to the testator, and the defendant pleaded *non assumpsit infra sex annos*; and upon the trial of the issue it appeared, that there was a new promise made within six years, but it was a promise made to the plaintiff himself, and not to the testator; it was held *per cur.* that he should have declared accordingly. Salk. 28. Dean v. Crane, 6 Mod. 309. S. C. [Bull. N. P. 150. S. C.]

So, it hath been held, that a bare (*c*) acknowledgment of the debt within six years of the action, is sufficient to revive it, and prevent the statute, though no new promise was made. Carth. 470. said to be so held by all the judges in Serjeants'-Inn. (*c*) As, stating an account of the goods sold, March, 105-6.—[And an acknowledgment of the debt even after the commencement of the action will take it out of the statute. Yea v. Fouraker, 2 Burr. 1099. What is an acknowledgment is matter for the consideration of a jury. Lloyd v. Maund, 2 Term Rep. 760. But although a promise is not necessary to take the demand out of the statute, yet the declaration of the defendant must amount to an acknowledgment of a *debt*; and therefore, where a person sued by an executor said, "I acknowledge the *receipt of the money*, but the testatrix gave it me." Clive, Baron, held it not sufficient. Owen v. Wolley, Bull. N. P. 148.]

2 Vent. 151. Bland v. Haſchig, adjudged by three judges againſt *Ventris* who inclined to the contrary; becauſe the plea of *non aſſumpſit infra ſex annos* implies a promiſe at firſt; and if one ſhould renew his promiſe within ſix years, it is reaſonable it ſhould bind him; and the plaintiff muſt ſue them all, elſe he will vary from the original contract. But if an *indebitatus aſſumpſit* for goods ſold be brought againſt four perſons who plead the ſtatute of limitations, and it be found that one of them promiſed within ſix years, there can be no judgment againſt him, for the contract being entire, it muſt be found that they all promiſed.

[But it hath been lately determined, that the acknowledgment of one out of ſeveral drawers of a joint and ſeveral promiſſory note, will take it out of the ſtatute as againſt the others, and may be given in evidence in a ſeparate action againſt any of the others. Whitcombe v. Whiting, Dougl. 652. And if in ſuch caſe, one of the drawers becomes bankrupt, and the payee receives a dividend under the commiſſion on account of the note, this payment of the dividend under the commiſſion will amount to ſuch an acknowledgment of the debt as will prevent any of the others from availing themſelves of the ſtatute of limitations in an action brought againſt them for the remainder of the money due on the note. Jackſon v. Fairbank, 2 H. Bl. 340.——The caſe of Bland v. Haſelrig in the text, Mr. Douglas obſerves, may be explained on the manner of the finding; for, as the plea was *joint*, and the declaration muſt have alleged a *joint undertaking*, the verdict did not find what the plaintiff had bound himſelf to prove. But, according to the principle in Whitcombe v. Whiting, the jury were to conſider the promiſe of one as the promiſe of all, and therefore, to find a general verdict againſt all. Dougl. 653. n.]

Salk. 154. pl. 3. 2 Vern. 141. [See, as to this point, Blakeway v. Earl of Strafford, 2 P. Wms. 373. Andrews v. Brown, Pr. Ch. 385. Jones v. Earl of Strafford, 3 P. Wms. 77. Vaughan v. Guy, Moſ. 245. Legaſtick v. Cowne, *Id.* 391. Lacon v. Briggs, 3 Atk. 107. Truman v. Fenton, Cowp. 548. Oughterlony v. Earl of Powis, Ambl. 231.] It ſeems to be the doctrine of the courts of equity, that if a man by will or deed ſubject his lands to the payment of his debts, debts barred by the ſtatute of limitations ſhall be paid, for they are debts in equity, and the duty remains; and the ſtatute hath not extinguiſhed that, though it hath taken away the remedy.

Abr. Eq. 305. Andrews v. Brown. Alſo it hath been ruled in equity, that if a man has a debt due to him by note, or a book-debt, and has made no demand of it for ſix years, ſo that he is barred by the ſtatute of limitations; yet if the debtor, or his executor, after the ſix years, put out an advertiſement in the *Gazette*, or any other newſpaper, that all perſons who have any debts owing to them, may apply to ſuch a place, and that they ſhall be paid; this (though general, and therefore might be intended of legal ſubſiſting debts only) yet amounts to ſuch an acknowledgment of that debt which was barred, as will revive the right, and bring it out of the ſtatute again.

(F) Of the Manner of pleading, and taking Advantage of the Statute of Limitations.

Lev. 111. Sid. 253. *& vide* Cro. Jac. 115. IT ſeems to be admitted, that the ſtatute of limitations muſt be pleaded (*a*) poſitively by him that would take (*b*) advantage thereof; (*c*) and that the ſame cannot be given in evidence, eſpecially in an *aſſumpſit*, becauſe the ſtatute ſpeaks of a time paſt, and relates to the time of making the promiſe.

(*a*) And therefore if the defendant pleads, that if any ſuch promiſe was made, it was not within ſix years, and ſo within the ſtatute of limitations; ſuch conditional plea is not good; *vide* head of Pleadings.——But purſuant to the ſtatute 4 & 5 Annæ, c. 16. for amendment of the law, the defendant, by way of double plea, may plead *non aſſumpſit* and *non aſſumpſit infra ſex annos*; though it may ſeem inconſiſtent, the plea of *non aſſumpſit infra ſex annos* im-

plying

plying a promiſe. (*b*) If a man deviſes all the reſt and reſidue of his perſonal eſtate, after debts and legacies paid, to *J. S.* and ſeveral of the creditors are barred by the ſtatute of limitations, who notwithſtanding bring actions againſt the executor, and he refuſes to plead the ſtatute of limitations; yet equity will not in favour of *J. S.*, to whom the ſurplus is deviſed, compel the executor to plead the ſtatute. Abr. Eq. 305. Caſtleton v. Lord Fanſhaw. (*c*) That though it appears upon the face of the declaration that the cauſe of action did not ariſe within ſix years, yet the defendant ſhall not take advantage of that without pleading, becauſe there might be an original ſued out, which the plaintiff cannot otherwiſe ſhew, than by way of replication, upon the defendant's putting him upon it. 2 Salk. 422, 3.

But in debt for rent, upon *nil debet* pleaded, the ſtatute of limitations may be given in evidence; for the ſtatute has made it no debt at the time of the plea pleaded, the words being in the preſent tenſe. Salk. 278. pl. 1. *per* Holt.

In replevin the defendant pleaded not guilty *de capt. prædict. infra ſex annos jam ultimo elapſos*; and though it was urged that this was the ſame with pleading *non cepit*, and if he did not take, he could not be guilty of the detainer; and if this way of pleading were not allowed, the ſtatute would be entirely evaded as to this action; yet the plea was held ill, becauſe he ought to have anſwered to the detainer, as well as to the taking; for there may be a detainer without a taking: beſides, a thing may be lawfully diſtrained, although unlawfully kept; as, by being put into a caſtle, &c. by which means it could not be replevied. Sid. 81. Arundel and Trevil, Keb. 279. S. C.

In treſpaſs, for a treſpaſs done 13 years before, the defendant pleads, that *infra ſex annos, &c. non eſt inde culpabilis.* Plaintiff replies, that he brought his action ſuch a term, and that within ſix years before that time the defendant did the treſpaſs; and upon this the defendant takes iſſue, and is found guilty; and it was held, 1*ſt*, That the defendant's plea was good in bar, without pleading the ſtatute. 2*dly*, That the plaintiff's replication was no departure; although it was objected, that he could have replied nothing, but that he was under ſome of the diſabilities, for which there is a ſaving in the ſtatute; for the plaintiff is not tied to the time or place laid in the declaration, but may vary from it upon evidence; and ſo when the defendant, by his plea, pleads to a certain time or place, and thereby makes the time or place material, the plaintiff may follow him without any (*a*) departure. Raym. 86. Lev. 110. Keb. 566. S. C. Lee v. Raynes. (*a*) Note; This caſe ſeems to differ from Tyler and Wall, Cro. Car. 229. for there the plaintiff in his replication varies as well from the time laid by the defendant in his plea, as the time laid in the declaration.

[In equity, where a particular ſpecial promiſe is charged to avoid the operation of the ſtatute, the plaintiff muſt deny the promiſe charged, by averment in the plea, as well as by anſwer to ſupport the plea.] Anon. 3 Atk. 70.

[For Lunatics ſee Idiots & Lunatics.]

Maihem.

(A) What it is.
(B) How puniſhed.

(A) What it is.

Co. Lit. 126. 128. 3 Inſt. 62. 118. Hawk. P. C. c. 44. 3 Bl. Comm. 121.

MAIHEM is defined to be any hurt done to a man's body whereby he is rendered leſs able in fighting, either to defend himſelf, or annoy his adverſary; ſuch as the cutting off, diſabling or weakening a hand or finger, ſtriking out an eye or fore-tooth, or caſtration, *&c.*, and theſe are properly ſaid to be maihems, and to come under the notion of felonies; but the cutting off an ear, or noſe, are ſaid not to be properly maihems, becauſe they do not weaken a man, but only diſfigure him.

(B) How puniſhed.

Bract. 144. 3 Inſt. 62.

BY the old common law caſtration was puniſhed with death, and other maihems with the loſs of member for member; but of later days maihem was puniſhable only by fine and impriſonment.

(*a*) The occaſion of this act was an aſſault that was made on Sir John Coventry, a member of the Houſe of Commons, by ſlitting his noſe, and thence called Coventry's act.

And by the ſtatute (*a*) 22 & 23 *Car.* 2. *c.* 1. it is enacted, "That "if any perſon ſhall on purpoſe, and of malice forethought, and "by lying in wait, unlawfully cut out or diſable the tongue, put "out an eye, ſlit the noſe, cut off a noſe or lip, or cut off or diſ- "able any limb or member of any ſubject of his majeſty, with "intention in ſo doing to maim or diſfigure, in any the manners "before-mentioned, ſuch his majeſty's ſubject, that then, and in "every ſuch caſe, the perſon or perſons ſo offending, their coun- "ſellors, aiders, and abettors, knowing of and privy to the offence "as aforeſaid, ſhall be and are by the ſaid ſtatute declared to be "felons, and ſhall ſuffer death as in caſes of felony without "benefit of clergy.

"Provided, that no attainder of ſuch felony ſhall extend to cor- "rupt the blood, or forfeit the dower of the wife, or the lands, "goods, or chattels of the offender."

L

If a man attack another of malice forethought, in order to murder him with a bill, or any other ſuch like inſtrument, which cannot but endanger the maiming him, and in ſuch attack happen not to kill, but only to maim him, he may be indicted on this ſtatute, together with all thoſe who were his abettors, &c. and it ſhall be left to the jury on the evidence, whether there was a deſign to murder by maiming, and, conſequently, a malicious intent to maim, as well as to kill; in which caſe the offence is within the ſtatute, though the primary intention was murder*.

Stat. Tri. vol. 6. f. 211. ſo ruled in Coke's trial who together with Woodburne were condemned and executed at Suffolk aſſizes, 8 Geo. 1. for ſlitting the noſe of Mr. Criſpe.

* Remedy *by Action.*—For a threat, aſſault, battery, or maihem, the party ſhall have a remedy by action of treſpaſs, *quare manus impoſuit ita quod*, &c. Lut. 1428.—*Quare in ipſum inſultum fecit & ipſum verberavit*, &c. F. N. B. 86. I——And ſuch is the form, though he does not wound him. F. N. B. 86. K.——*Quare in ipſum inſultum fecit, verberavit, vulneravit, & impriſonavit*, &c. F. N. B. 86. K.——*Quare, cepit, impriſonavit, & in priſona quouſque finem, &c. feciſſet, detinuit.* F. N. B. 86 K.

By *Indictment.*——So, maihem is the greateſt offence under felony. Co. Lit. 127. a.—So, for a maihem a man may be indicted, fined, and ranſomed. Co. Lit. 127. a. b. 3 Inſt. 63.—Though the maihem be done by himſelf. Co. Lit. 127. b.—Though the perſon be his villein, who cannot maintain an action for it againſt his lord. Co. Lit. 127. a.—So, an indictment lies for an aſſault, battery, or impriſonment of a ſubject. Com Dig. 1 V. 526.

When the Damages ſhall be increaſed for a Maihem.——If the declaration mention a maihem, the court, upon view of the mayhem, may increaſe the damages given by the jury.—1 Roll. 572. l. 10. 15. R. 1 Leo. 139.—— Though the particular part in which the maihem was, be not ſpecified. R. Hard. 408. [In Brown v. Seymour, the court ſeemed to think a declaration, that defendant aſſaulted and maimed the plaintiff in the left hand particular enough, though they did not allow the circumſtances of the caſe to be ſuch as called for an increaſe of damages. 1 Wilſ. 6.] So, in battery, where the manner of the battery is deſcribed, the court, upon view, may increaſe the damages. *Per* Hale. Hard. 408.—So, the court may increaſe damages, upon view, and examination of witneſſes, where the declaration is general *quod maihemavit*, without making any deſcription of the mayhem, if the judge of aſſiſe certify the particulars of the mayhem, or be in court, and affirm, that the particulars, now proved, were given in evidence at the trial. 1 Sid. 108.—But where the declaration does not mention a maihem, nor deſcribe the manner of the battery, the court cannot increaſe the damages upon view. Hard. 408.—So, if the maihem was not the act of the defendant directly, but by an horſe, after the plaintiff was thrown down by the defendant. R. 1 Sid. 433.—Or, by a gun, which the defendant let off, and which maimed the plaintiff againſt his will. R. 1 Sid. 108.—So, if the declaration be general *quod maihemavit*, without deſcribing how, and the judge do not certify it. 1 Sid. 108.——[In Smallpiece v. Bokenham, M. 27 Car. 2. C. B. upon a motion to increaſe damages *ſuper viſum vulneris*, the court ſaid, it was neceſſary to be proved to be the ſame wound for which the damages were given, and ordered notice to be given to the defendant who appeared, and witneſſes on the one part and on the other were examined, and ſeveral of the jurymen, who all ſaid, that no evidence was given to them that any blow was given upon the eye, or that the plaintiff had loſt his eye by the battery; and for this reaſon the court would not increaſe the damages; for new evidence ought not to be given, this being a cenſure on the firſt verdict, and a correction of it. Bull. N. P. 21.]

By Appeal.——So, he may proſecute his appeal of maihem. Han. Ent. 270. Co. Ent. 50. c.—And the writ of appeal, and indictment ſhall ſay, *quod felonice maihemavit.* 3 Inſt. 63, 118.—To an appeal of maihem, the defendant may plead *not guilty.* Han. 271.—So, if he did it *ſe defendendo*, he may plead in bar, *ſon aſſault demeſne.* Han. 271. 277. Co. Ent. 52.—And he muſt plead it; for he cannot give it in evidence upon *not guilty.* 2 Inſt. 316.—So, the defendant may plead a releaſe of the mayhem. Com. Dig. 1 V. 597—Or, of all actions perſonal; for the damages only are recovered in ſuch appeal. Lit. f. 502.—So, the defendant may plead 20 *l.* or other ſum given in ſatisfaction. Han. 274.——A recovery in treſpaſs for the ſame maihem. Co. Ent. 50. b.

Maintenance, and the Offence of Buying or Selling a pretended Title.

[See Mr. J. Buller's comment on the doctrine of maintenance, 4 Term Rep. 340.] Co. Lit. 368. b. 2 Inſt. 208. 212. Hawk. P. C. c. 83.

MAintenance in general ſignifies an unlawful taking in hand, or upholding of quarrels, or ſides, to the diſturbance or hindrance of common right; and is ſaid to be twofold:

Co. Lit. 368. 2 Inſt. 213. 2 Roll. Abr. 115.

1. *Ruralis*, or in the country; as where one aſſiſts another in his pretenſions to certain lands, by taking or holding the poſſeſſion of them for him by force or ſubtlety; or, where one ſtirs up quarrels and ſuits in the country, in relation to matters wherein he is no way concerned; for this kind of maintenance is puniſhable at the king's ſuit by fine and impriſonment, whether the matter in diſpute any way depended in plea, or not; but it is ſaid not to be actionable.

2 Inſt. 212. 2 Roll. Abr. 115.

2. *Curialis*, or in a court of juſtice; where one officiouſly intermeddles in a ſuit depending in any ſuch court, which no ways belongs to him, by aſſiſting either party with money, or otherwiſe, in the proſecution or defence of any ſuch ſuit.

Of this ſecond Kind of Maintenance there are ſaid to be three Species:

1. Where one maintains one ſide to have part of the thing in ſuit, which is called champerty.

2. Where one laboureth a jury, which is called embracery.

3. Where one maintains another without any contract to have part of the thing in ſuit, which generally goes under the common name of maintenance; and of which in the following order.

(A) What ſhall be ſaid to amount to an Act of Maintenance.

(B) In what Reſpects ſome ſuch Acts may be juſtified: And herein,

1. How far they are juſtifiable in reſpect of an Intereſt in the Thing in Variance.
2. How far in reſpect of Kindred or Affinity.
3. How far in reſpect of other Relations; as that of Lord and Tenant, Maſter and Servant.

4. How

4. How far in reſpect of Charity.
5. How far in reſpect of the Profeſſion of the Law.

(C) How Maintenance is reſtrained, and puniſhed by the Common Law.

(D) How reſtrained and puniſhed by Statute.

(E) Of the Offence of Buying or Selling a pretended Title.

(A) What ſhall be ſaid to amount to an Act of Maintenance.

IT is ſaid, that not only he who aſſiſts another with money in his cauſe, as by retaining counſel for him, or otherwiſe bearing him out in the whole or part of the expence, but alſo he who, by his friendſhip or intereſt, ſaves him that expence, which otherwiſe he may be put to, is guilty of maintenance; as where one perſuades, or but endeavours to perſuade, a man to be of counſel for another *gratis*. Bro. Maint. 7. 14. 2 Roll. Abr. 118. Hawk. P.C. c. 83. § 5.

Alſo, it ſeems to be an act of maintenance to open evidence to the jury, or to give evidence officiouſly without being called upon to do it, or to ſpeak in a cauſe as one of counſel with the party, or to retain an attorney for him; and ſome have ſaid, that it is maintenance even barely to go along with him to inquire for a perſon learned in the law. Hetl. 78, 79. Cro. Eliz. 735. Roll. Abr. 593. 2 Roll. Abr. 118.

It ſeems to be maintenance for a man of great power and intereſt to ſay publickly, that he will ſpend 20*l.* on one ſide, or that he will give 20*l.* to labour the jury; and it hath been ſaid to be maintenance for ſuch a perſon to come to the bar with one of the parties, and ſtand by him while his cauſe is tried, without ſaying any thing: but a promiſe to maintain another is not maintenance, unleſs it be in reſpect of the publick manner in which it is made, or the power of the perſon by whom it is made. Hawk. P.C. c. 83. § 7. and ſeveral authorities there cited.

It is ſaid to be maintenance for a juror to ſolicit a judge to give judgment according to the verdict; but it ſeems to be no maintenance for a juror to exhort his companions to join with him in ſuch a verdict as he thinks right. Hawk. P.C. c. 83. § 8.

It ſeems to be no maintenance for a man to give another friendly advice what action is proper for him to bring for ſuch a debt; or what method is ſafeſt to free him from ſuch an arreſt; or what counſellor or attorney is likely to do his buſineſs moſt effectually; for it would be extremely hard to make ſuch neighbourly acts of kindneſs, which ſeem rather commendable than blame-worthy, to come under the notion of maintenance; which always ſeems to imply Hawk. P.C. c. 83. § 9.

imply a contentious and over-buſy intermeddling with other men's matters, in which reſpect it is ſo highly criminal; yet it is ſaid, that a man of great power, not learned in the law, may be guilty of maintenance, by telling another, who aſks his advice, that he has a good title.

Hawk. P.C. c. 83. § 10. It is no maintenance to give a man money, who has no ſuit then depending, unleſs it plainly appear that it was given with a deſign to aſſiſt him in a ſuit intended, which ſuit is afterwards actually brought.

Hawk. P.C. c. 83. § 11. It is as much an act of maintenance to ſupport a man after judgment given, as to do it pending the plea.

(B) In what Reſpects ſome ſuch Acts may be juſtified: And herein,

1. How far they are juſtifiable in reſpect of an Intereſt in the Thing in Variance.

2 Roll. Abr. 115. 117. 2 Inſt. 564. Bro. Maint. 28. 53. IT ſeems clear, that not only thoſe who have an actual intereſt in the thing in variance, as thoſe who have a reverſion expectant on an eſtate-tail, or on a leaſe for life, or years, &c., but alſo thoſe who have a bare contingency of an intereſt in the lands in queſtion, which poſſibly may never come *in eſſe*, and even thoſe who, by the act of God, have the immediate poſſibility of ſuch an intereſt, as heirs apparent, or the huſbands of ſuch heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning ſuch lands; and if a plaintiff, in an action of treſpaſs, alien the lands, the alienee may produce evidence to prove that the inheritance, at the time of the action, was in the plaintiff, becauſe the title is now become his own.

Bro. Maint. 51. Alſo, he who is bound to warrant lands may lawfully maintain the tenant in the defence of his title, becauſe he is bound to render other lands to the value of thoſe that ſhall be evicted.

Noy, 99. 100. Moor, 620. Cro. Eliz. 552. Sid. 217. Alſo, he who has an equitable intereſt in lands or goods, or even in a choſe in action, as, a *ceſtui que truſt*, or a vendee of lands, &c., or an aſſignee of a bond for a good conſideration, may lawfully maintain a ſuit concerning the thing in which he has ſuch an equity; and from the ſame ground it ſeems plainly to follow, that the grantee of a reverſion for good conſideration might, without any attornment, maintain the tenant of the land, before the ſtatute 4 & 5 *Annæ*, *c.* 16. which makes ſuch attornment needleſs.

Hawk. P.C. c. 83. § 18. Wherever any perſons claim a common intereſt in the ſame thing, as, in a way, church-yard, or common, &c. by the ſame title, they may maintain one another in a ſuit concerning ſuch thing; and a man's bail may take care to have his appearance recorded; but, as ſome ſay, they cannot ſafely intermeddle farther.

2. How

2. How far in reſpect of Kindred or Affinity.

Whoever is of kin, or godfather, to either of the parties, or related by any kind of affinity ſtill continuing, may lawfully ſtand by at the bar and counſel him, and pray another to be of counſel for him; but cannot lawfully lay out his money in the cauſe, unleſs he be either father, or ſon, or heir apparent to the party, or huſband of ſuch an heireſs. 2 Inſt. 564. Hawk. P. C. c. 83. § 20.

3. How far in reſpect of other Relations; as that of Lord and Tenant, Maſter and Servant.

Not only the actual lord, but alſo the *ceſtui que uſe* of a ſeigniory, may come with the tenant to a trial in an aſſiſe againſt him, and ſtand by him, and aſſiſt him, and alſo pray the ſheriff to return an indifferent jury; and it ſeems a plauſible opinion, that he may alſo juſtify laying out his money in defence of his tenant's title: alſo, the lord of a town may maintain the inhabitants in an action, wherein the right to their common burying-place is queſtioned, by ſhewing authentick evidence of it to the jury. Co. Lit. 65. 101. 384. 2 Roll. Abr. 116, 117.

A tenant may lawfully come with his lord, and ſtand with him at a trial. Hawk. P. C. c. 83. § 22.

A maſter may go along with his ſervant, or with his domeſtick chaplain, to retain counſel: alſo, he may pray one to be of counſel for him, and may go with him, and ſtand with him, and aid him at the trial, but ought not to ſpeak in court in favour of his cauſe: alſo, if the ſervant be arreſted, the maſter may aſſiſt him with money to keep him from priſon, that he may have the benefit of his ſervice; but the maſter cannot ſafely lay out money for the ſervant in a real action, unleſs he have ſome of his wages in his hands; but thoſe, with the ſervant's conſent, he may ſafely diſburſe. Bro. Maint. 44. 52. Hetley, 79. Moor, 814.

A perſon retained generally as a ſervant, and not for a particular occaſion only, may lawfully ride about to ſpeed his maſter's buſineſs, and may go to counſel for him, and ſhew his evidence to the counſel, or to the jury, and ſtand by him at a trial, but cannot lawfully lay out his own money in the ſuit. Hawk. P. C. c. 83. § 24.

4. How far in reſpect of Charity.

Any one may lawfully give money to a poor man to enable him to carry on his ſuit: alſo, any one may lawfully go with a foreigner, who cannot ſpeak *Engliſh*, to a counſellor, and inform him of his caſe. Bro. Maint. 14.

5. How far in reſpect to the Profeſſion of the Law.

A counſellor, having received his fee, may lawfully ſet forth his client's cauſe to the beſt advantage; but can no more juſtify giving 2 Inſt. 564. 2 Roll. Abr. 116.

giving him money to maintain his ſuit, or threaten a juror, than any other perſon.

Keilw. 50. 2 Inſt. 564. Winch. 52. Jon. 208. Cro. Car. 259. 3 Mod. 98.

Alſo, an attorney ſpecially retained may lawfully proſecute or defend an action in the court wherein he is an allowed attorney, and lay out his own money in the ſuit, and maintain an action againſt his client for the money ſo laid out, by virtue of the retainer, without any ſpecial promiſe: alſo, an attorney ſo retained may in like manner maintain his client in a court wherein he is not an allowed attorney; but as ſome ſay cannot have an action for the money laid out in the ſuit, without a ſpecial promiſe: but an attorney, who maintains another, is no way juſtified, by a general retainer, to proſecute for him in all cauſes; neither can an attorney lawfully carry on a cauſe for another at his own expence, with a promiſe never to expect a re-payment; and it is queſtionable whether ſolicitors, who are no attornies, can in any caſe lawfully lay out their own money in another's caſe.

2 Inſt. 215.

But counſellors and attornies, uſing deceitful practice in maintenance of their clients cauſes, are puniſhable by the common law, as well as by the ſtatute of *Weſtm.* 1. *c.* 28. which enacts, "That if any ſerjeant, pleader, or other, do any manner of deceit "or colluſion in the king's court, or conſent unto it in deceit of "the court, or to beguile the court or the party, and thereof be "attainted, he ſhall be impriſoned for a year and a day, and from "thenceforth ſhall not be heard to plead in that court for any "man; and if he be no pleader, he ſhall be impriſoned in like "manner by the ſpace of a year and a day at the leaſt; and if "the treſpaſs require greater puniſhment, it ſhall be at the king's "pleaſure."

Dyer, 249. pl. 84. 2 Inſt. 215.

It is an offence within this ſtatute for an attorney to ſue out an *habere facias ſeiſinam*, falſely reciting a recovery where there was none, and by colour thereof to put the ſuppoſed tenant in the action out of his freehold.

2 Inſt. 215. * In moſt of theſe caſes the court would grant an attachment againſt the offender, on motion.

Alſo, it is an offence within the ſtatute to bring a *præcipe* againſt a poor man, having nothing in the land, on purpoſe to ouſt the true tenant; or to procure an attorney to appear for a man, and confeſs a judgment without any warrant; or to plead a falſe plea, known to be utterly groundleſs, and invented merely to delay juſtice, and to abuſe the court *.

(C) How Maintenance is reſtrained and puniſhed by the Common Law.

2 Roll. Abr. 114. 2 Inſt. 208. Hetley, 79.

BY the common law, all unlawful maintainers are not only liable to render damages in an action at the ſuit of the party grieved, but may alſo be indicted and fined, and impriſoned, *&c.* and it ſeems that a court of record may commit a man for an act of maintenance in the face of the court.

(D) How reſtrained and puniſhed by Statute.

BY the 1 *E.* 3. *c.* 14. and 20 *E.* 3. *c.* 4. it is enacted, "That "none of the king's miniſters, nor no great man of the realm, "by himſelf nor by other, by ſending of letters nor otherwiſe, nor "none other great nor ſmall, ſhall take upon them to maintain "quarrels, nor parts, in the country, to the diſturbance of com-"mon right."

And by the 1 *R.* 2. *c.* 4. it is enacted, "That no perſon what-"ſoever ſhall take or ſuſtain any quarrel by maintenance in the "country or elſewhere, on grievous pain, that is to ſay, the "king's counſellors and great officers, on a pain that ſhall be or-"dained by the king himſelf, by the advice of the lords of this "realm, and other officers of the king, on pain to loſe their of-"fices and to be impriſoned, and ranſomed, &c. and all other "perſons, on pain of impriſonment and ranſom," &c.

In the conſtruction of theſe ſtatutes the following points have been holden:

That *nul tiel record* is a good plea to an action on theſe ſtatutes, by which it appears that they extend not to taking out an original, which is never returned, but they extend as well to maintenance in a court-baron, as to maintenance in a court of record; neither is it material whether the plaintiff in the action, wherein there was ſuch maintenance, were nonſuited or recovered: But it is ſaid, that none of the ſtatutes of maintenance extend to the ſpiritual court. Hawk. P. C. c. 83. §40. 41.

He who fears that another will maintain his adverſary, may, by way of prevention, have an original grounded on theſe ſtatutes, prohibiting him to do it. Hawk. P. C. c. 83. §42.

By the 32 *H.* 8. *c.* 9. "No perſon ſhall unlawfully maintain or "cauſe or procure any unlawful maintenance in any ſuit, in any "of the king's courts, where any perſon ſhall have authority by "the king's commiſſion, patent, or writ to hold plea of lands, "or to examine, hear, or determine any title of lands, &c. and "no perſon ſhall unlawfully maintain, for maintenance of any "ſuit or plea, any perſon or perſons, or embrace any freeholders "or jurors, or ſuborn any witneſs by letters, rewards, or pro-"miſes, or any other ſiniſter means, to maintain any matter or "cauſe, or to the diſturbance of juſtices, &c. on pain of 10*l.* "one moiety to the king, the other to the informer."

In an information thereon, it is not ſufficient to ſay, that the defendant maintained the party, without adding, that he did it unlawfully; neither is it ſufficient to ſay, that a bill was exhibited, without further ſhewing that a plea was depending *. Hawk. P. C. c. 83. §45. * *Vide* alſo the ſtatutes 3 Ed. 1. c. 25, 28. and 33. 13 Ed. 1. c. 36. and c. 49. 28 Ed. 1. c. 11. 4 Ed. 3. c. 11. 20 Ed. 3. c. 5. 1 R. 2. c. 7. 13 R. 2. ſtat. 3. 20 R. 2. c. 1. 8 H. 6. c. 9. and 7 R. 2. c. 15. *& infra.*

(E) Of the Offence of Buying or Selling a pretended Title.

Moor, 751. pl. 1031. Hob. 115. Plow. 80.

IT ſeems an high offence at common law, as plainly tending to oppreſſion, for a man to buy, at an under rate, a doubtful title known to be diſputed, to the intent that the buyer may carry on the ſuit, which the ſeller doth not think it worth his while to do; and it ſeems not to be material whether the title be good or bad; or whether the ſeller were in poſſeſſion or not, unleſs the poſſeſſion were lawful and uncontеſted.

Alſo by the 1 *R.* 2. *c.* 9. reciting, that many perſons having true title to lands, *&c.* were wrongfully delayed, by means that the defendants did make gifts and feoffments of their lands in debate, and of their goods to great men, againſt whom the ſaid purſuants durſt not make their purſuits; and alſo that many perſons uſed to diſſeiſe others, and anon to make feoffments ſometimes to great men to have maintenance, and ſometimes to perſons unknown, to the intent to delay the ſaid diſſeiſees, *&c.* therefore it is enacted, "That no gift or feoffment of tenements or "goods be made by ſuch fraud or maintenance, and that if any "be ſo made, they ſhall be holden for (*a*) none; and that the "ſaid diſſeiſees ſhall recover againſt the firſt diſſeiſor their lands "and damages, without having regard to ſuch alienations, ſo "that they commence their ſuit within a year after the diſ-"ſeiſin."

(*a*) In reſpect of the diſſeiſees; but they are effectual between the feoffor and feoffee. Co. Lit. 369.

It is further enacted by 32 *H.* 8. *c.* 9. "That no perſon ſhall "bargain, buy, or ſell, or by any means obtain any pretended "rights or titles, or take, promiſe, grant, or covenant to have any "right or title to any (*b*) hereditaments, unleſs the ſeller, *&c.* "his anceſtors, or they from whom he claims, have been in "poſſeſſion of the ſame, or of the reverſion or remainder there-"of, or taken the rents or profits thereof, for one whole year "next before the ſaid bargain and ſale, *&c.* on pain that ſuch "ſeller ſhall forfeit the whole (*c*) value of the hereditaments "ſo ſold; and the buyer or taker, knowing the ſame, ſhall for-"feit the value of the hereditaments ſo by him bought or taken; "the one half of the ſaid forfeitures to be to the king, and the "other to him who will ſue."

(*b*) Whether freehold or copyhold. 4 Co. 26. a. Co. Lit. 369. b. Moor, 655.

(*c*) And therefore the plaintiff in his action muſt ſhew the value at the time of the bargain. Cro. Car. 233.

But it is provided, "That it ſhall be lawful for any perſon, "being in lawful poſſeſſion, by taking of the yearly farm-rents, "or profits of any hereditaments, to buy or get, by any reaſon-"able means, the pretended right or title of any other perſon to "the ſame.

"Provided, that no one ſhall be charged with theſe penalties, "unleſs he be ſued within one year after the offence."

In the conſtruction of this ſtatute the following opinions have been holden:

That

That the ſtatute being publick, there is no need to recite it in an action brought upon it; but if you take upon you to recite it, a material miſrecital will be fatal. Lit. Rep. 369. Plow. 84. Cro. Car. 233. Dyer, 74.

In an action againſt the buyer of a pretended title, it muſt expreſsly appear that the defendant knew that the ſeller had not been a year in poſſeſſion; but in ſuch an action by the buyer, the contrary muſt expreſsly appear; for otherwiſe it may be intended that he was *particeps criminis*. Leon. 167. Lit. Rep. 369.

It is not ſufficient to ſhew that the ſeller had not been in poſſeſſion a year before, &c. without averring, that he had a pretended right or title, for that is the point of the action. Dyer, 74. pl. 19, 20. Plow. 80. 87. Cro. Car. 233.

A contract for a leaſe for years, unleſs fairly made to try a title in ejectment, is within the ſtatute, whether it were made off the land, or upon the land, by a perſon in or out of poſſeſſion; and in an action on the ſtatute for making ſuch a leaſe, there is no need to ſhew its commencement or end, becauſe the plaintiff is ſuppoſed to be a ſtranger to it. Co. Lit. 369. Leon. 166. And. 76.

No conveyance by one who has the unconteſted poſſeſſion and abſolute undiſputed propriety of lands, as by a diſſeiſor having obtained a releaſe from the diſſeiſee who had the true right not conteſted by any other perſon whatſoever, or by a mortgagor having redeemed his lands, is within the meaning of the ſtatute; becauſe it no way favours of maintenance, and can be prejudicial to no one: neither is a leaſe for the uſual rent, by one who recovers lands by virtue of an ancient title, within the meaning of the ſtatute, though he had the abſolute property and poſſeſſion of the land; for the intent of the ſtatute was to reſtrain all perſons from transferring any diſputed right to ſtrangers. Plow. 88. Co. Lit. 369. Leon. 166. Savil, 95.

Whoever has a reverſion or remainder veſted in him may lawfully take any conveyance which will ſtrengthen his eſtate; but cannot take a covenant from a ſtranger for a conveyance from him, when he ſhall have recovered the land. Co. Lit. 369.

Mandamus.

THE writ of *mandamus* is a high prerogative writ, iſſuing in the king's name, out of the court of King's Bench, and directed to any perſon, corporation, or inferior court of judicature within the king's dominions, requiring them to do ſome particular thing therein ſpecified, which appertains to their office and duty, and which the court of King's Bench has previouſly 3 Bl. Comm. 110.

determined, or at leaſt ſuppoſes, to be conſonant to right and juſtice.

3 Burr. 1267. 4 Burr. 2188. Cowp. 378. The original nature of the writ, and the end for which it was framed, direct upon what occaſions it ſhould be uſed. It was introduced to prevent diſorder from a failure of juſtice, and defect of police. Therefore, it ought to be uſed upon all occaſions where the law has eſtabliſhed no ſpecifick remedy, and where in juſtice and good government there ought to be one. In the more ancient caſes, the grounds upon which the court of King's Bench have granted or refuſed a *mandamus* are not explicitly ſtated. Within the laſt century, it has been liberally interpoſed for the benefit of the ſubject and the advancement of juſtice. The value of the matter, or its importance to the publick police, is not ſcrupulouſly weighed. If the party making the application has a right, a *legal* right, and no other *ſpecifick legal remedy*, *this* will not be denied: for his having a remedy in *equity* will not be conſidered as any ground of refuſal. And even though he may have another *legal* ſpecifick remedy, if ſuch remedy be *obſolete*, the *mandamus* will be granted.

1 Term Rep. 404. 3 Term Rep. 651. 1 Term Rep. 404. 3 Term Rep. 652. Bull. N. P. 199. Ca. temp. Hardw. 99. 4 Burr. 2189.

This writ is the proper remedy to enforce obedience to acts of parliament, and to the king's charters, and, in ſuch caſes, is demandable *ex debito juſtitiæ*. But where the right is of a private nature, as in the caſe of an office, in which the publick are not concerned, ſuch as that of deputy-regiſter, it is diſcretionary in the court either to grant or refuſe it.]

(A) Of the Nature of the Writ: And herein of the Suggeſtion and Manner of awarding thereof.

(B) Of the Form thereof, and for what Irregularities it may be quaſhed or ſuperſeded.

(C) In what Caſes to be granted: And herein,

1. Where it lies to reſtore or admit a Perſon to an Office, and what ſhall be ſaid ſuch a publick Office for which a *Mandamus* will lie.
2. Where the Party's having another Remedy is a ſufficient Foundation to deny it; and therein of granting *Mandamuſes* to reſtore Members of Colleges, *&c.*
3. What Removal or Turning out of an Officer will entitle him to a *Mandamus*.

(D) Where it lies to inferior Courts, and Magiſtrates, to oblige them to do that Juſtice which the Publick Good requires, and the Law enjoins.

(E) Of

(E) Of the Authority by which it iſſues: And herein of the diſcretionary Power in the Court of granting or refuſing it.

(F) To whom to be directed.

(G) By whom to be returned.

(H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return.

(I) What ſhall be ſaid a good Return.

(K) Of traverſing the Return, and taking Iſſue thereon.

(L) Of the Party's Remedy for a falſe Return.

(M) Of awarding a peremptory *Mandamus*.

(A) Of the Nature of the Writ: And herein of the Suggeſtion and Manner of awarding thereof.

A *Mandamus* is a writ commanding the execution of an act, where otherwiſe juſtice would be obſtructed, or the king's charter neglected, iſſuing regularly only in caſes relating to the publick and the government; and is therefore termed (*a*) a prerogative writ.

(*a*) 4 Mod. 281. March, 101.

And in this (*b*) ſenſe and uſe of it, it is ſaid by (*c*) ſome to be of modern date, and to owe its original to (*d*) *Bagg*'s caſe; but (*e*) others hold it far more ancient, and that there are inſtances of ſuch a writ in the reigns of *Ed.* 1. and *Ed.* 3. (*f*), and that it is founded on theſe words in *Magna Charta*, *c.* 29. *Nullus liber homo capiatur vel impriſonetur, aut diſſeiſietur de libero tenemento ſuo, vel libertatibus, vel liberis conſuetudinibus ſuis, aut utlagetur, aut exuletur, aut aliquo modo deſtruatur; nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum, vel per legem terræ; nulli vendemus, nulli negabimus aut differemus juſtitiam vel rectum.* 10 Mod. 53.

(*b*) There is a writ called a mandamus, which lay where the king's tenant, who held of him by knights ſervice, died, his heir within age, and no writ of *diem clauſit extremum*, &c., was ſued out within a year and a day after his death; then iſſued a *mandamus* to the eſcheator, commanding him to inquire of what lands holden by knights ſervice the tenant died ſeiſed, &c. but for this *vide* F. N. B. 253. B. Dyer, 209. pl. 19. 248. pl. 18. Lamb. 36. (*c*) Lev. 23. Show. 263. Ca. Law and Eq. 53. 57. (*d*) 11 Co. 94. Roll. Rep. 173. S. C. (*e*) Lev. 23. Palm. 51. Dyer, 333. Skin. 293. pl. 3. 310. pl. 4. [(*f*) Lord Mansfield ſaid, that in a manuſcript book of reports which he had ſeen, the reporter cites (in reporting Dr. Bonham's caſe,) a *mandamus* in the time of Ed. 3. directed to the Univerſity of Oxford, commanding them to reſtore a man that was *bannitus*. 4 Burr. 2189.]

4 Mod. 52. Carth. 217.

It is now an eſtabliſhed remedy, and every day made uſe of, to oblige inferior courts and magiſtrates to do that juſtice, which they are in duty, and by virtue of their offices, obliged to do; and is a writ of right, which the ſuperior court is obliged to iſſue in the ordinary form, without impoſing any terms on him who demands it; and therefore where a *mandamus* was granted, to oblige a corporation to proceed to the election of a capital burgeſs, and it was afterwards moved, that a day ſhould be fixed for the election, that all parties might have notice; for that otherwiſe the perſon obtaining the *mandamus* might ſteal an election by ſurpriſe; the court refuſed to grant the motion, and held, that their power was only to command an election, but not to preſcribe the manner of it, which was left to the law, and which muſt make it good or bad accordingly.

Paſch. 6 G. 2. in B. R. The King v. Mayor and Burgeſſes of Eveſham. 2 Barnard. K. B. 236. 265. 2 Str. 949.

2 Kel. 243. pl. 195. Mich. 4 G. 2. in in B. R.

But though it be a writ of right, yet the court ſeldom grants it, without giving the party, to whom it is prayed, a day to ſhew cauſe againſt it *; alſo ſuch matter muſt be laid before the court, by which it may appear, that the party is entitled to it; and therefore on a motion for a *mandamus*, to reſtore the regiſtrar of the Blackſmiths Company, the court refuſed it, becauſe they did not produce their charter, or a copy of it, with an *affidavit*; for this being a private corporation, they held they could not take notice thereof, as they will of a town, *&c.* without ſuch previous information.

* Where it is to ſwear, or, to admit, the court will, in caſe the right appear plain, grant the writ upon the firſt motion: but where it is to reſtore one who has been removed, they will firſt grant a rule to ſhew cauſe why ſuch a writ ſhould not iſſue. Bull. N. P. 199.——Where they grant a rule to ſhew cauſe, though upon ſhewing cauſe it appear doubtful, whether the party have a right or not, yet the court will iſſue the *mandamus*, in order that the right may be tried upon the return. Rex v. Dr. Bland, T. 1741. Bull. N. P. 200.

(B) Of the Form thereof, and for what Irregularities it may be quaſhed or ſuperſeded.

2 Salk. 434. pl. 16. 452. pl. 3.

A *Mandamus* is a ſignable writ, and muſt be ſigned by the proper officer of the court before it is ſealed. There muſt be fifteen (*a*) days between the *teſte* and the return of the firſt writ of *mandamus*, if the party, to whom it is ſent, be above forty miles from *London*; but if but forty miles, or under, then eight days only.

[(*a*) Upon producing the rule in this caſe, it appeared to be *fourteen*, and not *fifteen* days, and ſo is 1 Str. 407. And one of the days is to be taken inclusive, and the other exclusive, ſo that a writ teſted the 14th may be returnable the 28th. *Ibid.*]

6 Mod. 133.

If there be any irregularity in the writ, it may be amended at any time before it is returnable (*b*); but it cannot be ſuperſeded after the return is out; neither can the party move to quaſh it before a return made and filed (*c*).

[(*b*) For the court will not amend it after a return has been made to it, particularly, if that return has been traverſed. Rex v. Mayor, &c. of Stafford, 4 Term Rep. 689. (*c*) In Rex v. Mayor of York, the court held, that it was too late for a party to object to the writ after he had made a return to it. 5 Term Rep. 74. But in Rex v. College of Phyſicians, 3 Burr. 2740. the writ was quaſhed after the return made. And ſee acc. Rex v. Ward, 2 Str. 893. Rex v. Mayor of Abingdon, 1 Ld. Raym. 559. 2 Salk. 699.]

If

If a *mandamus* be awarded to reſtore nine perſons to the place and office of common councilmen, this is ſuch an irregularity for which the writ will be quaſhed; for ſeveral perſons cannot join in ſuch writ, the amotion of one not being the amotion of another: beſides, their intereſts are ſeveral *, and they might have been removed for ſeveral different cauſes, one for one fault, and one for another; which would make it impracticable for the court to grant a joint reſtitution to them.

2 Salk. 436. pl. 19. Comb. 307. S. C. 5 Mod. 11. S. C. 2 Salk. 433. pl. 13. S.P. and that ſeveral perſons cannot join

in an action on the caſe for a falſe return to a *mandamus* to reſtore. * A *mandamus* was granted to a jury of a court baron to do an act to perfect the rights of ſeveral. Rex v. Ld. Montague, 24 G. 2. [Bull. N. P. 200. S. C. 1 Bl. Rep. 60. So, Rex v. Borough of Midhurſt, 1 Wilſ. 283.]

[A motion was made for a *mandamus* to the mayor, to aſſemble and do the buſineſs of the corporation, and the writ was granted accordingly. In drawing up the writ, the officer made it out for an aſſembly, and to admit all perſons having a right to their freedom, who ſhould appear before them to demand it. It was moved to ſuperſede the writ, becauſe every perſon's right was diſtinct, and it would be hard to oblige the mayor to make a return that he had admitted all who had a right. *Et per curiam*, It muſt be ſuperſeded, for we never intended ſuch a complicated *mandamus* as this.]

Rex v. Mayor of Kingſton upon Hull, 1 Str. 578. 8 Mod. 209. S.C. but the reaſon aſſigned in this laſt report for the writ's being ſuperſeded, is, that "it

"was not warranted by the rule." And ſee Rex v. Wildman, 2 Str. 579. a *mandamus* ſuperſeded on that ground.

If the writ be directed to a corporation by a wrong name, this is ſuch an irregularity for which it may be quaſhed; as, if to the mayor, aldermen and commonalty of *Rippon* where it ſhould have been, mayor, burgeſſes and commonalty: but in this caſe, the parties having made a good return, the court refuſed to grant a new writ; for by the return, if falſe, they ſubjected themſelves to an action on the caſe, and therefore a new writ would be only vexations.

2 Salk. 433. pl. 12. Ld. Raym. 563. The King v. Mayor, &c. of Rippon; *vide* Carth. 500-1.

So, where, in a *mandamus* to the corporation of *Ipſwich*, the direction was to the vill *de Gippo*, inſtead of *de Gipwico;* it was held, that the direction was wrong, *Gippus* and *Gipwicus* being different names; but that yet they ſhould have returned the ſpecial matter accordingly, and relied upon it; but that, after the return, they admitted themſelves the corporation to whom the writ was directed: beſides, a corporation may have ſeveral names.

2 Salk. 434. pl. 16. 2 Ld Raym. 1233. Serjeant Whitaker, Ceſ.

If a writ appears on the face of it to be *felo de ſe*, the court, *ex officio*, may quaſh it; as, where the Biſhop of *Ely* procured a *mandamus* to the vice-maſter for *Trinity College*, *Cambridge*, to compel him to execute a ſentence (*a*) of deprivation, pronounced by the Biſhop, againſt Doctor *Bentley*, maſter of the ſaid college, which ſentence the vice-maſter, by the ſtatutes of the college, was obliged to execute; and it appearing on the face of the writ, that the Biſhop himſelf was general viſitor, and that therefore it belonged to him to enforce the execution of his own ſentence, the court of *B. R.* quaſhed the writ, being a matter in which they had no right to intermeddle, there being a proper viſitor.

Hil. 9 G. 2. in B. R. The King v. Doctor Walker. [Ca. temp. Hardw. 212. S. C. (*a*) But if the Biſhop himſelf ſhould refuſe to compel the execution of the

ſentence, *qu.* whether the court of King's Bench would not grant a *mandamus* to him for that purpoſe? See And. 176.]

(C) In what Caſes to be granted: And herein,

1. Where it lies to reſtore or admit a Perſon to an Office, and what ſhall be ſaid ſuch a publick Office for which a *Mandamus* will lie.

HErein we muſt obſerve, that the caſes in the books on this head are ſo unſettled and contradictory, that it is hardly poſſible to fix on any general rule, whereby to determine in what inſtances the court of *K. B.*, having a ſuperintendency over all inferior courts and magiſtrates, will grant a *mandamus* or not; for though in general it be laid down as a rule (*a*), that where a man is refuſed to be admitted, or wrongfully turned out of any office or franchiſe that concerns the publick, or the adminiſtration of juſtice, he may be admitted, or reſtored by *mandamus*; yet, it being ſtill matter of controverſy, what ſhall be ſaid a publick office, or ſuch as relates to the adminiſtration of juſtice; and as the court of late has rather extended than contracted this remedy, it will be neceſſary, for the better apprehending hereof, to inſert the caſes themſelves, in which a *mandamus* has been granted or denied.

(*a*) 11 Co. 93. Bagg's caſe. 2 Sid. 112. ſame rule laid down by Glyn, C. J.

11 Co. 98. 4 Inſt. 71. It is clearly agreed, that the court of King's Bench, having a ſuperintendency over all inferior courts and magiſtrates, may by the plenitude of its power correct, not only errors in judicial proceedings, but alſo extrajudicial errors and miſdemeanors, tending to the breach of the peace, oppreſſion of the ſubject, to the raiſing of faction, controverſy, debate, or any manner of miſgovernment; ſo that no tort or injury, whether publick or private, can be committed, but what may be reformed and puniſhed according to the due courſe of law.

11 Co. 94. Bagg's caſe. 2 Bulſt. 122. Style, 299. 457. Raym. 12. 431. 437. Vent. 302. And on this foundation it has been adjudged, and admitted in variety of caſes, that if a mayor, alderman, burgeſs (*b*), common councilman, freeman, or other perſon, member of a corporation, having a franchiſe and freehold therein, be refuſed to be admitted, or being admitted, be turned out or disfranchiſed without juſt cauſe, he may have his remedy by writ of *mandamus*.

(*b*) It is ſaid, that a cuſtom to elect one to be of the common council, and to remove him *ad libitum*, is good; but where a man is a freeman, or alderman, &c. they cannot remove him from his freedom or place without cauſe; and a cuſtom to the contrary is void, becauſe the party hath a freehold therein; but that to be of council is a thing collateral to the corporation. Cro. Jac. 450. Warren's caſe.

2 Mod. 316. But it muſt appear what the office is; and therefore a *mandamus* to ſwear one, who was elected to be one of the eight men of *Aſhburn-Court*, was denied; becauſe it was not ſpecially inſerted what the nature of the office was, ſo as the court might be able to determine, whether it were ſuch a place for which a *mandamus* will lie, or not.

Noy, 78. Style, 457. (*c*) Vent. 77. Sid. 461. Lev. 291. Dighton v. A *mandamus* lies to reſtore a town-clerk, being an office of a publick nature, and ſuch as relates to the adminiſtration of juſtice. But (*c*) if a corporation have power by their charter to have a town-clerk, who ſhall continue *durante beneplacito* of the mayor and aldermen;

aldermen; by this they have an arbitrary power of turning him out at pleaſure, and need not, to the return of a *mandamus*, aſſign any reaſonable cauſe for their conduct herein. Mayor of Stratford upon Avon. Raym. 188.

S. C. where it is ſaid, that the court adviſed to repeal the patent becauſe of this inconveniency.

So, a *mandamus* lies for a (*a*) recorder and (*b*) clerk of the peace; for theſe are officers of a publick nature, and relate to the adminiſtration of juſtice. 153. [4 Burr. 1999.] (*a*) Style, 452. Vent. 143. (*b*) 4 Mod. 31. Show. 282. 12 Mod. 13.

It is admitted by all (*c*) the books which ſpeak of this matter, that a *mandamus* lies to reſtore a ſteward of a court-leet; but (*d*) ſome hold, that a *mandamus* does not lie to reſtore a ſteward of a court (*e*) baron, becauſe but a private office, and ſuch as does not concern the adminiſtration of juſtice; but (*f*) others hold that it does; becauſe he is judge of that part of the court which concerns copyholds, and is therefore an officer concerned in the adminiſtration of juſtice. 195. (*f*) Vent. 153. 2 Lev. 18. S. P. expreſsly by Hale, C. J. (*c*) 2 Sid. 112. Raym. 12. (*d*) Raym. 12. Sid. 40. (*e*) Fitzgib. 2 Lev. 18. Vent. 153. Sid. 40. Comb. 127.

It hath been adjudged, that a *mandamus* lies to reſtore one to an attorney's place in an inferior court; becauſe his is an office concerning the publick juſtice, and he is compellable to be an attorney for any man; and has a freehold in his place. Lev. 75. Sid. 152. Keb. 549. adjudged in Hurſt's caſe, who was reſtored to an attorney's place of the court of Canterbury; and in one Collin's caſe, who was reſtored to an attorney's place of the liberty of St. Martin's le Grand.

So, a *mandamus* was granted to the mayor of *Reading*, for an attorney of *B. R.*, who was prohibited to practiſe in an inferior court in *Reading*. Vent. 11. Sid. 410. Mod. 23.

It hath been adjudged, that a *mandamus* lies to reſtore a ſexton; though as to this the court at firſt doubted; becauſe he was rather a ſervant to the pariſh than an officer, or one that had a freehold in his place; but upon a certificate ſhewn from the miniſter and divers of the pariſh, that the cuſtom was to chooſe a ſexton, and that he held it for his life, and that he had 2 *d.* a year of every houſe within the pariſh; they granted a *mandamus* directed to the churchwardens. Vent. 143. 153. T. Raym. 211. 2 Lev. 18. 2 Keb. Rep 802. Ile's caſe. 7 Mod. 118.

A *mandamus* lies to reſtore a churchwarden, being a temporal officer, and an office concerning the publick; and therefore (*g*) where to a *mandamus* to ſwear a churchwarden, choſen according to the cuſtom, the archdeacon returned, that the perſon preſented was a poor dairy-man who had no eſtate, was *perſona minus habilis & idonea* for that office; the court granted a peremptory *mandamus*. 2 Sid. 112. Vent. 143. 3 Mod. 335. 5 Mod. 325. 8 Mod. 325. Style, 457. Comb. 417. [Ca. temp. Hardw. 130. 3 Burr. 1421.] (*g*) Carth. 393. Salk. 166. pl. 5. The King v. Rees. 12 Mod. 116. Ld. Raym. 138.

So, a *mandamus* hath been granted to reſtore a pariſh clerk, choſen according to the cuſtom, being a temporal officer. Style, 457. 2 Sid. 112. Vent. 143. 3 Mod. 335. Comb. 105. [It will equally be granted, though he be appointed by the parſon; for the right to the office is a temporal right; and the clerk, though appointed by the parſon, is a ſervant to the pariſhioners. Rex v. Aſhton, Say. Rep. 159. And the office is *primâ facie* an office for life. *Id.* 175.]

King v. Doctor Henchman, official of the conſiſtory-court of the Biſhop of London.

So, a *mandamus* was lately granted, to admit one *Robert Trott* to the office of pariſh clerk of *Clerkenwell*, being elected by the pariſh; it being ſhewn that the official had uſually admitted to this office.

2 Sid. 112. Sid. 40. Style, 457. Comb. 144. Stra. 58. 2 Stra. 897. 1023. [2 Barnard. K. B. 365.]

So, a *mandamus* lies for a ſchoolmaſter or the uſher of a ſchool, if he be elected for life, although he be not a ſworn officer; for this is a temporal and publick office, in which the party hath a freehold.

Rex v. Biſhop of London, 2 Str. 1192. 1 Will. 11. S. C.

[So, lecturers, if they have fixed ſalaries, not depending upon voluntary contributions, it ſeems, may be admitted or reſtored to their ſtations, if wrongfully kept out, by a writ of *mandamus*.

Rex v. Biſhop of London, 1 Term Rep. 331. Rex v. Field, 4 Term Rep. 125.

Rex v. Blower, 2 Burr. 1043.

So, this writ lies to reſtore a curate to a chapel which is a donative, and endowed with lands.

2 Ld. Raym. 1206. 2 Barnard. K. B. 366.

So, it lies to the biſhop to grant a licence to a curate, if it be refuſed without juſt reaſon.

Rex v. Biſhop of Carliſle, 2 Burn's E. L. 103.

Rex v. Barker, 3 Burr. 1265. 1 Bl. Rep. 300. 352.

So, ſince the act of toleration, it will lie to admit or reſtore a diſſenting miniſter where there is an endowment.]

S. C. Rex v. Jotham, 3 Term Rep. *Qu.* Whether the party applying ſhould not ſhew his compliance with the requiſitions of the toleration act?

2 Roll. Rep. 82. Roll. Abr. 535. Salk. 175. Carth. 169. 170. 3 Lev. 309. 3 Mod. 333. Skin. 290. pl. 1. Lee's caſe. Show. 217. 251. 261.

A *mandamus* lies to admit, reſtore, or diſcharge a conſtable; for he is a publick officer, and one whoſe office relates to the adminiſtration of juſtice.

It hath been adjudged, that no *mandamus* lies to reſtore a proctor of *Doctors-Commons*, admitting that no appeal lay from the dean of the arches to the archbiſhop, as viſitor; becauſe this is an eccleſiaſtical office, and a matter properly and only cognizable in that court; and that the temporal courts are not to intermeddle, or inquire into their ſentence, or into the proceedings in any matters whereof they have a proper juriſdiction, but are to give credit thereunto; although it was urged, that if a *mandamus* did not lie in this caſe, the party would be without remedy, for that no aſſiſe would lie of this office; and though an action on the caſe might lie, yet it may be defective; becauſe a jury may not well compute the damages in proportion to the loſs of a man's livelihoood: beſides, it was urged, that a *mandamus* ought to lie in this caſe, as well as for an attorney of an inferior court, becauſe this is an (*a*) officer of a more publick concern.

S. C. by the name of the King v. Oxenden. 3 Mod. 332. 3 Salk. 230. pl. 4. Holt, 435. pl. 1. (*a*) A proctor is not an officer, properly ſpeaking; it is only an employment in that court, which acts by different rules from the King's Bench. 3 Mod. 335. *Per cur.*

Carth. 170. 6 Mod. 18. S. P. *per* Holt; but ſaid to be againſt his conſent.

But it hath been ſince held, that a *mandamus* lies for a regiſtrar in an eccleſiaſtical court (*b*), upon an *affidavit* that he hath eccleſiaſtical juriſdiction.

(*d*) Comb. 133. 3 Salk. 232. pl. 9. Ld. Raym. 337. And. 177.

So,

So, upon a *mandamus* to the commiſſary of *York*, to admit Mr. *Dryden* a deputy-regiſtrar under Doctor *Sharp*, it was objected, that the writ did not lie for an eccleſiaſtical officer, becauſe he is under the inquiry and cenſure of his proper judge; nor for a private officer, becauſe he may have his action on the caſe for a diſturbance, or an aſſiſe, in caſe the place be a freehold; and herein was cited the above caſe of *Lee*, and the expreſs opinion of my Lord *Holt* therein, that a *mandamus* did not lie for a deputy-regiſtrar. In anſwer to which were cited the caſes of *The King* v. *Doctor Betteſworth*, to admit Mr. *Foulkes* apparitor general to the archbiſhop of *Canterbury*; *Hil.* 4 *G.* 1. *The King* v. *The Chapter of Norwich, to admit Doctor* Sherlock *to a* (*a*) *prebend*; *Hil.* 9 *G.* 1. to the univerſity of *Cambridge*, to reſtore Doctor (*b*) *Bentley* to his degrees of maſter of arts and doctor of divinity; from the reaſon of which caſes the court held, that this writ lay for a regiſtrar, an officer much leſs ſpiritual than a prebendary, or a doctor in divinity: alſo, this *mandamus* is at the ſuit of Doctor *Sharp*, and ſets forth his title to the office of regiſtrar, *exercendum per ſe vel ſufficient. deputatum ſuum*; and that the commiſſary had refuſed Mr. *Dryden*, whom he appointed his deputy; and that therefore the *mandamus* was well awarded, becauſe he had no other way to get his deputy admitted.

Mich. 4 G. 2. the King v. Doctor Ward. 2 Stra. 893. Fitzgib. 123. pl. 8. 194. pl. 7. Barnard. K. B. 254. 294. 380. 411. (*a*) Str. 159. Andr. 21. Barnard, K. B. 40. See 2 Str. 1082. Andr. 20. 185. S. P. (*b*) Forteſc. Rep. 202. 2 Ld. Raym. 1334. Andr. 177. Stra. 557.

So, where a *mandamus* was prayed to the lord preſident and council of the *Marches*, to admit *A.* to the exerciſe of the office of deputy-ſecretary; it was objected, 1*ſt*, That a deputy could not pray a *mandamus*, becauſe his authority was revocable. 2*dly*, That he being an officer belonging to the court, they are to judge of his ſufficiency, and ſo have power to refuſe. As to the firſt objection, it was adjudged, that the *mandamus* being at the ſuit of the principal, and ſetting forth that he had the office of ſecretary *exercendum per ſe vel ſufficientem deput. ſuum*, the *mandamus* was well awarded, becauſe he had no other remedy to have this deputy admitted; and as to the ſecond objection, it was adjudged, that if they refuſed to admit him for inſufficiency, they ought to have returned that he was inſufficient.

Vent. 110. Lev. 306. 2 Keb. 738. The King v. Clapham.

A *mandamus* is ſaid to have been denied to reſtore a clerk of a dean and chapter; becauſe he hath nothing to do with the publick, his office being only to enter leaſes granted, &c., and therefore he hath no more to do with the publick than a bailiff of a manor.

Comb. 133.

It is ſaid, that the court refuſed to grant a *mandamus* to reſtore a ſurgeon to an hoſpital, becauſe it was not a publick office.

Comb. 41. 7 Mod. 118. S. P. where, in ſuch a caſe the court made a rule, to ſhew cauſe why the *mandamus* ſhould not be granted.

[A *mandamus* hath been refuſed to admit a veſtry clerk, his office being merely of a private nature, and not being fixed and permanent, but depending entirely on the will of the inhabitants, who may chooſe a different clerk at each veſtry.]

Rex v. Inhabitants of Croydon, 5 Term Rep. 713.

It hath been adjudged, that a *mandamus* lies to reſtore the treaſurer of the New River Company; for though it be a private corporation, yet it was created by the king's letters patent, which being

Lev. 123. Sid. 169. Keb. 625. Middleton's

case. 3 Mod. 334. S. C. cited; and said to have been granted *de bene esse*, to bring the matter before the court.

being on record the judges are obliged to take notice of them, and see that they are duly executed.

Comb. 145.

A *mandamus* was granted to the mayor of *Bristol*, to restore Mr. *Roe* to the office of sword-bearer.

Vent. 143. (*a*) Refused to restore the clerk of the Butchers Company. 6 Mod. 18. 2 Ld. Raym. 959. 1004. So, to restore the approver of guns to the Gunsmiths Company. 6 Mod. 82. 2 Ld. Raym. 989. Comb. 347.——But *qu.* of these cases; for they seem not to be law.

It is said, that a *mandamus* was denied to one, who pretended to be (*a*) master of the lord mayor's water-house, because not an office, but a service.

Case of Scriven and Turner, 2 Str. 832.

[A *mandamus* was granted to the court of aldermen in *London*, to restore a person to the office of yeoman of the wood-wharf, on an affidavit of its being an ancient office, and a freehold.]

Hil. 7 G. 2. in B. R. The King v. City of London. 2 Barnard. K. B. 398. S. P. & C. [2 Term Rep. 182. note S. C.]

A *mandamus* was granted, to restore one *Smith* to the office of clerk of the city-works; it appearing by his *affidavit*, that the office was an ancient office, established time out of mind, to survey the works and edifices of the city, and to see that all the city-buildings were well done; and to sign the workmen's bills; and that he was admitted into this office, with the fees belonging to it, *quamdiu se bene gesserit*; and that there was an oath of office taken by him, and the oaths to the government; for the court held, that though there was something here that looked like service, by the nature of the employment, yet there being an oath of office, and oaths to the government to be taken, these import a publick office, for which a *mandamus* is proper.

Rex v. Mayor of London, 2 Term Rep. 177.

[So, it seems, a *mandamus* will lie to restore to the office of clerk of the Bridge-house estates in *London*, such office being an ancient office for life, the duty of which is to superintend certain estates which are appropriated by the corporation for the support of *London* bridge.]

4 Mod. 281. Comb. 244. Knipe and Edwin. Ld. Raym. 159. 163. 338. 561. 958. 589. 1004. 10 Mod. 146. 12 Mod. 609. 666. Fitzgib. 123. 194.

If there be a dispute between the high-steward of *Westminster* and the dean and chapter, about appointing a bailiff, and the steward name one, and the dean and chapter appoint and swear in another, the appointee of the steward may have a *mandamus*, but without prejudice; for though the court will not regularly grant a *mandamus* to try private titles, yet here the appointee of the steward having no seisin, so as to enable him to maintain an assise, and an action on the case only repairing him in damages, without putting him in possession of the office, a *mandamuses* is a proper remedy.

2. Where the Party's having another Remedy is a sufficient Foundation to deny it; and therein of granting *Mandamuses* to restore Members of Colleges, *&c.*

(*b*) Andr. 184. Skin. 454. 4 Mod. 112.

It seems to be now agreed, that no *mandamus* lies to restore or admit a (*b*) fellow or member of any (*c*) college, because these being private eleemosynary societies, and governed by particular

ticular laws of the founders, they who would take the benefit of them, muſt take it on ſuch terms as the founder has thought proper to impoſe; and muſt therefore, in caſe of any grievance, apply themſelves by way of appeal to their (*d*) proper viſitors.

124. in the caſe of Phillips and Bury fully debated and ſettled.

(*c*) That the law is the ſame in the caſe of an hoſpital or college of phyſick, ſaid to have been adjudged in Merrick's caſe, who was one of the college of phyſicians; and in Ayloffe's caſe. Carth. 92. 3 Mod. 265. [But the law is not in theſe caſes, as here ſtated, for the court of King's Bench have clearly a juriſdiction over hoſpitals and colleges of phyſick. Rex v. Dr. Aſkew, 4 Burr. 2186. Rex v. Mayor of Glouceſter, Mich. 1 W. & M. cited in And. 184.] (*d*) That in lay-foundations, whether of hoſpitals or colleges, the viſitatorial power is either in the founder or his heirs, or the viſitors appointed by the founder, and they have the ſole power to execute juſtice within that foundation; but where the corporation is ſpiritual, there, the biſhop of the dioceſe is viſitor. Carth. 93. 10 Co. 31. Show. 74.

And this ſeems to have been the better opinion of the judges, not only in thoſe (*e*) caſes where application was made for a *mandamus* before the party had appealed to the viſitor, but alſo where after ſuch application the ſentence had been confirmed by the viſitor; as in (*f*) *Appleford*'s caſe, where, to a *mandamus* to reſtore him to a fellowſhip of *New College*, the return was, that by the founder's laws they might expel any one who had committed an enormous crime, and that *Appleford* had committed an enormous crime, and therefore they expelled him; that he appealed to the viſitor, who was the Biſhop of *Wincheſter*, who confirmed the expulſion, and concluded to the juriſdiction of the court: and this was held a good return, though it did not mention what manner of crime *Appleford* had committed, ſo that it might appear whether he was lawfully expelled or not; for it was not neceſſary to mention the crime, becauſe the court had no authority to intermeddle with it.

(*e*) As Dr. Witherington's caſe. Sid. 71. Raym. 31. 68. Lev. 23. Keb. 2. 50. Dr. Robert's caſe. 2 Keb. 102. Dr. Patrick's caſe. Raym. 101. Lev. 65. Sid. 346. 2 Keb. 164. 199.

(*f*) Mod. 82. [So, Rex v. Biſhop of Ely, 5 Term Rep. 475.]

A *mandamus* to reſtore one *Prohuſt* to the place of chaplain of *All Souls* College in *Oxon*, being turned out by the warden of that college, was granted upon ſuggeſtion, that the archbiſhop of *Canterbury* was viſitor of the college, and the ſee was now vacant by the deprivation of the biſhop, by virtue of the act of parliament which enjoins the oath of allegiance; and for that *Prohuſt* had no other remedy, becauſe the dean and chapter of *Canterbury*, who are guardians of the ſpiritualty *ſede vacante*, have (*g*) refuſed to meddle with this viſitatorial power by way of appeal. But at another day, it being ſhewn in behalf of the college, that the dean and chapter of *Canterbury*, and not the archbiſhop, are viſitors of this college, becauſe they were created, and ſtand inſtead of the prior and convent of *Canterbury*, who were viſitors heretofore; and farther, that they were ready to hear the appeal; the court diſcharged the firſt rule, and ordered *Prohuſt* to apply himſelf by way of appeal.

Carth, 168. Prohuſt's caſe. Andr. 177.

(*g*) Whether a *mandamus* will lie to a viſitor to compel him to execute his juriſdiction, was ſaid by my Lord Hardwicke in Dr. Bentley's caſe, Hil. 9 G. 2. not to have been determined, though a rule for that purpoſe, to ſhew cauſe, was made, 12 Ann. and he ſeemed to think, that if this power of a viſitor be a juriſdiction, yet it is *forum domeſticum*, and not any publick juriſdiction; or rather a deciſion of the founder, upon his own private charity, than any juriſdiction at all. 15 Vin. Abr. 203. pl. 4. [It has been ſince determined, that a *mandamus* for this purpoſe will lie to a viſitor. Rex v. Biſhop of Lincoln, 2 Term Rep. 338. note.]

A *mandamus* was prayed to the mayor and jurats of *Sandwich*, governors of the hoſpital of the brothers and ſiſters of *St. Bartholomew*, to reſtore one who was a ſiſter of the ſaid hoſpital; and it

3 Keb. 360. Wheeler's caſe.

it was urged, that a *mandamus* ought to be granted, becauſe the party had a corody and freehold in the hoſpital. But *per cur.* The king is the founder, and ſo hath the viſitation, and therefore application muſt be made to him.

Rex v. Biſhop of Cheſter, 2 Str. 797.

[A *mandamus* was granted, directed to the biſhop of *Cheſter*, as warden of *Mancheſter* College, to admit a chaplain, upon the ground that the biſhop being viſitor of this college, which was of royal foundation, and having been alſo appointed warden, could not viſit himſelf, and, conſequently, the viſitatorial power was ſuſpended and the remedy was in the court of King's Bench to prevent a failure of juſtice. But the right of the court of King's Bench to interfere in this caſe ſeems to be at leaſt queſtionable: for where there is a defect of the viſitatorial power in private eleemoſynary lay-foundations, it hath been ſince ſolemnly determined, that the right of viſitation devolves upon the king, in his perſonal, not in his politick capacity, and muſt be exerciſed by him in his court of Chancery.

Rex v. Maſter and Fellows of St. Catherine's Hall, 4 Term Rep. 233.

It is, in general (*a*), a ſufficient reaſon with the court to refuſe a *mandamus*, that the party applying for it has another legal, ſpecifick remedy. Therefore, they have refuſed it to the Bank (*b*), to compel them to transfer ſtock, becauſe the party had a remedy by action on the caſe. So, to old churchwardens (*c*) to deliver over the pariſh books to the new ones; for they might have a right to keep them, and that right might be tried by an iſſue at law. So, to the benchers of an inn of court (*d*) to call a perſon to the bar; for the proper remedy, in ſuch caſe, is by appeal. So, to a mayor (*e*) to admit to the office of recorder; becauſe there was a recorder *de facto*, and the party had another remedy by *quo warranto*. So, to a treaſurer of a county (*f*) to reimburſe conſtables monies expended by them for conveying rogues, *&c.* under 17 *G.* 2. *c.* 5.; for the quarter ſeſſions have juriſdiction under the act over the conſtables' accounts. So, where there were two claimants of the ſame perpetual curacy (*g*), the court rejected an application for a *mandamus* to the biſhop to licenſe, becauſe each had another ſpecifick remedy by *quare impedit*. And for the ſame reaſon, it ſhould ſeem, notwithſtanding ſome authorities to the contrary, that a *mandamus* ought not to be granted to admit to a prebend (*h*).

(*a*) Note, for an obſolete remedy as by aſſiſe, is conſidered as an exception to the rule. 1 Term Rep. 404. 3 Term Rep. 652.

(*b*) Rex v. Bank of England, Dougl. 524.

(*c*) Rex v. Street, 8 Mod. 98.

(*d*) Rex v. Gray's Inn, Dougl. 353.

(*e*) Rex v. Mayor of Colcheſter, 2 Term Rep. 259.

(*f*) Rex v. Erle, 2 Burr. 1197.

(*g*) Rex v. Biſhop of Cheſter, 1 Term Rep. 396. (*h*) The caſe of Clarke v. Biſhop of Sarum, 2 Str. 1082. Andr. 20. 185. where ſuch a *mandamus* is granted, is held not to be law in Powell v. Milbank, 1 Term Rep. 401. note. The caſes of the King v. Dean and Chapter of Armagh, Rex v. Dean and Chapter of Norwich, 1 Str. 159. and Rex v. Dean and Chapter of Dublin, *Id.* 536. are cited in the report in Andrews, of Clarke v. Biſhop of Sarum, in ſupport of the rule. But in the caſe of the Dean and Chapter of Norwich, Dr. Sherlock was prebendary by virtue of an act of parliament, and he had no means but a *mandamus* to get into his ſtall. In the caſe of the Dean and Chapter of Dublin, there was no determination on the point, but the majority of the judges inclined againſt the *mandamus*. That the court will not grant a *mandamus* where a *quare impedit* lies, appears alſo from Rex v. Marquis of Stafford, 3 Term Rep. 646.

3 Term Rep. 578.

Hence ariſes a difference between a *mandamus to admit*, and a *mandamus to reſtore*. The former is granted merely to enable the party to try his right, without which he would have no legal remedy. But the court have always looked much more ſtrictly to the

the right of the party applying for a *mandamus* to be reſtored. In theſe caſes, he muſt ſhew a *primâ facie* title; for if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himſelf to this extraordinary remedy, he muſt lay ſuch facts before the court as will warrant them in preſuming that the right is in him.]

3. What Removal or Turning out an Officer will entitle him to a *Mandamus*.

It ſeems by the better opinion, that a member of a corporation, being only ſuſpended, and not (*a*) totally removed, may have a *mandamus*; becauſe, were it otherwiſe, they might always ſuſpend, and thereby not only effectually keep him out, but alſo deprive him of all remedy of redreſs. Lev. 162. Keb. 868. Raym. 152. The King v. Approved Men of Guildford.

(*a*) A *mandamus* to reſtore an alderman expelled from his priority and precedency of his place of alderman. 1 Lev. 119.

A *mandamus* was granted to the College of Phyſicians in *London*, to reſtore Dr. *Goddard* to all the privileges and pre-eminences that belonged to him. The preſident of the college returns, that they were incorporate, *&c.* by virtue of the ſtatute *H.* 8., and that they made a by-law, that there ſhould be a ſelect number of twelve to attend in committees, and that Dr. *Goddard* was one of the thirty, and that they put him out for certain reaſons, but that he remains fellow ſtill. And all the court, except *Mallet*, held that this was a good return, for it was in the fellowſhip he had a franchiſe; but to be one of the thirty is no ſuch thing as a man may ſue to be reſtored to, for it is only a ſelect number for the convenience of ordering their affairs. Sid. 29. Lev. 19. Keb. 75. 84. Dr. Goddard v. College of Phyſicians.

(D) Where it lies to inferior Courts, and Magiſtrates, to oblige them to do that Juſtice which the Publick Good requires, and the Laws enjoin.

THE court of King's Bench having a ſuperintendancy over all inferior courts and magiſtrates, will oblige them to execute that juſtice which the party is entitled to, and which they are enjoined by law to do; and of this there are multitudes of inſtances (*b*); as, where the ordinary refuſes to grant the probate of a will to an executor, or to grant adminiſtration to the next of kin, he may be compelled thereto by *mandamus*; for theſe being things enjoined by ſtatute, the temporal courts will take care that due obedience is paid to them. Styl. 7, 8. Lev. 186. Sid. 293. Comb. 158. 450. [1 Str. 552. 1 Bl. Rep. 640.]

(*b*) And therefore, where to a *mandamus* to the judge of the prerogative court to grant the probate of a will to a perſon named executor therein, the ordinary returned, that he was an abſconding perſon, and inſolvent; and that he had refuſed to give caution to pay legacies bequeathed to ſome of the teſtator's infant relations; a peremptory *mandamus* was granted; for the ordinary has no authority to interpoſe and demand caution of the executor, when the teſtator himſelf required none. Carth. 457. Salk. 299. pl. 11. The King v. Sir Richard Raines.

But

Hil. 4 G. 2. Smith's caſe in B. R. 2 Stra. 892. S. C. Andr. 24. 366. S. C. Barnard. K. B. 370. 425. S. C.

But a *mandamus* will not lie to oblige the ordinary to grant adminiſtration *durante minori ætate* of an infant to the next of kin, this being a matter out of the ſtatutes, and therefore diſcretionary in the ordinary to whom to grant it; and if in ſuch caſe he grants it to an improper perſon, or inſiſts upon unreaſonable ſecurity, the redreſs muſt be by appeal; or if in the laſt inſtance there be any remedy at common law, it muſt be by prohibition.

Mich. 7 G. 2. in B. R. the King v. Betteſworth. 2 Stra. 956. S. C. 2 Barnard. K. B. 334. S. C. 2 Kel. 139. pl. 118. S. C.

So, if the teſtator make *J. S.* his reſiduary legatee, who by the eccleſiaſtical law is entitled to adminiſtration upon the executor's renunciation; yet, if the ſpiritual court refuſe to admit him thereto, they cannot be compelled by *mandamus;* for this is a matter purely of eccleſiaſtical cognizance, and out of the ſtatutes; and therefore the party's redreſs muſt be by appeal.

Rex v. Johnſon and others, Eaſt. 29 G. 3. Archbiſhop of Canterbury v. Houſe, Cowp. 140.

[A *mandamus* iſſues *ex debito juſtitiæ*, to oblige the ordinary and his regiſtrar to deliver up an adminiſtration bond for the purpoſe of enabling the next of kin, or a creditor, to put it in ſuit.]

Lev. 91. Sid. 107. pl. 20. 5 Mod. 402. 12 Mod. 490. Ld. Raym. 337. 2 Show. Rep. 154. pl. 138. Carth. 448.

If by the cuſtom of a corporation, *&c.* a perſon ſerving an apprenticeſhip there, is at the end of his term entitled to his freedom, and the mayor, *&c.* refuſe to admit him thereto, they may be compelled by *mandamus;* for this is an act of publick juſtice, which the ſuperior court will ſee executed.

[1 Burr. 127. And now by 12 Geo. 3. c. 21. "Where "any perſon ſhall be entitled to be admitted to his freedom; and ſhall apply to the mayor, or other "officer who hath authority to admit freemen, to be admitted a freeman, and ſhall give notice ſpecifying "the nature of his claim to ſuch mayor, or other officer; that ſuch mayor or other officer do not "admit ſuch perſon within *one month* from the time of ſuch notice, the court of King's Bench will be "applied to for a *mandamus* to compel his admiſſion; if ſuch mayor, or other officer ſhall, after ſuch "notice, refuſe or neglect to admit ſuch perſon, a writ of *mandamus* ſhall iſſue to compel ſuch mayor, "&c. to admit ſuch perſon, &c."]

Rex v. Turkey Company, 2 Burr. 999. 6 Mod. 218. 310. Peat's caſe, *& vide* 2 Salk. 572.

[A *mandamus* has been granted to admit a Quaker, having made his affirmation, into the *Turkey* Company, without taking the oath preſcribed by 26 *G.* 2. *c.* 18.]

So, it hath been held, that a *mandamus* lies to the juſtices of the peace, to oblige them to admit a perſon to take the oath of allegiance, and to ſubſcribe according to the act of toleration, in order to qualify him to teach a diſſenting congregation: And herein it is ſaid, that the party ought to ſuggeſt whatever is neceſſary to entitle him to be admitted; and if that be not done, or if it be done, and the fact be falſe, that will be a good matter to return.

Green v. Pope, 1 Ld. Raym. 125. Rex v. Juſtices of Derbyſhire, 1 Bl. Rep. 606.

[So, a *mandamus* lies to the regiſtrar of a biſhop, or the juſtices at ſeſſions, to regiſter the certificate of a place for the meeting of proteſtant diſſenters according to the act of toleration. And as the regiſtrar and juſtices, in recording the certificate, are merely miniſterial; it does not ſeem to be neceſſary for the parties certifying to ſhew their having complied with the requiſitions of the act.]

So,

So, a *mandamus* lies to the (*a*) juſtices of the peace, church-wardens and overſeers of the poor, to oblige them to make rates for the relief of the poor. Comb. 422. 478. [But a *mandamus* does not lie to make an equal rate, for the remedy is by appeal to the ſeſſions. Rex v. the Guardians of the Poor in Canterbury, 1 Bl. Rep. 667. 4 Burr. 2290. Rex v. Churchwardens of Weobly, 2 Str. 1259. Rex v. Churchwardens of Freſhford, Andr. 24.] (*a*) To a juſtice of the peace to ſign a poor-rate. 5 Mod. 275. 6 Mod. 229. Comb. 422. 478. Fol. 36, 37. 368. 2 Seſ. Caſ. 65. pl. 68. [1 Str. 393. 3 Dougl. on Elect. 142. note. So, to juſtices of the peace to make a warrant of diſtreſs to levy a rate. 1 Wilſ. 133.]

So, *mandamuſes* have been granted to oblige juſtices of the peace to diſcharge priſoners, purſuant to acts of parliament made for the relief of inſolvent debtors. 2 Show. 74. pl. 57. Comb. 203. [So, to give judgment in an exciſe caſe. Rex v. Tod, 1 Str. 530. So, to take ſecurity on articles of the peace. Rex v. Lewis, 2 Str. 835. 1 Barnard. B. R. 166. S. C. Fitzg. 85. S. C.]

[So, a *mandamus* has been granted to county juſtices, to receive and proceed upon a general traverſe to a preſentment by a juſtice of the peace upon view of a highway being out of repair. So, to appoint overſeers. So, it has been granted to compel two juſtices to receive and proceed on a complaint againſt an overſeer for not paying over the balance of the pariſh money in his hands, notwithſtanding there has been an appeal to the ſeſſions. Rex v. Juſtices of Wilts, 3 Burr. 1530. 1 Bl. Rep. 467. S. C. Rex v. Horton, 1 Term Rep. 374. Rex v. Carter, 4 Term Rep. 246.

So, a *mandamus* has been granted (*b*) to the keepers of the common ſeal of the univerſity of *Cambridge*, commanding them to affix it to the appointment of high ſteward: to the warden of a college (*c*), to compel him to put the common ſeal to an anſwer of the fellows in Chancery, contrary to his own ſeparate anſwer: to commiſſioners of the land-tax to elect a clerk (*d*).] (*b*) Rex v. Vice-Chancellour, &c. of Cambridge, 3 Burr. 1647. 1 Bl. Rep. 547. S. C. (*c*) Rex v. Wyndham, Cowp. 377. (*d*) 1 Term Rep. 146.

So, where by the ſtatutes 19 *Car.* 2. *c.* 3. § 25. and 22 *Car.* 2. *c.* 11. § 61. for erecting *Newgate* market, power is given to the mayor and aldermen of *London* to impanel a jury, who ſhall aſſeſs and adjudge what ſatisfaction and recompence ſhall be given to the owners of the grounds; and that the verdict of ſuch jury, on that behalf to be taken, and the judgment of the ſaid mayor and court of aldermen thereupon, and the payment of the money ſo awarded or adjudged, *&c.* ſhall be binding and concluſive to and againſt the owners, *&c.* and there being 15,000 feet of the grounds of *J. S.* taken away for this purpoſe, for which a jury being impanelled aſſeſſed and awarded two ſhillings a foot; but the mayor and court of aldermen refuſed to give ſentence or judgment thereupon; a *mandamus* was awarded to compel them to it. Vent. 187. Raym. 214. Amherſt's caſe.

And this general juriſdiction and ſuperintendency of the King's Bench over all inferior courts to reſtrain them within their bounds, and to compel them to execute their juriſdiction, whether ſuch juriſdiction ariſes from a modern charter, ſubſiſts by cuſtom, or is created by (*e*) act of parliament, being *in ſubſidium juſtitiæ*, has of late been exerciſed in variety of inſtances; as, (*f*) a *mandamus* Andr. 183. (*e*) A *mandamus* to the preſident and fellows of St. John's College, Cambridge,

to oblige them to turn out certain fellows of the college, whose places became void for not taking the oaths of supremacy and allegiance, pursuant to the statute of 1 W. & M. c. 1. and c. 8. Skin. 359. pl. 1. 368. pl. 15. 393. pl. 30. 546. pl. 9. 4 Mod. 233. S. C. (*f*) Hil. 3 Geo. 1. Andr. 183. 2 Ld. Raym. 1334. Sel. Cas. 248. So, to receive an appeal. Sel. Cas. 248. [Dougl. 191. 3 Term Rep. 504.]

damus granted to the quarter sessions to give judgment for abating a nuisance.

Brooke v. Ewers, Mich. 5 Geo. 2. Str. 113. Sel. Cas. 248. Andr. 183. Rex v. Day, Say. Rep. 202. S. P.

So, a *mandamus* was granted to the court of *Sandwich*, to give judgment in an action of assault and battery.

Mich. 7 Geo. 1. Baily v. Bourn. Stra. 392. Forteſc. Rep. 198. Sel. Cas. 249. Andr. 183, 184.

So, a *mandamus* was granted to the sheriff's court in *London*, to give final judgment upon a writ of inquiry.

Trin. 2 G. 2. Barnard. K. B. 59. Andr. 184. Sel. Cas. 248.

So, a *mandamus* was granted to the bailiff of *Andover*, to give judgment in a cause there depending; but the court in this case required an affidavit of their refusal, else it should be presumed that the court would do right.

Mich. 8 Geo. 1. Andr. 184. Barnard. K. B. 82.

So, a *mandamus* was granted to the corporation of *Liverpool*, to hold an assembly for doing the publick business, which was making leases.

But though these kind of writs are daily awarded to judges of courts to give judgment, or to proceed in the execution of their authority, yet are they never granted to aid a jurisdiction, but only to enforce the execution of it; nor are they ever granted where there is another proper remedy, and therefore will not lie to an officer of an inferior court (*a*); as, to a serjeant at mace, an apparitor, *&c.* to compel them to execute their duty; for these are servants to their respective courts, and punishable by the judges of them; and for the superior court to interpose in obliging such inferior officers, would be to usurp the authority of the court, which has a proper jurisdiction over its own officers, and which alone is answerable to the superior court for the execution of such authority; and therefore where a *mandamus* issued to the Vice-Master of *Trinity* College *Cambridge*, commanding him to execute a sentence of deprivation, pronounced by the Bishop of *Ely*, as visitor of the college, against Dr. *Bentley*, the Master of that College; and it appeared on the face of the writ, and by the return, that the bishop himself or the king were visitors, the court held, that no *mandamus* would lie; for taking the bishop to be general visitor, as the writ supposes, he is the proper person to carry his own sentence into execution, having power *tam in capite quam in membris*; and if the vice-master refuses obedience to his mandate, he may pronounce sentence of deprivation against him, and he will be immediately ousted by the judgment; or, taking the crown to be visitor, the vice-master may be punished by commissioners appointed by the crown; one of which ways the court held to be the proper one to compel the vice-master to do his duty.

[(*a*) Therefore, it will not be granted to compel obedience to an order of sessions. Rex v. Bristow, 6 Term Rep. 168.] Hil. 9 G. 2. in B. R. The King v. Dr. Walker. *Ante.*

A *mandamus*

A *mandamus* lies to deliver up the enſigns of an office, or the papers or records of a publick nature to a ſucceſſor; as, (*a*) a *mandamus* to deliver the mace, and other enſigns of mayoralty, to the ſucceeding mayor: ſo, (*b*) a *mandamus* to a town clerk, to deliver ſeveral books which belonged to the corporation.

Sid. 31. [Crawford v. Powell, 3 Burr. 1013. 1 Bl. Rep. 229.]

(*a*) 5 Mod. 314. (*b*) Comb. 102. 2 Stra. 948. 2 Barnard. K. B. 235. S. P. Rex v. Ingram, 1 Bl. Rep. 50.

A *mandamus* lies to oblige corporations to chooſe proper officers, which if they neglected to do, this by the common law was a forfeiture of their charter; and though by the common law, upon the death of a mayor within his year, which was the act of God, and an ordinary contingency, the court of King's Bench was authoriſed to grant a *mandamus* immediately to fill up the vacancy; yet, upon an omiſſion to elect at the charter-day, or upon the removal of an officer unduly choſen, there was no power to compel an election before the day came round again to ſupply thoſe defects.

Vide tit. Corporations.

By the 11 *G.* 1. *c.* 4. it is enacted in the following words: "Whereas in many cities, boroughs, and towns corporate, within "that part of *Great Britain* called *England*, *Wales*, and *Berwick* "*upon Tweed*, the election of the mayor, bailiff or bailiffs, or "other chief officer or officers, is by charter, or ancient uſage, "confined to a particular day or time, without any proviſion how "to act or proceed in caſe no election be then made; and it fre"quently happens that by ſuch charter, or uſage, particular acts "are required to be done at certain times, in order to and for "the completing of ſuch elections; and by the contrivance or de"fault of the perſon or perſons, who ought to hold the court, or "preſide in the aſſembly where ſuch elections are to be made, or "ſuch acts to be done, or by accident, it hath ſometimes hap"pened, and may frequently do ſo, if not timely prevented, that "no courts or aſſemblies have been held, or elections made, or "ſuch acts done within the time fixed for that purpoſe; in which "caſes, if elections of ſuch officers could not afterwards be made, "or in conſequence of ſuch omiſſion the corporation ſhould be "diſſolved, great miſchiefs might enſue; for remedy and pre"vention whereof be it enacted, That if in any city, borough, or "town corporate, within that part of *Great Britain* called *Eng*"*land*, *Wales*, and *Berwick-upon-Tweed*, no election ſhall be made "of the mayor, bailiff or bailiffs, or other chief officer or officers "of ſuch city, borough, or town corporate, upon the day, or "within the time appointed by charter or uſage for ſuch elec"tion; or ſuch election, being made, ſhall afterwards become "void, whether ſuch omiſſion or avoidance ſhall happen through "the default of the officer or officers, who ought to hold the "court, or preſide where ſuch election is to be made, or by any "accident, or other means whatſoever; the corporation ſhall not "thereby be deemed or taken to be diſſolved or diſabled from "electing ſuch officer or officers for the future; but in any caſe, "where no election ſhall be made as aforeſaid, it ſhall and may "be lawful for the members or perſons of ſuch city, borough, or "corpo-

" corporation, who have right to vote, or be preſent at, or to do " any other act neceſſary to be done, in order to or for the com- " pleting of ſuch election; and they, and ſuch of them, as ſhall " be hindered by any reaſonable impediment or excuſe, are hereby " required reſpectively to meet or aſſemble together in the town- " hall, or other uſual place of meeting, for making ſuch election " within ſuch city, borough, or town corporate, upon the day " next after the expiration of the time within which ſuch elec- " tion ought to have been made, unleſs ſuch day ſhall happen to " be *Sunday*, and then upon the *Monday* following, between the " hours of ten in the morning and two of the afternoon of the " ſame day; and that the members, or perſons, having right to " vote at, or to do any other act neceſſary to be done in order to " ſuch election, or ſuch of them as ſhall be ſo aſſembled or met toge- " ther, ſhall forthwith proceed to the election of a mayor or bailiff, " or other chief officer or officers, for ſuch city, borough, or corpo- " ration, and to do every act neceſſary to be done, in order to or " for the completing of ſuch election, in ſuch manner as was " uſual in, or in order to the election of ſuch officer or officers, " upon the day, or within the time appointed by charter or uſage " for ſuch election; and in caſe upon ſuch day of meeting here- " by appointed for ſuch election, the mayor, bailiff or bailiffs, or " other proper officer or officers, who ought to have held the " court, or preſided at the aſſembly for ſuch election, or doing " any other act neceſſary to be done in order to ſuch election, if " the ſame had been made or done on the day fixed, or within " the time limited by charter or uſage for that purpoſe, ſhall be " abſent; then ſuch other perſon, having a right to vote, being " the neareſt then preſent in place or office to the perſon or per- " ſons ſo abſenting himſelf or themſelves, ſhall hold the court, " or preſide in the meeting or aſſembly hereby appointed, and " ſhall have the ſame power and authority, in all reſpects therein, " as belongs to the mayor, bailiff or bailiffs, or other chief officer " or officers of the ſame city, borough, or town corporate, at any " court or aſſembly, for the election of officers for ſuch place, " or for doing any other act neceſſary to be done in order to ſuch " election."

And by § 2. it is further enacted, " That if it ſhall happen that " in any city, borough, or town corporate, within that part of " *Great Britain* called *England*, *Wales*, and *Berwick-upon-Tweed*, " no election ſhall be made of the mayor, bailiff or bailiffs, or " other chief officer or officers of ſuch city, borough, or town " corporate, upon the day, or within the time appointed by char- " ter or uſage for that purpoſe; and that no election of ſuch " officer or officers ſhall be made purſuant to the directions " hereinbefore preſcribed; or ſuch election, being made, ſhall " afterwards become void as aforeſaid; in every ſuch caſe it ſhall " and may be lawful for his Majeſty's court of King's Bench, " upon motion to be made in the ſaid court, to award a writ or " writs of *mandamus*, requiring the members or perſons of ſuch " city, borough, or town corporate, having a right to vote at, or

" ſo

" to do any other act neceſſary to be done, in order to ſuch elec-
" tion, to aſſemble themſelves upon a day and at a time to be
" prefixed in ſuch writ or writs, and to proceed to the election
" of a mayor, bailiff or bailiffs, or other chief officer or officers,
" as the caſe ſhall require, and to do every act neceſſary to be
" done in order to ſuch election, or to ſignify to the ſaid court good
" cauſe to the contrary; and thereupon to cauſe ſuch proceed-
" ings to be had and made, as in other caſes of writs of *manda-*
" *mus* granted by the ſaid court for election of officers of corpo-
" rations; and of the day and time appointed, in and by any ſuch
" writ or writs of *mandamus*, for holding ſuch aſſembly, publick
" notice in writing ſhall, by ſuch perſon as the court ſhall ap-
" point, be affixed in the market-place, or ſome other publick
" place within ſuch city, borough, or town corporate, by the
" ſpace of ſix days before the day ſo appointed; and ſuch officer
" and other perſon reſpectively ſhall preſide in ſuch aſſembly, as
" ought to have preſided at the election of ſuch mayor, bailiff or
" bailiffs, or other chief officer or officers, or at the doing any
" other act neceſſary to be done in order to ſuch election, in caſe
" the ſame had been made or done upon the day hereinbefore
" preſcribed for that purpoſe."

§ 3. " And whereas in certain boroughs and towns corporate
" within that part of *Great Britain* called *England*, *Wales*, and
" *Berwick-upon-Tweed*, the mayor, bailiff or bailiffs, or other chief
" officer or officers, is or are to be nominated, elected, or ſworn
" at a court-leet, or view of frankpledge, or ſome other court;
" and by reaſon of the contrivance or default of the lord, or his
" ſteward, or ſuch other officer, by or before whom ſuch court
" ought to be held, in not holding the ſame, or by ſome accident
" it hath happened, and may hereafter happen, that no due no-
" mination, election or ſwearing, of ſuch mayor, bailiff or bailiffs,
" or other chief officer or officers, hath been, or ſhall be had or
" made; be it further enacted by the authority aforeſaid, That in
" every ſuch caſe it ſhall and may be lawful to and for his Ma-
" jeſty's court of King's Bench, upon motion to be made in the
" ſaid court, to award a writ of *mandamus*, requiring the lord, or
" his ſteward, or other officer, by or before whom ſuch court
" ought to be held, to hold, or cauſe to be holden, ſuch court-
" leet, or other court, and to do every other act neceſſary to be
" done by him, in order to ſuch nomination, election, or ſwear-
" ing, at ſuch day and time as ſhall be for that purpoſe judged
" proper by the ſaid court of King's Bench, and ſhall be ap-
" pointed in ſuch writ; or to ſignify to the ſaid court good cauſe
" to the contrary; and thereupon, to cauſe ſuch proceedings to
" be had and made, as in other caſes of writs of *mandamus*,
" granted by the ſaid court for holding of any court; and of the
" day and time appointed, in and by any ſuch writ of *mandamus*,
" for holding ſuch court, publick notice in writing ſhall, by ſuch
" perſon as the ſaid court of King's Bench ſhall appoint, be af-
" fixed in the market-place, or ſome other publick place within
" ſuch borough or town corporate, by the ſpace of ſix days be-
" fore the day ſo appointed; and where a nomination of perſons,

" in order to the election of any such mayor, bailiff or bailiffs " or other chief officer or officers, is to be made at such court- " leet, or other court; in every such case, after such nomination " made, all and every other act and acts necessary to be done, in " order to such election, shall be had, made, and done at such " assembly, and in such manner and form as the same ought to " have been had, made, and done, in case such election had been " made upon the day next after the expiration of the time pre- " scribed for such election by the charter or usage of such bo- " rough or corporation, according to the directions hereinbefore " mentioned."

§ 9. It is further enacted, " That where any writ of *mandamus* " shall issue out of the court of King's Bench in any of the cases " aforesaid, the person or persons, to whom such writ shall be direct- " ed, shall make his or their return to the first writ of *mandamus*."

Bull. N. P. 201. [This being a beneficial law for the subject, the court have been very liberal in the construction of it, and therefore have granted a *mandamus* for the election of a mayor, though there had not been any legal mayor for four years preceding.

Id. ibid. Case of the Borough of Tintagel, *infra*, E. 2 Str. 1003. Case of Aberyst- with, 2 Str. 1157. Case of the Corporation of Scarborough, *id.* 1180. Rex v. Mayor, &c. of Cambridge, 4 Burr. 2008. Rex v. Newsham, Say. Rep. 211. But the mayor *de facto* must be made party to the rule to shew cause. Rex v. Bankes, 3 Burr. 1452. 1 Bl. Rep. 445. 452.

So, they have granted a *mandamus* where there was a mayor *de facto* at the time, it appearing clearly there had not been a due election. But where it is at all doubtful whether the prior election be legal, the court will not grant such a *mandamus*, till the validity of the prior election has been determined in a proper manner by information.

Case of the Corporation of Scarborough, 2 Str. 1180. So, they have granted it to go to the election not only of the head officer, but of other annual officers, who were constituent parts of the corporation.

See Rex v. Woodrow, 2 Term Rep. 732.

Rex v. Willis, Andr. 279. So, they have granted it, to a steward of a court-leet, to hold a court-leet and swear a jury, that they may present a person duly elected mayor, that is, as duly elected mayor.]

(E) Of the Authority by which it issues: And herein of the discretionary Power in the Court of granting or refusing it.

Vide tit. Courts and their Jurisdiction. THIS general jurisdiction and superintendency is now only exercised by the court of King's Bench, as the supreme court for restraining and keeping all inferior courts and magistrates within their proper bounds, and obliging them to execute that justice with which they are invested.

Vern. 175. And though a *mandamus* may issue out of Chancery, yet on a motion to the Lord Keeper, to grant a mandatory writ to the Chief Justice of the King's Bench, to command him to sign a bill of exceptions, and a precedent produced, where in a like case such a writ had issued out of Chancery to the judge of the sheriff's court in *London*; the Lord Keeper denied the motion, for that the precedent

precedent produced was to an inferior court, and he would not preſume but the Chief Juſtice of *England* would do what ſhould be juſt in the caſe.

But though the court of King's Bench be intruſted with this juriſdiction of iſſuing out *mandamuſes*, yet they are not obliged to do ſo in all caſes wherein it may ſeem proper, but herein may exerciſe a diſcretionary power, as well in refuſing as granting ſuch writ; as, where the end of it is merely a private right; where the granting it would be attended with manifeſt hardſhips and difficulties, &c.

[So, they will not grant it to reſtore a perſon, where it is *confeſſed* he was *rightly* removed, even though he had no notice at the time.] Rex v. Mayor, &c. of Axbridge, Cowp. 523.

So, ever ſince the ſtatute 11 *G.* 1. *c.* 4. for obliging corporations to elect officers, it hath been held, that this court hath a diſcretionary power of refuſing a writ for that purpoſe, but may firſt receive information about the election, and, if diſſatisfied about the right, may ſend the parties to try it in an information. Hil. 8 G. 2. The King v. Mayor and Burgeſſes of Tintagel in Cornwal. 2 Stra. 1003. 1157. Andr. 280.

Alſo, in a doubtful caſe, the court of King's Bench may award a *mandamus* to be conſidered of further on the return, which may give more light, and diſcover more fully the juſtneſs of granting or refuſing it, and on ſuch return may either eſtabliſh or quaſh the writ. Sid. 169. Lev. 23. 2 Lev. 14. 2 Show. 74. Carth. 169. 10 Mod. 49.

(F) To whom to be directed.

THE writ is to be directed to him, who by law is obliged to execute it, or to do the thing thereby required; and therefore (*a*) where a *mandamus* was granted to the mayor, &c. of *Norwich*, it was moved, that the ſenſe of the mayor differed from the majority of the corporation, and that he would execute the writ; whereas the corporation were for returning an excuſe, &c. and they prayed, that the mayor might be ordered to deliver the writ to the reſt of the corporation; *ſed non allocatur;* for he is the head and principal, and (*b*) take your courſe againſt him. 2 Burr. 784. *Id.* 798.] (*a*) Salk. 432. pl. 10. 701. pl. 6. 2 Ld. Raym. 1244. [The court will not ſpecify to whom by name, a *mandamus* ſhall be directed. (*b*) That if the mayor had made any return, contrary to the votes of the majority concerned, it was at his peril; and that the way to puniſh him was by information in B. R. Carth. 500.

[Where the *mandamus* was directed to the *mayor, aldermen, and commonalty of* Rippon, and they returned that they were incorporated by the name of the mayor, *burgeſſes*, and commonalty of *Rippon*, the court held the writ bad, becauſe directed to the corporation by a wrong name. Rex v. Mayor, &c. of Rippon, 2 Salk. 433.

The writ muſt be directed either to that part of the corporation who are to do the act, or to the corporation at large; for if it be directed to a part of the corporation who are not to do the act, it ſhall be quaſhed. Therefore, where a *mandamus*, to admit a perſon to the office of town-clerk, was directed to the mayor and Rex v. Mayor, &c. of Abingdon, 2 Salk. 699. Reg. v. Mayor, &c. of He-

reford, *Id.* 701.

aldermen of *Hereford*, and in fact, the mayor only was to admit, the writ was quaſhed.

Rex v. Mayor, &c. of Norwich, 1 Str. 55.

So, where the *mandamus* was directed to the mayor, aldermen, *and common council* of *Norwich*, to proceed to the election of a town-clerk, the court granted a *ſuperſedeas*, it appearing, that the right of election was in the mayor and aldermen, and the writ was not directed to them, neither was it directed to the corporation by their corporate name.

Pees v. Mayor, &c. of Leeds, 2 Str. 640.

But, where the power of amotion was in the mayor, aldermen, *and others of the common council*, the mayor and aldermen being part of the common council, and the writ was directed to the mayor, aldermen, and common council, it was moved to quaſh it for this direction, becauſe it ſeemed to infer that the mayor and aldermen were no part of the common council: the court ſaid, here is nobody in this direction who muſt not join in the act: this is only repeating the ſeveral conſtituent parts of the corporation; and the mentioning the entire common council after the mayor and corporation, is but a repetition *quoad* the mayor and aldermen.]

6 Mod. 133. The Queen v. the Town of Clitheroe.

If a *mandamus* be directed to the two bailiffs of a town, to ſwear in other bailiffs, and they object, that having ſworn in others, and being now no longer bailiffs, and the writ not being directed to them in their natural capacities, they are not obliged to pay any obedience thereto; the court will notwithſtanding oblige them to return the writ; for if the perſons ſworn in by them had no right to be choſen, they ſtill continue bailiffs, and ought to obey the king's writ.

Trin. 5 Geo. 2. in B. R. The King v. Churchwardens of Wrexham, 15 Vin. Abr. 214. pl. 6.

But where a *mandamus* was directed to the churchwardens of *W.* to reſtore *A.* to the office of ſexton, and ſerved upon the late churchwardens, after their office was expired; and a rule was made to ſhew cauſe why an attachment ſhould not go, for not obeying the *mandamus*; upon the whole matter being diſcloſed by affidavit, the court allowed as a good reaſon for their not returning the writ, that they, at the time of the writ delivered to them, were not churchwardens.

2 Salk. 436. pl. 18. The Queen v. the Mayor, &c. of Derby.

A *mandamus* to the mayor, aldermen, and capital burgeſſes of *D.*, *viz.* whereas *A.* and *B.*, *&c.* removed the party complaining from his office of burgeſs, commanding them to command *A.* and *B.* to reſtore him, was quaſhed, for that it is abſurd, that the writ ſhould be directed to one perſon to command another.

Rex v. Ward, 2 Str. 893.

[The writ need not ſet out that the perſon to whom it is directed, is the perſon to do the act for which the *mandamus* is granted; for if it is miſdirected, it ſhould be ſo returned.]

(G) By whom to be returned.

Skin. 368. pl. 15. Carth. 500. Comb. 422. 2 Show. 504. pl. 465.

THE writ is to be returned by him to whom it is directed and if any other return it in his name, without his privity and conſent, an action on the caſe lies againſt him: alſo, it is a offence, for which the court will grant an attachment.

If a *mandamus* be directed to the mayor, &c., and the mayor, who is the moſt principal and proper perſon, return and bring in the writ; the court, upon affidavits, will not examine whether there was the ſenſe of the majority, but will receive it, and leave the parties to puniſh the mayor for the miſdemeanor, if he be guilty; but a peremptory *mandamus* will be granted, if the return be falſified. 1 l. 9. S. C. and leave given by the court to file an information againſt the mayor. Carth. 499. The King v. Mayor, &c. of Abingdon, 1 Ld. Raym. 559. S. C. 2 Salk. 431.

(H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return.

ON every *mandamus* there regularly iſſues an *alias* and *pluries*, to oblige the party to return the writ; but the court of King's Bench may make a peremptory rule to return the firſt writ; and, in caſe of diſobedience, grant an attachment: alſo, by the ſtatute 9 *Ann. c.* 20. and 11 *G.* 1. *c.* 4. perſons who are by law required to make returns to *mandamuſes*, in ſuch caſes as are within theſe ſtatutes, muſt make their return to the firſt writ of *mandamus*. 2 Salk. 429. pl. 4. 434. pl. 16. Ld. Raym. 391. 6 Mod. 25. Skin. 669. pl. 7. 2 Ld. Raym. 848. 1233.

If an attachment iſſues for not returning a *mandamus*, and the ſheriff, who is to ſerve the proceſs, takes bail thereupon, this is ſuch a miſdemeſnour, for which an attachment will be granted againſt him; for theſe are not like attachments in Chancery, for want of an anſwer, which are only as attachments of proceſs, but are writs on contempt, in nature of executions, and ſo not bailable by the ſheriff. Mich. 9 Geo. 2. The King v. Baſkerville, Sheriff of Shropſhire.

If a *mandamus* is awarded for electing an officer, and there is an equality of votes, ſo that the electors cannot agree, it is ſaid, that they ſhall be all brought up as in contempt, and laid by the heels, till they do agree. 6 Mod. 152. 1 Term Rep. 652.

[A *mandamus* was directed to the two bailiffs, one of whom was for obeying the writ, but the other would not, nor join in the return. The court granted an attachment againſt both; for they ſaid, it would be endleſs to try in all caſes which was in the right, and it would be always uſed for a handle of delay.] Caſe of the Bailiffs of Bridgenorth, 2 Str. 808. 1 Barnard. B. R. 53. S. C.

Where a writ was directed to the mayor and jurats of Rye to admit and ſwear a jurat; and the mayor claimed an excluſive right to the nomination of him, and the jurats denied any ſuch right in the mayor, ſo that they could never join in a return, it was conſented to try the right in a feigned iſſue. Rex v. Mayor, &c. of Rye, 2 Burr. 798.

(I) What ſhall be ſaid a good Return.

AS every *mandamus* iſſues upon a ſuppoſal of ſome breach and diſobedience of the law, or neglect of duty in the perſon to whom it is directed, the return thereto muſt be certain to every reſpect (*a*); and therefore it is ſaid not to be ſufficient to offer ſuch matter as the party may falſify in an action, but alſo ſuch matter muſt be alleged, that the court may be able to judge of it, 2 Salk. 432. pl. 11. Ld. Raym. 559. Vent. 111. [(*a*) But certainty to a certain intent in ge-

neral is all that is requiſite here, and determine, whether the party's conduct be agreeable to law or not.

which means, what, upon a fair and reaſonable conſtruction, may be called certain, without recurring to *poſſible* facts, which do not appear. If the return be certain upon the face of it, *that* is ſufficient, and the court cannot intend facts inconſiſtent with it, for the purpoſe of making it bad. If preſumptions were to be allowed, certainty in every particular would be neceſſary, and no man could draw a valid and ſufficient return. Beſides, preſumption and intendment, as far as they go, muſt be in favour of returns, not againſt them. *Per* Buller, J. Dougl. 159.]

Vent. 110. The King v. Clapham. Therefore, if to a *mandamus* to the Lord Preſident and Council of the *Marches*, to admit a perſon to the exerciſe of office of deputy-ſecretary, the return is, that *non fuit tempore receptionis brevis deputatus conſtitutus;* this is naught; for if he were made his deputy before, the return was true; unleſs he made him his deputy at the very inſtant of the receipt of the writ.

2 Salk. 436. pl. 10. 2 Ld. Raym. 1244. The Queen v. Mayor, &c. of Norwich. To a *mandamus* to admit a perſon alderman, the party may return, that he was not qualified, or that he was not elected: alſo, ſeveral cauſes may be returned, but they muſt be conſiſtent (*a*); and therefore if the return admits a good election, and afterwards avoids it by the matter repugnant, this is naught.

[(*a*) See *acc.* Wright v. Fawcett, 4 Burr. 2041. Rex v. Churchwardens of Taunton St. James's, Cowp. 413. Where ſeveral cauſes returned to a *mandamus* are inconſiſtent, the whole muſt be quaſhed, becauſe the court cannot know which to believe, and it is an objection to the whole return. It is like a declaration in which two inconſiſtent counts are joined; there, the plaintiff cannot have judgment. But where a return conſiſts of ſeveral independent matters not inconſiſtent with each other, ſome of which are good at law, and ſome bad, the court may quaſh the return as to ſuch as are bad, and put the proſecutor to plead to or traverſe the reſt. Rex v. Mayor, &c. of Cambridge, 2 Term Rep. 456. Rex v. Mayor, &c. of York, 5 Term Rep. 66. Rex v. Archbiſhop of York, 6 Term Rep. 493.]

6 Mod. 309. See Ld. Raym. 225. 559. A *mandamus* to ſwear one into the place of town-clerk; the return was, that upon the election *B.* had eighteen voices, and the party who ſued the *mandamus* but ſeventeen; and that they ſwore in *B.*: it was held a bad return, being argumentative, when it ſhould be expreſs and direct, that he was not choſen.

Raym. 153. A *mandamus* was granted to reſtore the recorder of *Barnſtaple*, directed to the mayor of the corporation; and he returned, *quod non conſtat nobis* that he was ever elected; and the return was adjudged inſufficient, and reſtitution awarded.

Sid. 209. Keb. 655. 716. 733. So, where to a *mandamus* to reſtore a town-clerk, it was returned, that he *nunquam debito modo admiſſus fuit;* it was held a bad return, being a negative pregnant, and involving matter of law, when the plain fact only ſhould be returned, ſo as to enable the court to adjudge upon it, and the party to bring his action, in caſe it were falſe.

Rex v. Mayor, &c. of York, 5 Term Rep. 66. [So, where a writ of *mandamus*, to certify the election of a recorder, ſtated, that the corporation, being duly aſſembled, proceeded to the election of a recorder; a return, that they were not duly aſſembled to proceed to the election of a recorder, was holden bad, as being a negative pregnant.]

Carth. 170. Lambert's caſe. 2 Salk. 433. pl. 13. 5 Mod. 11. But if the *mandamus* ſuggeſt, that he was *debite electus*, a return *quod non fuit debite electus* is good, becauſe it anſwers the ſuggeſtion in the writ.

S. P. [2 Str. 1235. S. P. 1 Show. 253. S. P. Andr. 105. S. P. on a *mandamus* to reſtore.

reſtore. But ſee 2 Str. 895. and Dougl. 82. A return to a *mandamus* ſtating in the words of the writ, that the proſecutor was not DULY ELECTED, *admitted, and ſworn*, was holden to be bad. *Secus*, perhaps, if it had been not duly elected, *or* admitted, *or* ſworn. Rex v. Lyme Regis, Dougl. 79.]

[If a writ ſet forth all the proceedings of the election, and conclude, "by reaſon whereof *A.* was elected;" it is a bad return to ſay "that he was not elected: the defendant ſhould traverſe one of the facts alleged. Rex v. Mayor, &c. of York, 5 Term Rep. 66.

Where an amotion is returned, the return muſt ſet out all the neceſſary facts preciſely, to ſhew that the perſon is removed in a legal and proper manner, and for a legal cauſe. It is not ſufficient to ſet out concluſions only; the facts themſelves muſt be ſet out preciſely, that the court may be able to judge of the matter. And ſo it is as to the *cauſe* of amotion; *that* muſt be ſet out in the ſame manner, that the court may judge of it. *Per* Lord Mansfield, 2 Burr. 731.

Therefore, where to a *mandamus* to reſtore *J. S.* to the place of common councilman of *L.*, the defendants returned generally the cauſe of the amotion by the common council, who were in due manner met and aſſembled; the court held the return to be bad; for that they were ſo duly aſſembled was a concluſion of law; that they ſhould have ſet out the facts, *viz.* that they had as a ſelect body the power of amotion: that all the members were ſummoned by regular and proper notice: and that *J. S.* himſelf was alſo regularly ſummoned and heard in his defence. *Ibid.*

So, if the amotion were by a part of a coporation, the return ſhould ſhew how they have ſuch authority, whether by charter or preſcription; for as the power of amotion is by the general law in the whole corporation at large, it ſhould appear how the ſelect part is entitled to it. Rex v. Mayor, &c. of Doncaſter, Say. Rep. 37.

But the power of amotion being generally in the whole corporation, it is obvious, that if it is ſtated, that the party was removed by the corporate body at large, it is unneceſſary to aver that the power was veſted in them. Rex v. Lyme Regis, Dougl. 149.

A return in general terms is bad; as, that the party had obſtinately refuſed to obey the rules and orders of the corporation, contrary to the duty of his office, without ſtating what the rules and orders were. Rex v. Mayor, &c. of Doncaſter, 2 Ld. Raym. 1564.

So, a return of removal for neglect of duty, without ſtating the particular inſtances of neglect, has been holden to be bad. Say. Rep. 37.

On a *mandamus* to reſtore to the office of a capital burgeſs, if the return ſtate the ground of diſfranchiſement to have been, the nonattendance of the proſecutor at a meeting to which he was ſummoned for the election of a capital burgeſs, an averment, that the right of ſuch election is in the capital burgeſſes being the common council, does not aſſert with ſufficient certainty, that he had a right to concur in the election, and ought to have obeyed the ſummons, becauſe, conſiſtently with ſuch an averment, he might not have that right, it not appearing thereby that all the capital burgeſſes are members of the common council. Rex v. Lyme Regis, Dougl. 177.

If a writ be directed to a corporation by a wrong name, they may return this ſpecial matter, and rely upon it; but if they anſwer 2 Salk. 434-5.

ſwer the exigency of the writ, they cannot take advantage of the miſnomer.

2 Salk. 431. If the ſuppoſal of the writ be falſe in not truly ſtating the conſtitution of the corporation, it will not be ſufficient for the return to ſtate it truly; the defendants muſt alſo deny the ſuppoſal of the writ.]

(K) Of traverſing the Return, and taking Iſſue thereon.

Vent. 111. 2 Salk. 432. pl. 8. 1 Str. 58. 1 Show. 335. Ld. Raym. 481.

THE party to the return of a *mandamus* could not traverſe nor interplead, which is one reaſon why the utmoſt certainty was required in ſuch return.

But now by the 9 *Ann. c.* 20. reciting, that divers perſons had illegally intruded themſelves into, and taken upon them to execute the office of mayors, bailiffs, port-reeves, and other offices within cities, towns corporate, boroughs, and places; and the great difficulty of determining, where the office was annual, the right to the ſame, within the compaſs of the year, or where it was not annual, the difficulty of determining the right, before the perſons had done divers acts prejudicial to the peace and order of ſuch city, *&c.* and reciting the great difficulty perſons illegally turned out, or refuſed to be admitted, lay under, and the dilatorineſs and expence attending the proceedings on writs of *mandamus*; it is therefore enacted, "That as often as, in any of the caſes aforeſaid, any writ of *mandamus* ſhall iſſue out of the King's Bench, "the courts of ſeſſions of counties palatine, or out of any the "courts of the grand ſeſſions in *Wales*, and a return ſhall be made "thereunto, it ſhall and may be lawful to and for the perſon or "perſons, ſuing or proſecuting ſuch writ of *mandamus*, to plead to "or traverſe all or any the material facts contained within the ſaid "return; to which the perſon or perſons making ſuch return ſhall "reply, take iſſue, or demur; and ſuch further proceedings, and "in ſuch manner, ſhall be had therein, for the determination there"of, as might have been had if the perſon or perſons, ſuing ſuch "writ, had brought his or their action on the caſe for a falſe re"turn; and if any iſſue ſhall be joined on ſuch proceedings, the "perſon or perſons ſuing ſuch writ, ſhall and may try the ſame "in ſuch place, as an iſſue joined in ſuch action on the caſe "ſhould or might have been tried; and in caſe a verdict ſhall be "found for the perſon or perſons ſuing * ſuch writ, or judgment "given for him or them on demurrer, or by *nil dicit*, or for want "of a replication or other pleading, he or they ſhall recover "his and their damages and coſts, in ſuch manner as he or they "might have done in ſuch action on the caſe as aforeſaid; ſuch "coſts and damages to be levied by *capias ad ſatisfaciendum*, *fieri* "*facias*, or *elegit*, and a peremptory writ of *mandamus* ſhall be "granted without delay, for him or them for whom judgment "ſhall

* Where defendants ſhall recover coſts, *vide* § 5. of this ſtatute.

" ſhall be given, as might have been, if ſuch return had been " adjudged inſufficient; and in caſe judgment ſhall be given for " the perſon or perſons making ſuch return to ſuch writ, he or " they ſhall recover his or their coſts of ſuit, to be levied in man- " ner aforeſaid *."

* By § 7. of this ſtatute, the ſtatutes of amendment and jeofails are extended to proceedings on writs of *mandamus*.——If in a proceeding under the ſtatute, no damages are given by the jury, the want of it cannot be ſupplied by a writ of inquiry; but in ſuch caſe the party may bring an action for a falſe return; for the act does not take away the party's right to bring ſuch action, but only provides that in caſe damages are recovered, by virtue of that act, againſt the perſons making the return, they ſhall not be liable to be ſued in any other action, for making ſuch return. Stra. 1051. —There are many caſes to which the ſtatutes do not extend.—In all thoſe caſes the proceedings muſt be according to the courſe of the common law.

(L) Of the Party's Remedy for a falſe Return.

IT is clearly agreed, that for a falſe return to a *mandamus* an action on the caſe lies; as, if upon a *mandamus* to reſtore *T. S.* to his place of burgeſs of *P.* the mayor, *&c.* return a good cauſe, the matter of which is falſe, an action lies for the falſe return. 11 Co. 99. Bagg's caſe. [An action will lie for a *ſuppreſſio veri* in a return, as well as for an *allegatio falſi*. Dougl. 149.]

Alſo it hath been adjudged, that where the return is made by ſeveral perſons, the action may be either joint againſt all, or ſeveral, being founded on a tort or injury; as, if made by the mayor and aldermen, the action may be brought againſt the mayor only; and if upon evidence it appears, that he voted againſt the return, but was over-ruled by the majority, the plaintiff will be non-ſuited †. Carth. 171, 172. Sir Peter Rich v. Pilkington, Lord Mayor of London, 6 Mod. 152. S. P.

† Where ſeveral join in an application for a *mandamus*, they muſt all join in the action for a falſe return. 1 Ld. Raym. 125.

[The return need not be under the ſeal of the corporation, nor need the mayor ſign it; and if an action be brought againſt the mayor for a falſe return, it will be a ſufficient evidence againſt him, that the *mandamus* was delivered to him, and has ſuch a return, unleſs he can ſhew the contrary. Rex v. Mayor of Exeter, 1 Ld. Raym. 223. Bull. N. P. 209.

In an action for a falſe return the plaintiff ſet out, that he was choſen upon the firſt of *October*, according to the cuſtom. Upon evidence it appeared, that the cuſtom was to chooſe upon the 29th of *September*, and that the plaintiff was then choſen; and this was holden ſufficient to ſupport the declaration; for the day in the declaration is but form. Vaughan v. Lewis, Carth. 228.

In an action for a falſe return, it is not material whether the writ iſſued properly or not.] Green v. Pope, 1 Ld. Raym. 126.

Alſo, if the matter concerns publick government, and no particular perſon is ſo far intereſted as to maintain an action, the court will grant an information againſt the particular perſons that made the return ‡. Salk. 374. pl. 16. Ld. Raym. 584.

‡ The return muſt be filed and allowed before the information can be moved for.

[Clerical miſtakes in returns may be amended after they are filed.] Rex v. Lyme Regis, Dougl. 135.

(M) Of awarding a peremptory *Mandamus*.

11 Co. 99. 1 Str. 145. 609.

IF the return be insufficient, or falsified in an (*a*) action on the case, the court regularly grants a (*b*) peremptory *mandamus*, either to admit (*c*), restore, or discharge, *&c.* the party, as the case requires.

(*a*) That on falsifying the return, in an action on the case, no motion can be made for a peremptory *mandamus* till four days are past after the return of the *postea*; because the defendant has so long to move an arrest of judgment. 2 Salk. 430, 431. (*b*) Not to be granted in the first instance. Skin. 669. pl. 7. (*c*) But it is said, that if the court does not see cause of restitution, though there be no good return to the writ, yet they will not grant a peremptory *mandamus*. 7 Mod. 83, 84.

2 Salk. 428. pl. 1. 1 Ld. Raym. 216. Skin. 670. pl. 8. S. C.

But the action which falsifies the return, is to be brought in that court out of which the *mandamus* issued; and therefore where in an action on the case in *C. B.* for a false return to a *mandamus*, judgment was given for the plaintiff on demurrer; yet the court of *B. R.* refused to grant a peremptory *mandamus;* because every *mandamus* recites the fact *prout nobis constat per recordum*, which cannot be said in this case, as the court cannot take notice of the records of the Common Pleas.

Foot v. Prowse, 2 Str. 697.

[The judgment of the Exchequer-chamber, whereby the judgment of *B. R. pro defendente* was reversed, being affirmed in parliament, the plaintiff moved for a peremptory *mandamus*, insisting, that he had now falsified the return, and, consequently, set aside the defendant's excuse. But it was objected, that no peremptory *mandamus* ought to go, unless, besides the reversal of the judgment given for the defendant, there had been also a new judgment given for the plaintiff; that a peremptory *mandamus* is a judicial writ, and must be founded upon some judgment establishing the right of the party who applies for it: *P. C. Philips* v. *Bury*, 2 *Salk.* 431. *Cro. Ja.* 206. *Yelv.* 74. 2 *Ventr.* 295. *P.* 10 *Ann. Lidd* v. *Rod*, *Tr.* 7 *Ann. Hicks* v. *Sherburn*, 1 *Br. P. C.* 328. But *per curiam*—A peremptory *mandamus* ought to go; for this is not a judicial writ founded upon the record, but is a mandatory writ, which the court always grant, when they are satisfied of the party's right. The reversal of our judgment is a declaration by the superior court, that the plaintiff had a right; and there is no occasion for any new judgment. We every day grant peremptory *mandamuses* on producing the *postea*, which shews a formal judgment is not necessary. A peremptory *mandamus* was awarded.

Ruding v. Newel, 2 Str. 983.

But a peremptory *mandamus* is not grantable pending a writ of error.

It is enacted by stat. 9 *Ann. c.* 20. § 2. that "where any *man-*
"*damus* shall issue to admit or restore any burgesses, *&c.*, and a
"return shall be made, and a verdict be found for the persons
"suing such *mandamus*, or judgment be given for them, a pe-
"remptory *mandamus* shall be granted without delay, as if such
"return had been adjudged insufficient."

Dean, &c. of Dublin, v. Dowgatt,

Since this statute a *mandamus* is in nature of an action, special replications and pleadings therein being admitted, and costs given to

to either ſide that prevails, and error lies upon a judgment given therein. Yet it hath been ſolemnly determined, that no writ of error will lie on a peremptory *mandamus;* for ſuch a conſtruction would entirely defeat the end of the ſtatute, and prevent the officer, who was choſen annually, from having any fruit of the *mandamus.*]

1 P. Wms. 348. 8 Mod. 27. S. C. 1 Str. 536. S. C. 2 Br. P. C. 554. S. C. Pender v. of Dublin v.

Herle, 3 Br. P. C. 178. S. P. upon the authority of the above caſe of Dean, &c. Dowgatt.

Marriage and Divorce.

MARRIAGE is a compact between a man and a woman for the procreation and education of children; and ſeems to have been inſtituted as neceſſary to the very being of ſociety; for, without the diſtinction of families, there can be no encouragement to induſtry, or any foundation for the care of acquiring riches. All well-ordered ſocieties have therefore guarded the marriage rite with religious ſolemnities, and ordained that the contract ſhould be indiſſoluble during the joint lives of the parties. And the reaſon of this latter proviſion is, becauſe children gradually ſucceeding one another, the parents have hardly done with the care of their education, before they are themſelves unfit for a ſecond marriage. It is alſo fit, that marriages ſhould continue during life, that the mutual care of the parents may be employed in making proviſion for their children; and that the love and reſpect of the children may be returned to both parents without diſtraction or confuſion. Beſides, the common intereſt could not be ſo well provided for, if there were a proſpect that the marriage was any otherwiſe to be determined but by death only; for each perſon would be injuriouſly drawing out of the common ſtock, to the injury of their joint concern, and to the prejudice of the education of their offſpring: nor can ſuch a joint intereſt be well and commodiouſly carried on without a mutual friendſhip and endearment, which muſt be leſſened and deſtroyed by the proſpect, that the contract may be determined by the humour of either party. Hence it is, that fornication and all other luſts are unlawful, becauſe children are begotten without any care or preparation for their education; and the crime of adultery receives this further aggravation, that it not only entails a ſpurious race on the huſband, for whom he is under no obligation to provide, but likewiſe deſtroys that peace and mutual endearment which ought always to ſubſiſt in the marriage ſtate.

[Some

[Some ancient nations appear to have been more ſenſible of the importance of marriage inſtitutions than we are. The *Spartans* obliged their citizens to marry by penalties, and the *Romans* encouraged theirs by the *jus trium liberorum*. A man, who had no child, was entitled by the *Roman* law only to one-half of any legacy that ſhould be left him, that is, at the moſt, could only receive one-half of the teſtator's fortune. With us, the laws hold out no temptation to marriage, and prudence will, in general, recommend celibacy.]

We ſhall conſider what is enjoined or forbidden with reſpect to marriage under the following heads:

(A) What Perſons may marry, and particularly within the Levitical Degrees.

(B) Of Eſpouſals and Marriage Contracts: And herein of the Difference between Contracts *in præſenti* and *futuro*, and the Remedies for the Violation thereof.

(C) Of the Solemnization and Ceremonies requiſite to a complete Marriage: And herein of the Offence of performing the Ceremony without due Authority or Licence.

(D) Of Offences againſt the Rights of Marriage; And herein,

1. Of the Offence of a forcible Marriage.
2. Of the Offence of marrying an Infant Female under the Age of ſixteen, without Conſent of Guardian.
3. Of the Offence of procuring an improvident Marriage; and therein of Marriage-Brokage Contracts and Agreements.

(E) Marriage how long to continue: And herein of the ſeveral Kinds of Divorces; and herein,

1. Of Elopement.
2. Of the Offence of taking away a Wife, and of criminal Converſation.
3. Of the ſeveral Kinds of Divorces.

(A) What

(A) What (*a*) Persons may marry, and particularly within the Levitical Degrees.

(*a*) At what age persons may contract and intermarry, *vide* head of Infants.—Of marriages by idiots and lunaticks, *vide* head of Idiots and Lunaticks.

[IT is enacted by 26 *G.* 2. *c.* 33. § 11. that "all marriages, "solemnized by licence, where either of the parties, not being "a widow or widower, shall be under the age of 21 years, which "shall be had without the consent of the father of such of the parties, so under age, (if then living,) first had and obtained, or if "dead, of the guardian or guardians of the person of the party so "under age, lawfully appointed, or one of them; and in case "there shall be no such guardian or guardians, then of the mother, if living and unmarried; or, if there shall be no mother living and unmarried; then of a guardian or guardians "of the person appointed by the court of Chancery, shall "be absolutely null and void to all intents and purposes whatsoever."

This has been adjudged to comprehend the marriages of illegitimate persons under the age of twenty-one years. Rex v. Hodnett, 1 Term Rep. 96.

But, by § 12. "in case any guardian or mother whose consent "is made necessary as aforesaid, shall be *non compos mentis*, or "beyond sea, or withhold his or her consent to the marriage of "any person, such person desirous to marry may apply by petition to the Lord Chancellour, who may proceed upon such petition in a summary way; and if the marriage proposed shall "on examination appear to be proper, he shall judicially declare "the same to be so, by an order of court, and such order shall be "as effectual, as if such guardian or mother had consented."

The marriages of the royal family being excepted from the salutary restraints of this act, it is enacted by stat. 12 *G.* 3. *c.* 11. "that no descendant of the body of King *George* the second, "male or female, (other than the issue of princesses who have "married, or may hereafter marry, into foreign families,) shall "be capable of contracting matrimony without the previous "consent of his majesty, his heirs or successors, signified under "the great seal, and declared in council, (which consent, to "preserve the memory thereof, is hereby directed to be set out "in the licence and register of such marriage, and to be entered "in the books of the privy council); and that every marriage, "or matrimonial contract, of any such descendant, without such "consent first had and obtained, shall be null and void to all "intents and purposes whatsoever."

§ 2. "Provided, that in case any such descendant, being above the "age of twenty-five years, shall persist in his or her resolution to "contract a marriage disapproved of, or dissented from, by the "king, his heirs or successors; that then such descendant, giving "notice to the king's privy council, which notice is hereby directed to be entered in the books thereof, may, at any time from "the expiration of twelve calendar months after such notice given "to the privy council as aforesaid, contract such marriage; and

"his

" his or her marriage with the perſon before propoſed, and re-
" jected, may be duly ſolemnized without the previous conſent
" of his majeſty, his heirs or ſucceſſors; and ſuch marriage ſhall
" be good, as if this act had never been made, unleſs both houſes
" of parliament ſhall, before the expiration of the ſaid twelve
" months, expreſsly declare their diſapprobation of ſuch intended
" marriage."]

(a) For the general expoſition of this ſtatute, *vide* Co. Lit. 24. 235. 2 Inſt. 683, 4. Hob. 181.

By the ſtatute of (a) 32 *H.* 8. *c.* 38. it is enacted, " That
" no reſervation or prohibition (God's law except) ſhall trouble
" or impeach any marriage without the (b) Levitical degrees; and
" that no perſon, of what eſtate, degree, or condition ſoever he
" be, ſhall be admitted to any of the ſpiritual courts within the
" king's realm, or any of his grace's other lands and dominions,
" to any proceſs, plea, or allegation contrary to the ſtatute."

(b) But the ſtatute does not reſtrain the eccleſiaſtical courts from divorces upon other accounts; as, upon the account of inſufficiency, adultery, pre-contract, &c. Vaugh. 206, &c.

Vaugh. 206, &c.

Since this ſtatute, it hath been clearly agreed, that if the ſpiritual courts proceed to impeach or diſſolve a marriage out of the Levitical degrees, that then the temporal courts are to prohibit them; for by that ſtatute all marriages, that are out of thoſe degrees, are declared to be good and lawful; and therefore, if the ſpiritual court moleſt perſons in doing that which is declared lawful to be done by the ſtatutes of the realm, they are by the temporal courts to be prohibited, becauſe they exceed their juriſdiction, thus bounded by the temporal law; but where the law has not bounded them, their juriſdiction ſtill continues; and therefore within the Levitical degrees they are ſtill judges of inceſt.

Roll. Abr. 340. 357. Vaugh. 208. 220.

We muſt likewiſe obſerve, that if a perſon marry his couſin within the Levitical degrees, yet they continue huſband and wife, till a ſentence of divorce be pronounced.

The degrees prohibited by the Levitical law, are ſuch as are ſaid to be againſt the law of nature, and ſuch as are againſt the divine poſitive law.

Grot. de Jure, lib. 2. c 5. Vaugh. 221. 242. &c.

Thoſe againſt the law of nature, are all marriages between the aſcending and deſcending line *in infinitum;* and this is ſaid to be contrary to the law of nature, becauſe it tends to the deſtruction of the natural will of the Creator, which deſigned the preſervation and continuance of ſuch inhabitants of the world as he originally created; and all acts of men that tend to the deſtruction of ſuch *ſpecies*, as murder of an innocent perſon, are ſaid to be againſt the law of nature; and therefore inceſt, between the aſcending and deſcending line, is contrary to the law of nature; for the mother would never have preſerved and educated the female iſſue, if it had been admitted to the father to have had acceſs to them; and fathers would never have educated and preſerved their male iſſue, if they might have aſcended the bed of their mothers. There is alſo another reaſon why this is called unnatural, and that is, becauſe it deſtroys the natural duties between parents and children; for the parent could never preſerve or maintain that authority that is neceſſary for the education and government of his child; nor the

the child that reverence that is due to the parent in order to be educated and governed, if ſuch indecent familiarities were admitted. There likewiſe ſeems to be a natural reaſon againſt this, or any near intercourſe between collaterals, which is drawn from that which is obſerved in brute creatures, *viz.* that it is neceſſary to croſs the ſtrain, in order to continue the *ſpecies*. It may be, that there being the ſame tone and figure in the blood, and a ſimilar conformation of veſſels, the circulation of it becomes torpid and inactive; whereas a new mixture of others of the ſame kind, where there is a different figure and motion of the blood and ſpirits, may add a new vigour and ability to the animal œconomy.

Thoſe prohibited by the poſitive divine law, are all collaterals to the third degree; and though this be not contrary to the law of nature, yet it ſeems eſtabliſhed on very ſtrong reaſons; for if a concourſe between brothers and ſiſters might be allowed, or their marriages be tolerated, the neceſſity there is that they ſhould be educated together, and the frequent opportunities they have with each other, would fill every family with lewdneſs, and create heart-burnings and unextinguiſhable jealouſies between brothers and ſiſters, where the family was numerous; and it would confine every family to itſelf, and hinder the propagating common love and charity among mankind; becauſe there would be a danger of taking a wife out of any family, if women were liable to be corrupted by ſuch vicious freedoms. This prohibition is likewiſe carried to uncles and aunts, nephews and nieces; becauſe upon the death of the father and mother they come into the education of children *loco parentum;* and, by conſequence, it was neceſſary to propagate the ſame reverence of blood in ſuch near degrees, that the uncle might have the ſame regard and command as a father, and a niece the ſame duty as a daughter; it was alſo neceſſary, in order to perfect the union of marriage, that the huſband ſhould take the wife's relations in the ſame degree, to be the ſame as his own without diſtinction, and ſo *vice verſa;* for if they are to be the ſame perſon as was intended by the law of God, they can have no difference in relations; and, by conſequence, the prohibition touching (*a*) affinity muſt be carried as far as the prohibition touching conſanguinity.

Vaugh. 222. [Mr. Hume obſerves, that "the "natural "reaſon, "why marriage in "certain "degrees is "prohibited by the "civil laws, "and condemned "by the "moral ſentiments of "all nations, is "derived "from "men's "care to "preſerve "purity of "manners; "while they "reflect, "that if a "commerce "of love "were authoriſed "between "the neareſt relations, the frequent opportunities of intimate converſation, eſpecially during early youth, "would introduce an univerſal diſſoluteneſs and corruption. But as the cuſtoms of countries vary conſiderably, and open an intercourſe, more or leſs reſtrained, between different families, or between the "ſeveral members of the ſame family, ſo we find, that the moral precept, varying with its cauſe, is "ſuſceptible, without any inconvenience, of very different latitude in the ſeveral ages and nations of the "world. The extreme delicacy of the Greeks permitted no converſe between perſons of the two ſexes, "except where they lived under the ſame roof; and even the apartments of a ſtep-mother, and her "daughters, were almoſt as much ſhut up againſt viſits from the huſband's ſons, as againſt thoſe from "any ſtrangers or more remote relations. Hence, in that nation, it was lawful for a man to marry, "not only his niece, but his half-ſiſter: a liberty unknown to the Romans, and other nations, where "a more open intercourſe was authoriſed between the ſexes." Hiſt. vol. 4. 110.]

(*a*) According to the text xviii. Levit. ver. 16. *The nakedneſs of thy brother's wife ſhalt thou not uncover, it is thy brother's nakedneſs.*

The law in *Leviticus*, *cap.* xviii. *ver.* 6. is, *That none of you ſhall approach to any that is near of kin, to uncover their nakedneſs;* which words being general, muſt be underſtood and expounded by

by the examples from the 6th to the 20th verſe; among which we find many prohibitions to collaterals in the third degree, both in affinity and conſanguinity; but there is no example of collaterals in the fourth degree, either in affinity or conſanguinity; and therefore the law of marriage opens to relations in the fourth degree; and the Jewiſh lawyers, in computing their degrees, computed them according to the natural order of things; that is, from the *propoſitus* up to the common ſtock, and ſo down to the other relations; which is the fair and natural order of computing proximity; and in this order of computation, couſin-germans are held to be of the fourth degree, and to have liberty to marry.

Selden, Ux. Hebraica, lib. 1. c. 4.

This likewiſe was the ancient ſenſe of the Chriſtian church, and even of the church of *Rome* in the time of Pope *Gregory*; for in writing to *Auſtin* Biſhop of *Canterbury* he ſays, *In quartâ generatione contracta matrimonia minime ſolverentur*; but afterwards, when they found that diſpenſations for inceſtuous marriages brought great profit to the church of *Rome*, and knowing it had obtained univerſally in the Chriſtian church, that it was lawful to marry in the fourth degree, Pope *Alexander* II. began a new computation of degrees; and he ſaid, that the ſecular computation, which was the computation of the civil law, was not properly adapted to the deciſions touching inceſtuous marriages; but they ought to compute up to the common ſtock, where the relation joined, becauſe there the blood was connected; and therefore they computed the degrees according to the diſtance of the perſon remoteſt from the common ſtock; for according as the remoteſt was diſtant from the common ſtock, ſo they computed the relation between the parties; ſo that the firſt couſins that are in the fourth degree, by the received computation in the Moſaick and civil law, were now by the canonical computation thrown into the ſecond degree; and by this alteration of the computation of degrees, they forbad not only firſt couſins but ſecond and third couſins to marry, unleſs they obtained diſpenſations.

Vaugh. 210.

The intention of the ſtatute above mentioned was to reſtore every thing according to the prohibition expreſſed in the law of God; and plainly, the Levitical computation of degrees was in the manner they computed in the civil law; and agreeably hereunto hath been the reſolution in our law.

Hence it hath been adjudged, that the marriage of two ſiſters, one after the other, was inceſtuous, being in the ſecond degree; although it was objected, that the verſe in xviii *Levit.* being, *thou ſhalt not take a wife to her ſiſter to vex her*, &c. the prohibition relating to polygamy, to jealouſy and vexing, the reaſon thereof ceaſed with the death of the firſt wife; in the ſame manner as if *Moſes* had ſaid, thou ſhalt not take a wife to her ſiſter to vex her, beſides the other in her lifetime. But herein the court held, that though the vexing, in one part of the text, related to the life of the wife, yet by another part it is made unlawful for ever; and that from theſe words, *None of you ſhall approach to any that is near of kin to him, to uncover their nakedneſs*; which makes the nearneſs of kin the chief cauſe of the prohibition, and is the reaſon that runs

Vaugh. 302. Hill v. Good. Carth. 271. S. P. admitted.

through the whole chapter; and that therefore the vexing refers only to the life of the wife, but the inceſtuous copulation is the ſame after her death, the nearneſs of kin ſtill continuing.

So, it hath been reſolved, that marrying the ſiſter's daughter is inceſtuous, being in the third degree. Raym. 464. Watkinſon v. Mergatron. 2 Jon. 191. S. C.

So, it hath been reſolved in variety of books and caſes, that the marriage with the wife's ſiſter's daughter was inceſtuous, being likewiſe in the third degree; and the degree of affinity being the ſame with that of conſanguinity. Moor, 907. Cro. Eliz. 218. 4 Leon. 16. S. C. Man's caſe. 2 Lev. 254. 3 Keb. 660. Hob. 181. Noy, 29. Sid 434. 2 Jon. 118. 2 Show. 70. 5 Mod. 448. 3 Lev. 364. 2 Lutw. 1055.

But upon a prohibition, for proceeding againſt a perſon in the eccleſiaſtical court who had married the widow and relict of his great uncle, it was adjudged, that ſuch marriage, being in the fourth degree, was out of the Levitical law, and therefore lawful. Vaugh. 206. 2 Vent. 9. Harriſon & ux. v. Dr. Burwell.

On a motion for a prohibition to the court of the Biſhop of *Exon*, for preſenting *J. S.* for inceſt, who had married the daughter of his brother of the half blood; it was reſolved, that no prohibition ſhould go; for the court ſaid, though the brothers were not of the whole blood, yet were they brothers, and therefore the marriage inceſtuous; they agreed, that if the father marries the mother, and the ſon the daughter, this was lawful enough; and *North* cited the caſe of the Earl of *Mancheſter*, who had married his great aunt's huſband's ſecond wife; and this was held by divines and civilians a good marriage, for *affinis mei affinis non eſt mihi affinis*. Mich. 30 Car. 2. in C. B. Oxhenham & ux. v. Gayre.

On a motion for a prohibition, for proceeding againſt a perſon in the eccleſiaſtical court, who had married his ſiſter's baſtard daughter; it was urged for the prohibition, that though the Levitical law forbids a man to approach to any near of kin to uncover their nakedneſs, yet that this cannot be intended of a baſtard, becauſe he is of kin to no perſon whatſoever (*a*), *&c.* but the court inclined not to grant a prohibition. 5 Mod. 161. Hains v. Jeſcott. Comb. 356. S. C. [Com. Rep. 2. S. C. 1 Ld. Raym. 68. S. C.

(*a*) This objection of being *nullius filius*, and therefore having no conſanguinity, muſt be underſtood only as to civil purpoſes, and is to be confined chiefly to inheritances, 1 Term Rep. 101. for there is a relation as to moral purpoſes; and hence a baſtard cannot marry his own mother, or baſtard ſiſter. 3 Salk. 66.]

(B) Of Eſpouſals and Marriage Contracts: And herein of the Difference between Contracts *in præſenti* and *futuro*, and the Remedies for the Violation thereof.

Swinburne defines eſpouſals in this manner, *ſponſalia ſunt mutua repromiſſio nuptiarum rite inter eos, quibus jure licet, facta*; which comprehends, 1*ſt*, That this promiſe muſt be mutual; 2*dly*, That it muſt be done *rite*, or duly; 3*dly*, That it muſt be entered into by them who may lawfully marry. Swinb. of Eſpouſals, § 2.

Such contracts are divided into contracts *in præſenti*, and contracts *in futuro*.

Swinb. 74. 2 Salk. 438. pl. 3. 6 Mod. 155. (*a*) Alſo a marriage in fact or reputation, is held good in the temporal courts: but when the validity of the marriage ſhall be tried in the ſpiritual courts, and not by verdict, *vide* tit. Baſtardy. In debt on a bond, the defendant pleaded *ne unques accouple* in loyal matrimony; plaintiff demurred, and had judgment; for it alters the trial; for inſtead of trying *per pais*, it puts the trial on a certificate from the Ordinary. Secondly, It admits a marriage, but denies the legality of it; whereas a marriage *de facto* is ſufficient, and whether loyal or not loyal, is no ways material. 2 Salk. 437. pl. 2. So, in an aſſault and battery by baron and feme, the defendant pleaded *ne unques accouple* in loyal matrimony; and on demurrer, the plea was held naught. Comb 473. So, in treſpaſs for taking his wife, and the like plea, which was held naught. Comb. 131. [In general, common reputation, and cohabitation as man and wife, or the acknowledgment of the parties, may be admitted as evidence of marriage in the temporal courts. Comb. 202. Cowp. 232. 2 Bl. Rep. 877. Eſpin. Ni. Pr. Caſ. 213. A jury alſo are the proper judges of the fact of a marriage denied by an anſwer in Chancery, and always lean to ſupport the proof of it, in favour of a juſt creditor, ſuing for a debt contracted during cohabitation. 2 Vez. 270. And it is for the moſt part incumbent on thoſe who would impeach a reputed marriage, to ſhew wherein its irregularity conſiſts. Burr. Set. Ca. 232. 1 Salk. 119.]

A contract *in præſenti*, or *per verba in præſenti*, as, *I marry you, you and I are man and wife*, &c., is by the civil law eſteemed *ipſum matrimonium*, and amounts to an actual marriage; which the very parties themſelves cannot diſſolve by releaſe, or other mutual agreement; it being as much a marriage in the ſight of God, as if it had been *in facie eccleſiæ*, with this difference, that if they cohabit before marriage *in facie eccleſiæ*, they are for that puniſhable by eccleſiaſtical cenſures; and if, after ſuch contract, either of them lies with another, ſuch offender ſhall be puniſhed as an adulterer.

Swinb. §10, 11. This remedy is taken away by 26 G. 2. c. 33. §13. Leon. 147. Roll. Abr. 22. Cro. Eliz. 79. Styl. 295. Carter, 233. Dickinſon v. Holecroft, Salk. 24. pl. 6. 5 Mod. 411. 6 Mod. 172. Salk. 120. pl. 1. 121. 2 Stra. 938.

A contract *in futuro*, as, *I will marry you*, &c., may be enforced in the ſpiritual court, but ſuch contract either party may releaſe: alſo, if either party marry another perſon, ſuch ſecond marriage diſſolves the contract.

But it hath been reſolved, that an action will lie at common law for the violation of ſuch an executory contract *per verba de futuro*, for the temporal loſs to the party; and though the party hath a remedy in the ſpiritual court. But it ſeems, that by bringing an action at common law, and that appearing on record, the remedy in the ſpiritual court is actually releaſed; for now in lieu of a performance of the contract he ſhall recover damages: alſo, the defendant ſhewing, that he hath been ſued for the ſame matter in the ſpiritual court, and producing a ſentence againſt the plaintiff, the plaintiff, notwithſtanding any proof of his, will be nonſuit; becauſe the ſpiritual court were the proper judges, whether it were a precontract or not.

Carth. 467.

Such promiſes are good, though the time of marriage be not agreed on; but in ſuch caſe it is neceſſary, to entitle the party to his action, to allege that he offered to marry her, and that ſhe refuſed.

Carth. 467. Salk. 24. pl. 6. S. C. Harriſon v. Cage & ux. 5 Mod. 411. 2 Salk. 437. pl. 2. S. P.

In an action againſt huſband and wife, the plaintiff declared, that he promiſed to marry the defendant's wife, while ſole, and that ſhe the ſame time promiſed to take him for her huſband; and averred, that he tendered himſelf, and that ſhe refuſed, &c. It was objected, that marriage was no advancement to a man, though it was to a woman; alſo, that no time was laid when this agreement

ment was to have been executed: but the court over-ruled both objections. and the diſtinction as to whether a man or a woman exploded.

This action muſt be founded on reciprocal promiſes; and therefore, if the promiſe be on one ſide only, it does not bind, being only *nudum pactum*. Salk. 24. pl. 6.

But if a man of full age and a female of fifteen promiſe to intermarry, and afterwards the man marries another, an action lies againſt him; for though ſuch promiſe may be ſaid to be voidable, as to the infant, yet it ſhall be binding on the perſon of full age, who ſhall be preſumed to have acted with ſufficient caution; otherwiſe this privilege allowed infants, of reſcinding and breaking through their contracts, which was intended as an advantage to them, might turn greatly to their prejudice. Trin. 5 & 6 Geo. 2. Holt v. Ward, 2 Stra. 850. 937. Barnard. K. B. 209. Fitzgib. 175. 3 Atk. 306.

If *A.* contracts himſelf to *B.*, and after marries *C.*, and *B.* ſues *A.* upon this contract in the ſpiritual court, and there ſentence is given, that *A.* ſhall marry and cohabit with *B.*, which he does accordingly; they are baron and feme (*a*), without any divorce between *A.* and *C.*, for the marriage of *A.* and *C.* was a mere nullity*. Moor, 169. 4 Co. 29. S. C. Sid. 13. S. C. cited, and denied by Twiſden; *& vide* Salk. 120. pl. 1. 121.

(*a*) But if a woman maketh a contract of matrimony with *J. S.*, and then marrieth with *J. D.*, who is ſeiſed of lands and dieth, ſhe ſhall have dower of his lands; becauſe ſuch marriage was not void, but voidable only, by reaſon of the precontract. Moor, 226. Perk. 34.——

* But now *vide* 26 Geo. 2. c. 33.

It hath been held, that the clauſe in the ſtatute of frauds and perjuries, 29 *Car.* 2. *c.* 3. § 4. relating to marriage-agreements, extends as well to a promiſe to marry, as to the payment of marriage-portions. 2 Lev. 65. but Skin. 196. pl. 10. ſeems *cont.* & Stra. 34. Ld. Raym. 387. 2 Eq. Caſ. Abr. 248. are expreſly ſo. A promiſe to marry another, if broken, where the promiſes are mutual, and the parties might legally contract, ſubjects the perſon, breaking ſuch promiſe, to an action for damages, notwithſtanding the ſtatute: for ſuch actions are every day maintained.

(C) Of the Solemnization and Ceremonies requiſite to a complete Marriage: And herein of the Offence of performing the Ceremony without due Authority or Licence.

IN order to make the marriage complete, ſo as to entitle the wife to dower, the iſſue to inherit, *&c.*, the ſame muſt be celebrated *in* (*b*) *facie eccleſiæ*; and therefore the private contract, without the prieſt's bleſſing, makes no marriage; though ſuch contract may be enforced in the ſpiritual court. Roll. Abr. 357. Moor, 169. As to the loyalty of marriage, and of the different kinds of trial, *vide* tit. Baſtard.

(*b*) Before the time of Pope Innocent the Third, there was no ſolemnization of marriage in the church; but the man came to the houſe where the woman inhabited, and led her home to his own houſe, which was all the ceremony then uſed. Moor, 170. *Per* Goldingham, Doctor of the Civil Law, *arguendo*. [Marriages in England during the uſurpation were ſolemnized before juſtices of the peace, but for what purpoſe this novelty was introduced, except to degrade the clergy, does not appear.]

Alſo, though the marriage be ſolemnized *in facie eccleſiæ*; yet, if it were without conſent, it is void; and therefore if a man takes Roll. Abr. 340. Co. Lit. 33.

6 Co. 22. Keilw. 52. Dyer, 13. *E. S.* to wife by *dureſs*, the ſame is void, though ſolemnized *in facie eccleſiæ*.

Cro. Car. 488. 43 Sid. 65. [It is only mentioned as a doubt in Roll's Abridgment, whether marriages by dureſs are not merely void: ſurely they are not ſo before ſentence. They are marriages *de facto*. Cro. Car. 493. And Mr. Noy held them good, Dy. 13 in marg.]

Salk 119. pl. 14. Heydon v. Gould; & *vide* 2 Salk. 438. pl. 3. 3 Lev. 3-6. 2 Show. 300. pl. 303. *A.* and *B.* being ſabbatarians, were married by one in their own way, who uſed the form of the common prayer, except the ring, but was a mere layman; the wife dying, the huſband took out adminiſtration to her; but upon application of her ſiſter, the letters of adminiſtration were repealed, and the ſentence of appeal affirmed by the delegates; for the huſband, demanding a right due to him as huſband, muſt bring himſelf within the rules preſcribed by that juriſdiction to whom he applies: alſo, the conſtant form of pleading marriage is, that it was *per preſbyterum ſacris ordinibus conſtitutum*; and an act of parliament was made confirming the marriages contracted during the uſurpation.

5 Co. 32. Co. Lit 344. Jon 250. 2 Salk. 673. 6 Mod. 189. 2 Str. 1056. 2 Atk. 650. A marriage ſolemnized by a perſon in prieſt's orders is good and binding, though there was no publication of banns or licence to diſpenſe therewith: but herein it ſeems agreed, that not only the party performing the ceremony, but alſo the parties married, being lay perſons, are puniſhable by eccleſiaſtical cenſures; and for acting contrary to ſuch ancient canons as have been received and allowed in this kingdom: but it ſeems agreed, that the canons of 21 *Jac.* 1 bind not the laity, not having been univerſally received, and being made only in convocation where the laity are not repreſented.

The uſe of matrimonial banns is ſaid to have been firſt introduced in the Gallican church, though ſomething like it obtained even in the primitive times, and it is this Tertullian is ſuppoſed to mean by *trinundina promulgatio*.

[By 26 *G.* 2. *c.* 33. § 2. No miniſter ſhall be obliged to publiſh the banns of matrimony between any perſons whatſoever; unleſs they ſhall ſeven days, at the leaſt, before the time required for the firſt publication, deliver or cauſe to be delivered to him a notice in writing of their true chriſtian and ſirnames, and of the houſes of their reſpective abodes, within ſuch pariſh, chapelry, or extra-parochial place, where the banns are to be publiſhed, and of the time, during which they have inhabited or lodged in ſuch houſes reſpectively.

§ 1. All banns of matrimony ſhall be publiſhed in the pariſh church, or in ſome publick chapel, wherein banns of matrimony have been uſually publiſhed, of the pariſh or chapelry wherein the perſons to be married ſhall dwell.

And where the perſons to be married ſhall dwell in divers pariſhes or chapelries, the banns ſhall be publiſhed in the church or chapel belonging to ſuch pariſh or chapelry wherein each of the ſaid perſons ſhall dwell.

And where both or either of the perſons to be married ſhall dwell in any extraparochial place, (having no church or chapel wherein banns have been uſually publiſhed,) then the banns ſhall be publiſhed in the pariſh church or chapel belonging to ſome pariſh or chapelry adjoining to ſuch extraparochial place.

§ 5. Note—That all pariſhes, where there ſhall be no pariſh church or chapel thereto, or none, wherein divine ſervice ſhall be uſually celebrated

celebrated every *Sunday*, may be deemed extraparochial places for the purpoſes of this act, but for no other purpoſe.

Provided, That after the ſolemnization of any marriage under a publication of banns, it ſhall not be neceſſary, in ſupport of ſuch marriage, to give any proof of the actual dwelling of the parties in the reſpective pariſhes or chapelries wherein the banns of matrimony were publiſhed, nor ſhall any evidence in ſuch caſe be received to prove the contrary in any ſuit touching the validity of ſuch marriage. § 10.

And the ſaid banns ſhall be publiſhed upon three *Sundays* preceding the ſolemnization of marriage, during the time of morning ſervice, or of the evening ſervice, if there be no morning ſervice, in ſuch church or chapel, on any of thoſe *Sundays* immediately after the ſecond leſſon. § 1.

Whilſt the marriage is contracting, the miniſters ſhall inquire of the people by three publick banns, concerning the freedom of the parties from all lawful impediments. And if any miniſter do otherwiſe, he ſhall be ſuſpended for three years. Lindw. 271.

And in caſe the parents or guardians, or one of them, of either of the parties, who ſhall be under the age of 21 years, ſhall openly and publickly declare, or cauſe to be declared, in the church or chapel where the banns ſhall be ſo publiſhed, at the time of ſuch publication his diſſent to ſuch marriage, ſuch publication ſhall be void. St. 26 G. 2. c. 33. § 3.

And where the parties dwell in divers pariſhes, the curate of the one pariſh ſhall not ſolemnize matrimony betwixt them, without a certificate of the banns being thrice aſked from the curate of the other pariſh. Rubr.

And by the 26 *Geo.* 2. *c.* 33. § 1. Where the banns ſhall be publiſhed in any church or chapel belonging to any pariſh adjoining to any extraparochial place as aforeſaid, the miniſter, publiſhing ſuch banns, ſhall in writing, under his hand, certify the publication thereof, in ſuch manner, as if either of the parties to be married dwelt in ſuch adjoining pariſh.

As to licences, ſome have queſtioned the biſhop's power to grant licences for marrying without banns firſt publiſhed; becauſe this is diſpenſing with an act of parliament: for the marriage office, which requires banns, is part of the ſtatute law. But this power of diſpenſing is granted to the biſhop by ſtatute law too, *viz.* by the 25 *H.* 8. *c.* 21. by which all biſhops are allowed to diſpenſe, as they were wont to do, and ſuch diſpenſations have been granted by biſhops ever ſince Archbiſhop *Mepham*'s time at leaſt. Johnſ. 194.

By *Can.* 101. no faculty or licence ſhall be granted for ſolemnization of matrimony, without publication of banns by any perſon exerciſing any eccleſiaſtical juriſdiction, or claiming any privileges in the right of their churches; but only by ſuch as have epiſcopal authority, or the commiſſary for faculties, vicars general of the archbiſhops and biſhops, *ſede plen.*; or, *ſede vacante*, the guardian of the ſpiritualties, or ordinaries exerciſing of right epiſcopal juriſdiction in the ſeveral juriſdictions reſpectively.

And by the 26 *G.* 2. *c.* 33. § 7. No ſurrogate deputed by any eccleſiaſtical judge, who hath power to grant licences of marriage,

ſhall grant any ſuch licence before he hath taken an oath before the ſaid judge, faithfully to execute his office according to law to the beſt of his knowledge; and hath given ſecurity by his bond in the ſum of 100*l.* to the biſhop of the dioceſe, for the due and faithful execution of the ſaid office.

Can. 101. And no licence ſhall be granted, but to ſuch perſons only as be of good quality.

Id. And no licence ſhall be granted, but upon good caution and ſecurity taken.

Can. 102. Which ſecurity ſhall contain theſe conditions, 1. That at the time of granting ſuch licence there is not any impediment of precontract, conſanguinity, affinity, or other lawful cauſe to hinder the ſaid marriage. 2. That there is not any controverſy or ſuit depending in any court before any eccleſiaſtical judge touching any contract or marriage of either of the ſaid parties with any other. 3. That they have obtained thereto the expreſs conſent of their parents (if they be living), or otherwiſe, of their guardians or governors. Laſtly, That they ſhall celebrate the ſaid matrimony publickly in the pariſh church or chapel, where one of them dwelleth; and in no other place; and that, between the hours of eight and twelve in the forenoon.

Can. 103. And for the avoiding of all fraud and colluſion in the obtaining of ſuch licences and diſpenſations; before ſuch licence ſhall be granted, it ſhall appear to the judge by the oaths of two ſufficient witneſſes, (one of them to be known either to the judge himſelf or to ſome other perſon of good reputation then preſent, and known likewiſe to the ſaid judge,) that the expreſs conſent of the parents, or parent (if one of them be dead), or guardians or guardian of the parties is thereunto had and obtained: and furthermore, that one of the parties ſhall perſonally ſwear that he believeth, that there is no let or impediment of precontract, kindred, or alliance, or of any other lawful cauſe whatſoever, nor any ſuit commenced in any eccleſiaſtical court, to bar or hinder the proceeding of the ſaid matrimony, according to the tenor of the aforeſaid licence.

Can. 104. But if both parties who are to marry, being in widowhood, do ſeek a faculty for the forbearing of banns, then the clauſes before mentioned requiring the parents' conſents may be omitted; but the pariſhes, where they dwell, ſhall both be expreſſed in the licence, as alſo the pariſh named where the marriage ſhall be celebrated. And if any commiſſary for faculties, vicars-general, or other the ſaid ordinaries, ſhall offend in the premiſes, or any part thereof, he ſhall, for every time ſo offending, be ſuſpended from the execution of his office for the ſpace of ſix months; and every ſuch licence or diſpenſation ſhall be held void to all effects and purpoſes, as if there had never been any ſuch granted; and the parties marrying by virtue thereof, ſhall be ſubject to the puniſhments which are appointed for clandeſtine marriages.

2 Burn's E. L. 427. This clauſe, ſaith Dr. Burn, declaring the licence void to all effects and purpoſes, as if there had never been any ſuch granted, ſeemeth to render it a matter of great importance, that the aforeſaid pre-requiſites be ſtrictly obſerved; for although before the

ſtatute

ſtatute of 26 *G.* 2. only the licence in ſuch caſe was void, and the parties marrying by virtue thereof were liable to be puniſhed, as for a clandeſtine marriage; yet, now by that ſtatute, the marriage alſo will be void, and the other conſequences of clandeſtine marriages will enſue.

By the 5 *W.* *c.* 21. § 3. for every ſkin or piece of vellum or parchment, or ſheet or piece of paper, upon which any licence for marriage ſhall be engroſſed or written, ſhall be paid a ſtamp duty of 5*s.*

No licence of marriage ſhall be granted by any archbiſhop, biſhop, or other ordinary, or perſon having authority to grant the ſame, to ſolemnize any marriage in any other church or chapel than in the pariſh church or publick chapel of the pariſh or chapelry, within which the uſual place of abode of one of the perſons to be married, ſhall have been for the ſpace of four weeks immediately before the granting of ſuch licence; or, where both, or either, of the parties ſhall dwell in the extraparochial place, having no church or chapel wherein banns have been uſually publiſhed, then in the pariſh church or chapel belonging to ſome pariſh, or chapelry, adjoining to ſuch extraparochial place, and in no other place whatſoever. St. 26 G. 2. c. 33. § 4.

Provided, that where the marriage is by licence, it ſhall not be neceſſary, in ſupport of ſuch marriage, to give any proof that the uſual place of abode of one of the parties, for the ſpace of four weeks as aforeſaid, was in the pariſh or chapelry where the marriage was ſolemnized; nor ſhall any evidence in ſuch caſe be received to prove the contrary in any ſuit touching the validity of ſuch marriage. That is to ſay, adds Dr. *Burn*, this ſhall not avail ſo as to render the marriage null and void; but nevertheleſs the ſurrogate, who granteth ſuch licence contrary to the tenor of this act, ſeemeth to incur the violation of his oath and forfeiture of his bond given to the ſpiritual judge, and is liable to be otherwiſe puniſhed for his contempt of the law. § 10. 2 Burn's E. L. 428.

Alſo, this ſhall not extend to deprive the Archbiſhop of *Canterbury*, and his proper officers, of the right which hath hitherto been uſed in virtue of the ſtatute of the 25 *H.* 8. *c.* 21. of granting ſpecial licences to marry at any convenient time or place. § 6.

By which ſtatute of 25 *H.* 8. power is given to the Archbiſhop of *Canterbury* to grant faculties, diſpenſations, and licences, as the pope had done before. And by the ſame ſtatutes, it is enacted, that all children procreated after ſolemnization of any marriages, to he had by virtue of a licence of diſpenſation from the Archbiſhop of *Canterbury*, ſhall be admitted, reputed, and taken, legitimate in all courts and other places, and inherit the inheritance of their parents and anceſtors.

If any perſon ſhall falſely make, alter, forge, or counterfeit any ſuch licence of marriage, or cauſe or procure the ſame to be done, or aſſiſt therein, or utter or publiſh the ſame as true, knowing the ſame to be falſe, altered, forged, or counterfeited; he ſhall be guilty of felony without benefit of clergy. § 16.

§ 1. In all cases, where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place.

§ 4. And no licence-marriage shall be solemnized in any other church or chapel, than where the usual place of abode of one of the parties hath been for the space of four weeks next before the granting of such licence.

And by *Can.* 63. every minister who shall celebrate marriage between any persons contrary to the canons aforesaid, or any part thereof, under colour of any peculiar liberty or privilege claimed to appertain to certain churches and chapels, shall be suspended for three years by the ordinary of the place where the offence shall be committed; and if any such minister shall afterwards remove from the place, where he hath committed the fault, before he be suspended, then shall the bishop of the diocese, or ordinary of the place where he remaineth, upon certificate, under the hand and seal of the other ordinary from whose jurisdiction he removed, execute that censure upon him.

By a constitution of Archbishop *Reynolds*, matrimony shall be solemnized reverently, and in the face of the church.

And by the words, in the beginning of the office of matrimony, it is supposed to be done in the face of the congregation.

By the 26 *G.* 2. *c.* 33. § 8. "If any person shall solemnize marriage in any other place than a church or publick chapel, where banns have been usually published, unless by special licence from the Archbishop of *Canterbury*; or shall solemnize matrimony without publication of banns, unless licence be first had from some person having authority to grant the same; every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be adjudged guilty of felony, and transported for fourteen years;" the prosecution for which felony is by § 9. to be commenced within three years after the offence committed. And by § 8. "All marriages solemnized in any other place than a church or such publick chapel, unless by special licence aforesaid, or that shall be solemnized without publication of banns, or licence of marriage from a person or persons having authority to grant the same first had and obtained, shall be null and void to all intents and purposes whatsoever." But by § 18. it is provided, that this act shall not extend to *Scotland* (a), nor to any marriages among Quakers or Jews, where both the parties shall be Quakers or Jews, or to marriages solemnized beyond the seas.

(a) Whether clandestine marriages in Scotland, of English parties, who resort thither to evade the English law, shall be sustained in England, hath been doubted. And very learned men have questioned, notwithstanding that such marriages are valid by the law of Scotland, whether they are effective in England. Where parties are bound, by the laws of their own country, to execute any important act or contract with certain solemnities, it is doubted, whether they can elude their own law by going purposely to another country where such solemnities are not essential, and then returning immediately when the act is done. It is a question of publick law; and the most celebrated writers on publick law have holden, that such an act is fraudulent, it is *fraudem facere legi*, which the laws of all nations disallow. In the case of Robinson v. Bland, 2 Burr. 1079. which was a security given in France for money there lost at play, wherein the locality of the transaction came in question, there is an *obiter* observation of Lord Mansfield very remarkable. "As to the money won at law, by the rule of the law of England, no action can be maintained for it. To this it has been objected, that the contract was made in France: therefore, the law of France must prevail, and be the rule of determination; by which law, it is alleged, that the money is there recoverable before the marshals of France, who can enforce obedience to their sentences by imprisonment.

" priſonment. I admit that there are many caſes, where the law of the place of the tranſaction ſhall be the " rule; and the law of England is as liberal in this reſpect, as other laws are. It has been laid down at " the bar, that a *marriage* in a foreign country muſt be governed by the law of that country where the mar- " riage was had. Which, in general, is true. But the marriages in Scotland of perſons going from hence " for that purpoſe, were inſtanced by way of example. *They* may come under a very different conſideration, " according to the opinion of Huberus, p. 33. and other writers. No ſuch caſe has yet been litigated in " England, except one, of a marriage at Oſtend, which came before Lord Hardwicke, who ordered it to be " tried in the eccleſiaſtical court: but the young man came of age, and the parties were married over again; " and ſo the matter was never brought to a trial." 2 Burn's E. L. 438. But in Buller's Niſi Prius, 113. there is a ſhort note of a caſe, wherein this point was afterwards determined, upon an appeal to the dele- gates, viz. Crompton v. Bearcroft, Dec. 1, 1768. The appellant and reſpondent, both Engliſh ſubjects, and the appellant being under age, ran away without the conſent of her guardian, and were married in Scotland; and on a ſuit brought in the ſpiritual court to annul the marriage, it was holden, that the mar- riage was good.

The above act of 26 *G.* 3. *c.* 33. § 8. having enacted, That the ceremony ſhall be ſolemnized in no other place than a publick church or chapel, *where banns have been uſually publiſhed*, except by ſpecial diſpenſation from the Archbiſhop of *Canterbury*, it was holden, that a marriage, which had been had in a chapel, erected ſince the act, was invalid. A ſtatute, however, was immediately paſſed for confirming marriages in ſuch new churches and chapels, with a retroſpect but including the time to come only up to the firſt of *Auguſt* 1781.

Rex v. Northfield, Dougl. 659.

St. 21 G. 3. c. 53.

By ſtat. 26 *G.* 2. *c.* 33. § 15. all marriages ſhall be ſolemnized in the preſence of two credible witneſſes at the leaſt, beſides the miniſter who ſhall celebrate the ſame; and, immediately after the celebration of every marriage, an entry thereof ſhall be made in the regiſter directed by § 14. to be kept; in which entry it ſhall be expreſſed, that the marriage was celebrated by banns or licences; and if both or either of the parties married by licence be under age, with conſent of the parents or guardians, as the caſe ſhall be; and ſhall be ſigned by the miniſter with his proper addition, and alſo by the parties married, and atteſted by ſuch two witneſſes.

If the marriage has been regularly ſolemnized, any ſubſequent irregularity in the entry ſhall not affect its validity.

St. Devereux v. Much Dewchurch, Burr. Set. Ca. 506. Bull. N. P. 114. S. C.

The above ſtatute doth not take away the evidence of preſumption from cohabitation: though if the evidence be clear, that the marriage was not celebrated according to the requiſitions of the act, (as, where in a marriage by licence, one of the parties is under age, and no conſent has been had,) it is totally void, and no declaratory ſentence in the eccleſiaſtical court is neceſſary.]

Rex v. Preſton next Feverſham, Burr. Set. Ca. 486. 1 Bl. Rep. 192. S. C. Bull. N. P. 114. S. C.

Alſo, by the (*a*) 7 & 8 *W.* 3. *c.* 35. § 2. it is enacted, " That " every parſon, vicar, or curate, who ſhall marry any perſons in " any church or chapel, exempt or not exempt, or in any other " place whatever, without publication of the banns of matrimony " between the reſpective perſons according to law, or without " licence for the ſaid marriages firſt had and obtained, ſhall for " every ſuch offence forfeit the ſum of one hundred pounds."

(*a*) For the puniſhment on gaolers permitting ſuch marriages, *vide* 10 Ann. c. 19. § 176. And on perſons erecting offices for making inſurances on marriages, 10 Ann. c. 26. § 109.

And

And by § 3. of the ſaid ſtatute, it is enacted, "That every parſon, vicar, or curate, who ſhall ſubſtitute or employ, or knowingly and wittingly ſhall ſuffer and permit, any other miniſter to marry any perſons in any church or chapel, to ſuch parſon, vicar, or curate belonging or appertaining, without publication of banns, or licences of marriage firſt had and obtained, ſhall for every ſuch offence forfeit the ſum of one hundred pounds: the aforeſaid reſpective forfeitures to be recovered by action of debt, bill, plaint, or information, in any of his Majeſty's courts of record, wherein no eſſoin, wager, or protection of law, or any more than one imparlance ſhall be allowed; one moiety thereof to his Majeſty, his heirs and ſucceſſors, and the other moiety to him or them who ſhall inform, or ſue for the ſame."

[It has been determined, that, notwithſtanding this ſtatute, the eccleſiaſtical court is ſtill at liberty to impoſe ſpiritual cenſures upon any perſon marrying without licence, or publication of banns.

And by § 4. of the ſaid ſtatute, it is enacted, "That every man ſo married without licence, or publication of banns as aforeſaid, ſhall forfeit the ſum of ten pounds, to be recovered, together with coſts of ſuit, in manner as aforeſaid, by any perſon who ſhall inform or ſue for the ſame; and likewiſe, that every ſexton or pariſh clerk, who ſhall knowingly or wittingly aid, promote, and aſſiſt at ſuch marriages, ſo celebrated without banns or licences as aforeſaid, ſhall forfeit the ſum of five pounds; to be recovered with coſts of ſuit, in manner as aforeſaid, by any perſon who ſhall inform or ſue for the ſame."

Middleton v. Croft, 2 Str. 1056. Vin. Abr. tit. Canons, pl. 14 S. C. 2 Atk. 650. S. C.]

(D) Of Offences againſt the Rights of Marriage: And herein,

1. Of the Offence of a forcible Marriage.

BY the 3 *H.* 7. *c.* 2. it is enacted in the words following: "Where women, as well maidens as widows and wives, having ſubſtances, ſome in goods moveable, and ſome in lands and tenements, and ſome being heirs apparent unto their anceſtors, for the lucre of ſuch ſubſtances, be oftentimes taken by ſuch miſdoers contrary to their will, and after married to ſuch miſdoers, or to other by their aſſent, or defiled, to the great diſpleaſure of God, and contrary to the king's laws, and diſparagement of the ſaid women, and utter heavineſs and diſcomfort of their friends, and to the evil enſample of all other; it is therefore enacted, That what perſon or perſons from henceforth, that taketh any woman ſo againſt her will unlawfully, that is to ſay, maid, widow, or wife, that ſuch taking, procuring, and abetting the ſame, and alſo receiving wittingly the ſame woman ſo taken againſt her will, and knowing the ſame, be felony; and that ſuch miſdoers, takers, and procurators to the ſame, and receitors knowing the ſaid offence in form aforeſaid, be henceforth reputed and judged as principal fe-

" lons,

" lons. Provided always, that this act extend not to any perſon " taking any woman only claiming her as his ward, or bond- " woman."

§ 3. and by 39 *Eliz. c.* 9. " All perſons who ſhall be principals " or procurers, or acceſſories before ſuch offence committed, are " excluded from the benefit of the clergy."

In the conſtruction of the ſaid ſtatute of 3 *H.* 7. *c.* 2. the following points have been reſolved:

That the indictment for this offence muſt ſet forth, both that the woman hath lands or goods, or that ſhe was heir apparent, and that the taking was for lucre; and alſo that ſhe was married or defiled; for the enacting clauſe, in ſaying, that what perſon takes any woman *ſo* againſt her will, plainly reſtrains the taking to ſuch as is within the preamble (*a*); but it needs not ſet forth, that the taking was with an intention to marry or defile. Hob. 182. Cro. Car. 485. Daliſ. 22. And. 115. 3 Inſt. 68. Savil, 59. 12 Co. 20. 110. Stat. Tri. vol. 5. fol. 468. Swandſon's caſe.

(*a*) Yet theſe words, *eâ intentione ad ipſam maritand.*, are uſually inſerted in indictments upon this ſtatute; and it is ſafeſt ſo to do. Hale's Hiſt. P. C. 660.

It is ſaid in *Hale*, that to make the offence felony within this ſtatute, the taking muſt be againſt her will; but herein, by *Hawkins*, that is no manner of excuſe, that the woman at firſt was taken away with her own conſent; becauſe if ſhe afterwards refuſe to continue with the offender, and be forced againſt her will, ſhe may from that time as properly be ſaid to be taken againſt her will, as if ſhe had never given any conſent at all; for till the force was put upon her ſhe was in her own power. Hal. Hiſt. P. C. 660. Hawk. P. C. c. 42. § 5.

That it is not material, whether a woman taken againſt her will be at laſt married or defiled with her conſent, or not, if ſhe were under the force at the time; becauſe the offender is in both caſes equally within the words of the ſtatute, and ſhall not be conſtrued to be out of the meaning of it, for having prevailed over the weakneſs of a woman, whom by ſo baſe means he got into his power. Cro. Car. 493. 3 Keb. 193. Vent. 243. Browne's caſe. 1 Hawk. P. C. c. 42. § 6.

That thoſe who after the fact receive the offender, but not the woman, are not principals within this ſtatute; becauſe the words are, *receiving wittingly the ſame woman ſo taken*, &c., but it ſeems clearly that they are acceſſories after the offence, according to the known rules of common law. 3 Inſt. 61. Daliſ. 22. St. P. C. 44. Hal. Hiſt. P. C. 661. 1 Hawk. P. C. c. 42. § 7.

That thoſe who are only privy to the marriage, but noways parties to the forcible taking away, or conſenting thereto, are not within the ſtatute. Hal. Hiſt. P. C. 660. 1 Hawk. P. C. c. 42. § 8.

That where a woman is taken by force in the county of *A.* and married in the county of *B.*, the offender may be indicted and found guilty in the county of *B.*, becauſe the continuing of the force there, amounts to a forcible taking within the ſtatute. Cro. Car. 448. Hob. 183. Hale's Hiſt. P. C. 660.

It hath been adjudged, as is the conſtant practice at this day, that on an indictment for a forcible marriage, grounded on this ſtatute, the wife may be a witneſs againſt the huſband; for it being by force, it cannot be ſaid a marriage *de jure*, ſo as to make them one perſon in law. Cro. Car. 488. Vent. 243. 4 Mod. 8. 4 St. Tr. 455.

But had ſhe freely, without conſtraint, lived with him, that thus married her, any conſiderable time, her examination in evidence might be more queſtionable. Hale's Hiſt. P. C. 661.

2. Of

2. Of the Offence of marrying an Infant Female under the Age of ſixteen, without Conſent of Guardian.

3 Inſt. 62. 3 Mod. 84.

By the 4 *Ph. & Mar. c.* 8. it is provided, "That it ſhall not be "lawful for any perſon to take away any maid, or woman-child "unmarried, and within the age of ſixteen years, from the parents "or guardian in ſocage, and that if any woman-child or maiden, "being above the age of twelve years, and under the age of "ſixteen, do at any time aſſent or agree to ſuch perſon that ſhall "make any contract of matrimony, (contrary to the form of the "act,) that then the next of kin of ſuch woman-child, or maid, to "whom the inheritance ſhould deſcend, return, or come, after "the deceaſe of the ſame woman-child, or maid, ſhall, from the "time of ſuch aſſent and agreement, have, hold, and enjoy all "ſuch lands, tenements, and hereditaments, as the ſaid woman-"child or maid had in poſſeſſion, reverſion, and remainder at the "time of ſuch aſſent and agreement, during the life of ſuch per-"ſon that ſhall ſo contract matrimony; and after the deceaſe of "ſuch perſon ſo contracting matrimony, that then the ſaid land, "*&c.* ſhall deſcend, revert, remain, and come to ſuch perſon or "perſons as they ſhould have done in caſe this act had never been "made; other than him only that ſo ſhall contract matrimony."

Hicks v. Gore, 3 Mod. 84.

[In this ſtatute it hath been reſolved, that the marriage muſt be clandeſtine, and to the diſparagement of the heireſs.

Rex v. Cornforth, 2 Str. 1162.

That a baſtard under the care of her putative father is within the act.

1 Bott. P. L. by Conſt, 405. pl. 536. S. C.

Rex v. Moor, 2 Mod. 128.

That the offence is within the juriſdiction of the court of King's Bench.]

2 Lev. 179. S. C. 1 Freem. 444. S. C. 3 Keb. 708. S C.

3. Of the Offence of procuring an improvident Marriage, and therein of Marriage-Brokage Contracts and Agreements.

Lev. 257. 5 Mod. 221.

It is of ſuch conſequence, that all marriages ſhould proceed from free choice, and not from any compulſion or ſiniſter means, that it hath been held a matter indictable, or an offence for which the court will grant an information, to procure an improvident or an unequal marriage.

[(*a*) And this though entered into after marriage. Toth. 27. 1 Ch. Rep. 87.]

And on this foundation, that marriage ought to be free, marriage-brokage bonds and contracts have been declared to be void, and decreed to be given up and cancelled (*a*).

Show. Par. Ca. 76. Hall v. Patter.

So, though it was decreed in Chancery, that a bond of 1000*l.* penalty, for the payment of 500 *l.*, given for procuring a marriage between perſons of equal rank, fortune, *&c.*, was good; yet, upon an appeal to the Houſe of Lords, the decree was reverſed; for that ſuch bonds to match-makers are of dangerous conſequence, and tend to the betraying and ruining perſons of fortune and quality, and are not to be countenanced in equity; and that marriage

riage ought to be procured by the mediation of friends and relations; and that such bonds would be of evil example to executors, guardians, trustees, servants, and others who have the care of children.

Nor will the court only decree a marriage-brokage bond to be delivered up, but a gratuity of fifty guineas, actually paid, to be refunded; for that such bargains are in no shape to be countenanced. Abr. Eq. 90. Smith v. Bearing, 2 Vern. 392.

[The defendant had a lease made, by *Thomas Thynne*, of the impropriation of *Thame* for two lives in reversion, after another lease for life of Mr. *Thynne* of *Egham*. On the death of Mr. *Thynne* without issue, the estate came to Lord *Weymouth*, who had made a lease, under which the plaintiff claimed. The plaintiff's bill was to set aside the defendant's lease upon surmise, that the consideration of the lease was the defendant's undertaking to procure a marriage between Mr. *Thynne* and Lady *Ogle*. It was objected, that the Lord *Weymouth* being a remainder-man, claimed by settlement paramount, and came not in privity of estate; and therefore neither he nor his lessee were entitled to controvert, whether the lease was made on good consideration or not. But by the court—If the lease was gained by fraud, or an unjust consideration, it is to be deemed void, and the estate to be discharged of it, as if no such lease had been made. An issue was directed to be tried at the bar of the court of Common Pleas, whether the lease was made in consideration of defendant's assisting to effect or procure the said marriage. Two verdicts were given in favour of the defendant, whereupon the bill was dismissed. Upon an appeal to the Lords in Parliament, the decree was reversed, and without regard to the verdicts, the lease was set aside.

" shape; for it cannot be supposed, they set it aside as a marriage-brokage contract upon the proofs." 1 Vez. 509.

Stribblehill v. Brett, 2 Vern. 445. Lord Hardwicke, speaking of this case, says, " the " Lords did " a very " extraor- " dinary " thing, de- " termining " contrary, " and with- " out re- " gard to the " verdicts. " They " must have " been of " opinion " the issues " were di- " rected in " some im- " proper

Upon motion for an injunction to restrain the defendant either from bringing an action on a promissory note given by the plaintiff to the defendant in 2000 *l.* for undertaking to procure him a marriage with a lady, or that the defendant may be restrained from assigning it over to any other person, Lord *Hardwicke* said, As it is not only charged by the bill to be a marriage-brokage agreement, but the charge is supported by an affidavit, I will make an order upon the defendant to keep the note in his own possession, and not to assign or indorse it over to any person whomsoever; but I will not extend the injunction so far as to prevent him from proceeding at law. Smith v. Ayckwell, 3 Atk. 566. Ambl. 66. S. C.

On a treaty of marriage between *P. B.* and Miss *H.*, then about 20 years old, articles were entered into, to which the intended husband and wife, the defendant, who was the intended wife's servant, and *R. A.* were made parties. The first clause therein was for securing an annuity of 100 *l.* to the defendant out of the wife's estate; but every other provision therein for the benefit of the wife and issue of the marriage was made revocable by the wife, after the marriage should be had. About the same time with the articles, a bond was given by *P. B.* before the marriage to pay the defendant 1000 *l.*, which bond was afterwards delivered up to be cancelled; Cole v. Gibson, 1 Vez. 506.

cancelled; but at what particular time did not appear. A recovery was ſuffered to the uſe of the articles. And ſubſequent to the marriage, a new grant was made to the defendant of this annuity; which was continued to be paid for ſome time after the wife's death. A bill was brought to ſet it aſide; and Lord *Hardwicke* directed three iſſues: Firſt, Whether the bond was executed in conſideration of, or as a premium for, defendant's procuring or aſſiſting plaintiff in his marriage, or on any other, and what conſideration? Second, Whether the 1000 *l.* were thereby made payable at or on the marriage, or at any other, and what time? Third, Whether the annuity or rent-charge was granted in conſideration of the bond, or procuring or aſſiſting plaintiff in his marriage, or for any other, and what conſideration?

Shirley v. Martin, Excheq. 14th Nov. 1779. 3 Cox's P. Wms. 74. note.

And as contracts of this kind are avoided on reaſons of publick inconvenience, it hath been therefore adjudged, that they will not admit of ſubſequent confirmation by the party.

Peyton v. Bladwell, 1 Vern. 240.

So, any private agreement or treaty infringing the open and publick agreement on the marriage, is conſidered as fraudulent; as, in the following caſes: Sir *J. B.* being executor of the plaintiff *Peyton*'s mother, and having purchaſed an eſtate which belonged to the plaintiff's mother, promiſed, that he would not only ſettle ſuch eſtate upon the plaintiff, but alſo other lands of 300 *l.* a-year, if a convenient match could be found for the plaintiff. In 1676, Sir *J. B.* treated a marriage for him with the niece of the plaintiffs Sir *J. R.* and *Denham*, and it was agreed between him and Sir *J. R.*, that Sir *J. R.* ſhould give his niece 2500 *l.* portion, to be laid out in lands after his death, and that Sir *J. B.* ſhould ſettle lands of the value of 300 *l.* a-year, whereof 200 *l. per annum* ſhould be ſettled for the jointure, and that he would alſo ſettle other lands of 100 *l. per annum* on himſelf for life, remainder on plaintiff *Peyton* and his heirs. Accordingly, by leaſe and releaſe, Sir *J. B.*, in conſideration of a bond entered into by Sir *J. R.* to pay 2500 *l.* after his and his wife's death for the marriage portion, conveyed lands ſtated in the deed to be 300 *l.* a-year; and as to 200 *l.* a-year thereof, the ſame were limited for the jointure of the wife of plaintiff *Peyton*, remainder to the heirs male of their two bodies, remainder to *Peyton* in tail, remainder to him in fee; and as to the reſidue, to plaintiff *Peyton* in tail, remainder to him in fee. And Sir *J. B.* thereby covenanted, that the jointure lands were 200 *l.* a-year, and that within two years then next he would ſettle other lands of 100 *l.* a-year, and worth 1700 *l.*, to be ſold, to the uſe of himſelf for life, remainder to plaintiff *Peyton* in fee. After the marriage, Sir *J. B.* prevailed on plaintiff *Peyton*, who was very young, by promiſes of leaving him a greater eſtate by his will than he had promiſed to ſettle upon him, and by other inſinuations, to execute a writing, whereby Sir *J. B.* was to receive the profits of the whole eſtate, allowing the plaintiff *Peyton* only 100 *l.* a-year, and to aſſign over to him Sir *J. R.*'s bond, and alſo to releaſe and diſcharge the agreement for 100 *l. per annum* on him and his heirs after the death of Sir *J. B.* The plaintiff's bill was to be relieved againſt theſe agreements, which had been extorted from the plaintiff

tiff *Peyton*, and to have the jointure made good, the lands ſettled for the jointure not being of the value of 200*l.* a-year. After long debate, the Lord Keeper decreed, that the defendant *Bladwell*, notwithſtanding the agreement with plaintiff *Peyton*, ſhould account for all the profits of the eſtate which Sir *J. B.* had been in poſſeſſion of under that agreement, over and above the 120*l. per annum*, and the Maſter was to ſee what was the value of the jointure lands at the time of the ſettlement; and the defendant was decreed to make good ſo much as the jointure lands fell ſhort of 200*l. per annum* at the time of the ſettlement made. And Sir *J. B.* having deviſed ſome lands to the plaintiff *Peyton*, the defendant was decreed to make up thoſe lands, and to ſettle them according to the marriage agreement. And although it was ſtrongly inſiſted by the defendant's counſel, that the agreement being to ſettle 100*l. per annum* on plaintiff *Peyton* and his heirs, he had power to releaſe and diſcharge that agreement; and there was no benefit thereby intended to the wife or iſſue of that marriage; and in caſe the ſettlement had been made, it had been in plaintiff *Peyton*'s power to have ſold or given away thoſe lands (the ſettlement being to be made to him and to his heirs after the death of Sir *J. B.*), and therefore he might well releaſe the agreement as to the 100*l. per annum*, and no one could be ſaid to be injured by it, any more than if he had deviſed away or ſold thoſe lands; yet the court declared its deteſtation of ſuch underhand agreements; and that it was a deceit and fraud as to Sir *J. R.*, who was drawn in to give a great portion with his niece, in expectation of a ſettlement adequate to it, which by this means is to be fruſtrated: for though plaintiff *Peyton* could have diſpoſed of the lands, which were to have been ſettled on him and his heirs, yet that is frequently done in many ſettlements, the father by that means being left at liberty to provide for his younger children, and to reward them moſt, who behave themſelves beſt: and ſtill there is a benefit intended to the iſſue of the marriage, and it is part of the conſideration for which the portion was given; and therefore they declared this underhand agreement and releaſe to be fraudulent, and ſet the ſame aſide, and decreed the agreement to be performed, as to the 100*l. per annum*.

Upon a treaty for a marriage between *C. R.* and the plaintiff, the plaintiff's father would not conſent to the match, by reaſon that *C. R.* was indebted in the ſum of 200*l.* to one *B.*, for which he and his mother ſtood bound in a bond. To remove this obſtruction, *H. R.* (younger brother of *C. R.*) and the mother gave a new bond to *B.* for the payment of this debt; and thereupon the bond in which *C. R.* was bound was given up to be cancelled. But *C. R.* gave his brother *H. R.* a counter-bond to indemnify him againſt the debt, and paid the intereſt of the 200*l.* to *B.* during his life. It was in proof, that the plaintiff, the widow of *C. R.*, was privy to all this matter, and that ſhe, being in love with *C. R.*, contrived this way to ſatisfy her father, that the marriage might take effect: but now being ſued by *H. R.* on the counter-bond, as adminiſtratrix to her huſband, ſhe brought her bill to be relieved. Redman v. Redman, 1 Vern. 348.

Lord

Lord Chancellour ſaid, This is a plain fraud, and by this contrivance the father of the plaintiff was drawn in to give the greater portion; and he abſolutely refuſed to marry his daughter, till *C. R.* was made a clear man, and, particularly, diſcharged of this very debt; and though *H. R.* had no obligation upon him to become bound for his elder brother's debt, yet it was all one to the plaintiff's father which way that debt became diſcharged; but that was to be firſt done, let it be one way or other. And his Lordſhip declared, that in caſe *C. R.* himſelf had been the plaintiff, he ſhould have been relieved; but the caſe was ſtronger, becauſe if this bond ſhould be ſuffered to lie on *C. R.*'s eſtate, it might ſwallow the aſſets, and defraud his creditors; as it alſo injured the plaintiff in the right ſhe had by the cuſtom of *London* to the perſonal eſtate of her huſband; and therefore he decreed the bond to be delivered up.

Gale v. Lindo, 1 Vern. 475.

Upon a treaty of marriage between one *G.* and the ſiſter of *W. P.*, the woman not having ſo great a fortune as the man inſiſted upon, ſhe prevailed with her brother *W. P.* to let her have 160 *l.* to make up her portion, and gave him a bond for the repayment of it, upon which the marriage was had. The huſband, who knew nothing of the bond, died without iſſue, and his wife ſurvived him, and afterwards died, having made her will, and the plaintiff executor. *W. P.*, the brother, dies, and makes the defendant his executor, who put the bond in ſuit againſt the plaintiff as executor of the widow, to recover the 160 *l.*, and thereupon he brings his bill to be relieved.—For the defendant, it was inſiſted, that although this might be a fraud, as againſt the huſband or any iſſue of his, who were to have the benefit of the marriage agreement, yet the huſband being dead, and there being no iſſue, the bond was good againſt the woman herſelf, and, by conſequence, againſt her executor, there being no creditors in the caſe, nor any deficiency of aſſets pretended. Lord Chancellour.—You admit the huſband might have been relieved on a bill brought by him and his wife; that which was once a fraud will be always ſo; and the accident of the woman's ſurviving the huſband will not better the caſe. Decreed the bond to be delivered up, and a perpetual injunction againſt it.

Lamlee v. Hamman, 2 Vern. 499.

Lamlee the mother having a jointure in part, and 10 *l. per annum* deviſed to her by her huſband, and charged upon the other part of the premiſes in queſtion, on the marriage of *Lamlee* the ſon, joined in the ſettlement, and accepted 15 *l. per annum* in lieu thereof. The day before the ſettlement, ſhe had taken a ſecurity from her ſon for 10 *l. per annum* out of the leaſehold eſtate, which was not compriſed in the marriage ſettlement, and the ſon covenanted to pay it. The ſon died; the plaintiff, his widow, took out adminiſtration to him. The defendant brought an action of covenant againſt her for the non-payment of the 10 *l. per ann.* The bill was to be relieved againſt this action on the ground of fraud; and the court, upon the authority of the above caſes, decreed a perpetual injunction.]

An

An uncle gives his niece by will 1200 *l.*, the niece marries, but, antecedent to the marriage, the father takes a bond from the then intended husband to pay him 200 *l.* in case the daughter should happen to die without issue male, living her husband: the daughter did die without issue male, living her husband; whereupon the father sued the husband at law upon this bond; and the husband brought his bill in equity to be relieved against the bond, and had a decree accordingly; for it appearing that no money was paid, nor any consideration given for entering into it, the court took it to be in nature of a marriage-brokage bond, and therefore ordered it to be delivered up. Pr. Ch. 267. 2 Eq. Ca. Abr. tit. Bonds, &c. D. pl. 1. S. C. 2 Vern. 588. S. C.

[*A.* made an absolute conveyance of lands to *B.* and his heirs, in consideration of 1500 *l.*, which sum was at that time the full value. On the next day, *B.* executed a defeasance; declaring, that if *A.* or his heirs should, within 16 years, pay to *B.* the 1500 *l.* the conveyance should be void. *B.* entered and enjoyed the lands, and about three years afterwards, upon his marriage, settled them as an absolute estate on his wife and her issue. To this settlement *A.* was privy, but took no notice of the defeasance, or ever attempted to refute the general opinion, that *B.* was the sole and absolute owner of the estate. Upon *B.*'s death, *A.* set up the defeasance, and filed a bill to redeem, to which the son and heir of *B.* pleaded the purchase deeds and his father's marriage settlement. It was in proof, that *A.* made the conveyance to enable *B.* to obtain a marriage and a considerable fortune, though not with the particular lady whom he married. A perpetual injunction was decreed against *A.*, to stop all proceedings under the defeasance. Webber v. Farmer, 2 Br. P. C. 88. Mr. Viner says, that the decree was affirmed in the House of Lords by eight Lords against seven; Cowper and Harcourt against the decree, and Parker for it: that in a manuscript report of it, said to be Lord Harcourt's, there is added a note, that the wife's father had notice of the defeasance before the settlement made; a circumstance which is taken notice of in the argument for the appellant in 2 Br. P. C. 90. Vin. Abr. tit. Fraud, H. pl. 3.

On a treaty of marriage between Lord *Arbuthnot*, then a minor, and the daughter of *Morrison*, it was agreed, that *Morrison* should pay 50,000 marks as a portion for his daughter, and a settlement was agreed to be made by Lord *Arbuthnot* and his friends in consideration of that fortune. The night before the execution of the articles, *Morrison* prevailed on Lord *Arbuthnot* privately to sign a writing, purporting that the real agreement was for 40,000 marks only, and that *Morrison* had agreed to the contract for 50,000, upon the express granting of this private obligation, by which Lord *Arbuthnot* bound himself to release *Morrison* from 10,000 marks, part of the 50,000. When Lord *Arbuthnot* came of age, he brought his action to have this obligation reduced, on two grounds, 1. That it was granted by him, whilst a minor, without the consent of his guardians. 2. That it was *contra fidem tabularum nuptialium*, to elicit such a writing clandestinely, contrary to a solemn contract entered into in the presence of his friends. The Lords of Session sustained the reason of reduction, and held the obligation null. Against their decree, *Morrison* appealed to the House of Lords, where it was affirmed with 80 *l.* costs. Morrison v. Arbuthnot, H. L. 1728. 1 Br. Ch. Rep. 548. note.

A treaty was entered into between the plaintiff and his son of the one part, and *R. G.* and her uncle of the other part, for the marriage Pitcairne v. Ogbourne, 2 Ves. 375.

marriage of the plaintiff's ſon and *R. G.* The uncle was treated with *in loco parentis;* the intended wife's whole dependance was upon him; ſhe continued to live with him till the time of his death, and ſhe took an ample proviſion under his will. Upon this treaty an annuity bond was entered into by the plaintiff, by which he ſtipulated to pay 150*l. per annum* to the huſband and to the wife, if ſhe ſurvived him. The wife ſurvived the huſband. The plaintiff filed his bill to reduce the payment to 100*l. per annum*, upon an agreement ſaid to be entered into between the plaintiff, and the huſband and wife, but to which the uncle was not privy; whereby, though the bond was to import payment for 150*l.*, yet, for reaſons given on the tranſaction, the actual agreement was declared to be for 100*l.* only. The Maſter of the Rolls diſmiſſed the bill, conſidering the private agreement as a fraud upon a material party.

Neville v. Wilkinſon, 1 Br. Ch. Rep. 543.

Where a bond was entered into by the plaintiff to the defendant before the plaintiff's treaty of marriage, but the defendant, by the plaintiff's deſire, upon the occaſion of ſuch treaty, miſrepreſented to the wife's father the amount of the plaintiff's debts, and particularly concealed from him the bond in queſtion; Lord *Thurlowe* relieved by injunction againſt the bond, although it did not appear, that there was any actual ſtipulation on the part of the wife's father in reſpect of the amount of the plaintiff's debts.

Key v. Bradſhaw, 2 Vern. 102.

A bill was brought to be relieved againſt a bond drawn in common form, for payment of money; but proved to be made on an agreement, that the plaintiff ſhould either marry her ſervant, or ſhould, by way of forfeiture, pay him the ſum of money mentioned in the condition of the bond. The court decreed the bond to be delivered up to be cancelled, it being contrary to the nature and deſign of marriage, which ought to proceed from a free choice, and not from any compulſion.

Montefiori v. Montefiori, 1 Bl. Rep. 363. 1 Br. Ch. Rep. 548. S. C. cited by Lord Thurlowe.

Joſeph Montefiori, a Jew, being engaged in a marriage treaty; his brother *Moſes*, to aſſiſt him in his deſigns, and repreſent him as a man of fortune, gave him a note for a large ſum of money, as the balance of accounts between him and his brother *Joſeph*; which balance he (*Moſes*) acknowledged to have in his hands; though, in truth, no ſuch balance, or any thing like it, exiſted. After the marriage had, *Moſes* reclaimed this note, as being given on no conſideration; and the matter was referred to arbitration. The arbitrators awarded the note to be delivered up, which *Joſeph* refuſed to do; upon which the court was moved for an attachment againſt him for non-performance of this award; and on his part, a croſs motion was made, to ſet aſide the award, on a ſuggeſtion, that the arbitrators were miſtaken in point of law. Lord *Manſfield*.—The law is, that where, upon propoſals of marriage, third perſons repreſent any thing material, in a light different from the truth, even though it be by colluſion with the huſband, they ſhall be bound to make good the thing, in the manner in which they repreſented it. *It ſhall be*, as repreſented to be. And the huſband alone is entitled to relief, as well as when the fortune, &c. ſo miſrepreſented have been ſpecifically ſettled on the wife: for no man

ſhall ſet up his own iniquity as a defence, any more than as a cauſe of action. The arbitrators therefore being clearly miſtaken in point of law, the award muſt be ſet aſide. The rule for the attachment was diſcharged, and the rule for ſetting aſide the award made abſolute.

A mother, who was guardian to her daughter, took a bond from the huſband to give her a releaſe of all accounts of the meſne profits of the eſtate within two years after the marriage. The court held ſuch bond to be of the ſame nature with a marriage-brokage bond, and decreed it to be delivered up: for if a bond to *give* money if ſuch a marriage could be obtained, was ill; by the ſame reaſon, a bond to *forgive* a ſum of money muſt be ill alſo.

Duke Hamilton v. Lord Mohun, 1 Abr. Eq. Ca. 90. 1 P. Wms. 118. S. C. mentions it as a releaſe to be given within two years after the marriage, in purſuance of a covenant in the marriage-articles, which were made on great deliberation; and that Cowper, C. relieved againſt this covenant, ſaying, That to tolerate ſuch an agreement would be paving a way to guardians to ſell infants under their wardſhip. 1 Salk. 158. S. C.

The defendant, who was a taylor by trade, and entitled to a ſmall real eſtate of about 14 *l. per annum*, in 1730, made his addreſſes to the plaintiff, who was then about the age of 26 years, and was the daughter of a man eſteemed in the neighbourhood as a man of ſubſtance, and who could give her about 500 *l.* for her fortune: the courtſhip had been carried on ſome time, before it came to her father's knowledge, who, as ſoon as he was acquainted with it, declared a great diſlike of the match, and forbade the plaintiff giving the defendant any encouragement; notwithſtanding which, the courtſhip was carried on in a clandeſtine manner till *January* 1732, when the defendant met the plaintiff at a market-town in the neighbourhood, and there, at an alehouſe, the following bonds were executed, nobody being preſent except the witneſſes, who were two ſtrangers, and were called in for that purpoſe, *videlicet*, A bond from the plaintiff in the penalty of 600 *l.*, with condition, that "if ſhe did, on or before the expiration of thirteen months after the deceaſe of her father, according to the uſage and ceremony of the church of *England*, eſpouſe and marry the defendant, if the defendant would thereunto aſſent, and the laws of the realm permit the ſame, or if it ſhould happen the plaintiff ſhould not, nor would not marry and take to huſband the defendant as aforeſaid, but ſhould marry with ſome other perſon, then the plaintiff ſhould and would well and truly pay, or cauſe to be paid, unto the defendant the ſum of 500 *l.* of lawful *Britiſh* money, at or immediately after failure of ſuch marriage; but if it ſhould happen that the plaintiff ſhould die before the time limited and appointed for the ſaid marriage, then the plaintiff ſhould leave and give the defendant 10 *l.* as a token of her love, to buy him a ſuit of mourning with; then the obligation to be void, elſe, *&c.*"—A bond from the defendant in the like penalty, with condition, that "if he did, on or before the expiration of thirteen months after the deceaſe of the plaintiff's father, according to the uſage and ceremony of the church of *England*, eſpouſe and marry the plaintiff, if

Woodhouſe v. Shepley, 2 Atk. 535.

" the plaintiff ſhould thereunto aſſent, and the laws of the realm " permit; or if it ſhould happen the defendant ſhould not, nor " would not marry and take to wife the plaintiff as aforeſaid, but " ſhould happen to marry with ſome other woman, then the de- " fendant did thereby covenant and agree to forfeit, ſurrender, " and yield up unto the plaintiff for her own uſe, all his eſtate real " and perſonal in *M.* and *S.*, or elſewhere by ſea or land; but if " it ſhould happen the defendant ſhould die *fore* the time limited " and appointed for the ſaid marriage, then the plaintiff was to " have to her own uſe one half of all the defendant's eſtate, both " real and perſonal, that he ſhould be poſſeſſed of at the time of " his deceaſe; then the obligation to be void, elſe, *&c.*"—An in- dorſement on the back of defendant's bond: " Memorandum, " That before the ſealing of this bond, *R. Shepley* doth promiſe, " covenant, and agree, that he will ſettle and aſſure the within- " named *H. Woodhouſe* a yearly dower, according to what portion " ſhe ſhall have, and make her a good aſſurance as the law di- " recteth, either of lands, money, or living, that ſhall pleaſe her; " if this ſaid *H. Woodhouſe* ſhall have a child or children, then ſhe " ſhall have one half of his eſtate, and the child or children the " other half that he ſhall die poſſeſſed of, or that by any means " belong to him, or his inheritance, that may either fall to him " by ſea or land; and if this ſaid *H. Woodhouſe* ſhall marry this " *R. Shepley*, and have no children by him, then ſhe ſhall pay to " *Sarah Shepley* 20 *l.* of lawful money as a legacy, and then all his " lands, livings, goods, chattels, money, and any thing that ſhall " ever belong to him, or that ever did in his lifetime, that has not " been received, ſhe ſhall have and peaceably enjoy, and take for " her own uſe, and at her own diſpoſing, both in her life and at " her death, unto which I have put my hand. *R. S.*" Upon the examination of the witneſſes to the bonds, it appeared they differed in their accounts of the execution; one ſaying, the bonds were read over before execution; the other, that they were not; one, that they were exchanged; the other, that they both remained in the cuſtody of the defendant; and in fact, at the time the anſwer was put in, they were both in the hands of the defendant. After this tranſaction, the execution of theſe bonds remained unknown, and the intercourſe was continued till *May* 1736, when the plain- tiff's father died, who by his will left her a fortune of about 340 *l.* The thirteen months expired, and then the plaintiff filed the ori- ginal bill to be relieved againſt her bond, and dying ſoon after, the cauſe was revived by her adminiſtrator. The croſs bill was brought by the defendant to have ſatisfaction of this bond out of the aſſets of *H. Woodhouſe*, alleging, he was always ready and willing to have married her, but was prevented from having any acceſs to her by her brothers. Lord *Hardwicke* refuſed to decree ſatisfaction of this bond on the croſs bill, but directed it to be delivered up to be cancelled on the original bill; grounding his decree upon publick and general conſiderations, the encouragement which tranſactions of this kind, if allowed, would give to diſobedience, and the *fraud* upon parents.

But

But where a father treated for the marriage of his ſon; and in the ſettlement on the ſon, there was a power reſerved to the father to jointure whom he ſhould marry, in 200 *l. per annum*, paying 1000 *l.* to the ſon; and the father afterwards treating about marrying a ſecond wife, the ſon agreed with the ſecond wife's relations to releaſe the 1000 *l.*, and actually did releaſe it; but took a bond from the father, without the privity of the ſecond wife's relations, for the payment of this 1000 *l.*; equity refuſed to ſet this bond aſide, becauſe it would be injurious to the firſt marriage, which, being prior in time, was to be preferred.] Roberts v. Roberts, 3 P. Wms. 66.

(E) Marriage how long to continue: And herein of the ſeveral Kinds of Divorces; and herein,

1. Of Elopement.

MArriage, for the reaſons already given, being to continue during life, a wife can in no (*a*) caſe whatſoever leave her huſband; for in doing it ſhe breaks the moſt ſolemn vow, which is made in the preſence of God and in the face of the church, that ſhe will cleave to him during life; and therefore, if a woman runs away from her huſband, without any (*b*) provocation, he ſhall not anſwer for any (*c*) contract ſhe makes, nor be obliged to anſwer for her neceſſaries.

(*a*) That a wife may have alimony, without any ſeparation. Moor, 874.

(*b*) For if a huſband turn away his wife, or by ill uſage oblige her to go away, he gives her credit wherever ſhe goes, and muſt pay for neceſſaries for her. Salk. 118. pl. 10. 6 Mod. 171. 2 Ld. Raym. 1006. [But in this caſe, if the wife, whilſt ſhe is living apart from her huſband, commit adultery, it hath been holden, that the huſband is not bound to receive her again, and, conſequently, not liable for neceſſaries provided for her ſubſequent to the time of her being guilty of adultery. Govier v. Hancock, 6 Term Rep. 603.]

(*c*) That a court of equity will not aſſiſt a wife, who elopes, with alimony.

Alſo, if a woman elope from her huſband, ſhe loſes her dower; but it ſeems, that elopement was no bar of dower at the common law, though a divorce were ſued and obtained for the adultery; but now by the ſtatute of *W.* 2. *c.* 34. it is expreſsly provided, that in ſuch caſe the wife ſhall loſe her dower; the words of which are, *ſi uxor ſponte reliquerit virum ſuum & abierit, & moretur cum adultero ſuo, amittat in perpetuum actionem petendi dotem ſuam, quæ ei competere poſſet de tenementis viri ſui ſi ſuper hoc convincatur, niſi vir ſuus ſponte & abſque coertione eccleſiæ eam reconciliet, & ſecum cohabitare permittat, in quo caſu reſtituatur ei actio;* and though ſhe does not go away *ſponte*, but is taken againſt her will, yet if after ſhe conſents, and remains with the adulterer, ſhe ſhall loſe her dower; for the remaining with him, without reconciliation, is the bar of dower, not the manner of the going away; and this was the old way of preventing the crime; for they thought it unfit that a wife, who did not ſhare in the labours of the huſband, ſhould have any family proviſion. 2 Inſt. 435. Co. Lit. 32, 40. F N. B. 150. Roll. Abr. 680. [6 Term Rep. 604.]

In *Dyer*, there is a precedent of ſuch elopement pleaded, and iſſue taken upon the reconciliation of the huſband; but it is there held, that the defendant cannot give in evidence any other elope- Dyer, 107.

ments than that which is pleaded; for there may be divers elopements, and divers reconciliations, and defendant, at his peril, ought to take iſſue on one only; that is, as I underſtand the book, upon the laſt; for if there be divers reconciliations, yet, if ſhe afterwards elope, the ſhewing that ſhe was once reconciled after elopement, will not take away what is ſet up in bar of dower.

Perk. 354. Brook, 12. Roll. Abr. 680. 2 Inſt. 436. Co. Lit. 32. b.

If a woman be raviſhed, and remain with the raviſher againſt her will, ſhe ſhall not loſe her dower; but, if after ſuch raviſhment ſhe conſent to remain with him, ſhe ſhall loſe it, though the book thinks the contrary; and in the caſe cited there, ſhe anſwered only to the elopement, and not to the remaining with the adulterer: but if ſhe voluntarily go away from her huſband, though ſhe remain all her lifetime with the adulterer againſt her will; or if ſhe remain not with him, but he turn her away, yet ſhall ſhe loſe her dower: but if ſhe be reconciled, as the ſtatute ordains, then ſhe ſhall be endowed, though the huſband hath aliened the land in the mean time.

(a) Perk. 355. N. N. B. 150. Roll. Abr. 680. (b) 2 Inſt. 436.

If ſhe elope, and live in adultery in any other the manors or lands of her huſband, ſome (a) books ſay ſhe ſhall not loſe her dower; either becauſe it cannot be intended a running away from her huſband, when ſhe remains in any of his manors or lands; or, becauſe he is to take care that no ſuch live there: But my Lord (b) *Coke* holds the contrary; and ſays, though ſhe cohabits with her huſband in the ſame houſe, yet without his reconciliation *ſponte*, ſhe ſhall loſe her dower; *a fortiori* in the other caſe; for the adultery, and the remaining with the adulterer, are the cauſes of her being barred of dower; and ſo, though ſhe do cohabit, and be reconciled to her huſband, yet if it be by church cenſures, ſhe ſhall

(c) Roll. Abr. 680.

loſe her dower; though (c) *Rolle* ſays, if ſhe elope, and after live with her huſband for ſome years till his death, by his conſent, without compulſion of the church, ſhe ſhall not be barred of her dower, though it be not averred, that ſhe was reconciled to her huſband; which ſeems reaſonable enough, the permiſſion to cohabit with him being an argument and proof of the huſband's reconciliation.

2 Inſt. 435. Roll. Abr. 680. Dyer, 106. b. in margine.

If a man grants his wife, with her goods, to another, and ſhe lives with the grantee all the lifetime of the huſband, yet ſhe ſhall loſe her dower, by reaſon of her living with him in adultery; and in that caſe, where ſuch a grant was pleaded, it was held, 1*ſt*, That the grant was void. 2*dly*, That it did not amount to a licence, or, if it did, that it was void. 3*dly*, That after the elopement, there ſhall be no averment admitted *quod non fuit adulterium*; though the grantee and the woman married after the huſband's death; and though in that caſe, they brought ſentence of purgation of the adultery, from the ſpiritual court, yet it was not allowed againſt ſuch preſumption.

Roll. Abr. 680. Green v. Harvey.

If the huſband's relations keep him from his wife, ſo that ſhe does not know what is become of him, and give out that he is dead, and thereupon procure her to releaſe all marriages and intereſts which ſhe can have in him as her huſband, and alſo perſuade her to marry again, which ſhe does, with one who has notice

that

that her firſt huſband is alive, but ſhe herſelf has no notice of it; though ſhe live in adultery with this man, and though her huſband be not out of the realm, nor beyond the ſeas, ſo that ſhe ought to have taken notice of his being alive; yet, becauſe *non reliquit virum ſponte*, as the ſtatute ſays, but by perſuaſion of his friends, not knowing herſelf but that he was dead, this is no ſuch elopement as will bar her of her dower.

2. Of the Offence of taking away a Wife, and of criminal Converſation.

At common law, the huſband may have an action of treſpaſs *de uxore abductâ cum bonis viri:* alſo, this offence is prohibited by the ſtatute of *Weſtm.* 2. *c.* 13. and a further puniſhment inflicted than was at the common law; and by *Weſtm.* 2. *c.* 34. it is puniſhable at the ſuit of the king, by the words following, *de mulieribus abductis cum bonis virorum ſuorum habeat rex ſectam de bonis ſic aſportatis.* 2 Inſt. 180. 1. 434. Dyer, 256. b.

If the wife be *infra annos nubiles, viz.* under the age of twelve years at the time of taking away, ſome have holden, that the huſband ſhall not have a writ *de uxore abductâ cum bonis viri;* but my Lord *Coke* holds the contrary, and that ſhe is *uxor* until diſagreement. 47 E. 3. Action ſur l'Statat. 37. 2 Inſt. 435. *cont.*

If the wife be taken away, and after be divorced, or if ſhe die, yet the huſband ſhall have his action *de uxore abductâ cum bonis viri;* for in this action he ſhall not recover his wife, but damages; and he cannot have an action for taking her away as his ſervant, becauſe the law gives him an action in another form. 2 Inſt. 434.

Alſo, it is held, that though the words of the writ be *rapuit, &c.*, yet here it is taken for a violent taking away, and not when carnal knowledge is had; ſo as this action may be brought againſt women as well as men. 2 Inſt. 435. Cro. Jac. 538, 539. that it may be *cepit & abduxit* as well as *rapuit.*

In an action of treſpaſs *de uxore abductâ cum bonis viri ſui*, the jury found for the plaintiff, *quoad* taking ſome goods, but as to all the reſt, for the defendant. It was alleged, *1ſt*, That this action concludes *contra formam ſtatuti*, and ſo the plaintiff makes his caſe upon the ſtatute, and has failed in proof; for the verdict is for the defendant, as to the taking away the wife, which is the only matter provided againſt by any ſtatute. *Sed non allocatur*; for *per cur.*, if a man brings an action at common law, and concludes *contra formam ſtatuti* generally, it ſhall not hurt; but if he recites a ſtatute in particular, and lays the fact to be *contra formam ſtat. prædict.*, there he muſt make his caſe within the ſtatute, elſe he has failed of his caſe; and it has been adjudged, that an indictment of barretry concluded *contra formam ſtat.* is good, though there be no ſtatute that is expreſs againſt it. *2dly*, That it does not lay *per quod conſortium amiſit.* *3dly*, That the word *raviſh* in *Engliſh* implies a carnal knowledge only; (though in latitude it ſignifies alſo a forcible taking away,) and ſo the matter amounts to a felony of the plaintiff's own ſhewing, for which he can have no action of Mich. 17 Car. 2. at Oxford, in B. R. Walker v. Rich. Ent. 1654. in Engliſh.

treſpaſs; but to theſe the court paid no regard, becauſe they were made immaterial by the verdict.

Cro. Car. 89, 90. adjudged and affirmed *in Cam. Scacc.* Cro. Jac. 538. S. P. adjudged. 2 Roll. Abr. 556. Jon. 440. Lit. Rep. 339. 2 Roll. Rep. 51. S. P. adjudged.

Alſo, the huſband alone may bring an action for the battery, carrying away and detaining of his wife, *per quod ſolamen & conſortium* of his ſaid wife *amiſit*; becauſe the action is founded upon the ſpecial damage done to himſelf, and will be no bar to another action brought by baron and feme, or by the feme, after the death of the baron, for the ſame battery.

Salk. 119. pl. 12. 6 Mod. 127. 2 Ld. Raym. 1031. Ruſſel v. Corne.

In treſpaſs and falſe impriſonment by baron and feme, *per quod negotia domeſtica* of the huſband *ramanſerunt infecta ad grave damnum ipſorum*; it was objected, that this being laid as a ſpecial damage to the huſband, the action ought to have been brought by him alone; but adjudged for the plaintiffs after verdict, being only matter in aggravation of damages.

Sid. 387. Palm. 393. 3 Mod. 120. 2 Ld. Raym. 1032.

In treſpaſs by baron and feme, for beating the feme, they may declare, that it was *ad damnum ipſorum*, notwithſtanding a feme covert can have no damages, for this action will ſurvive.

7 Mod. 79. [Force and violence being in law ſuppoſed to accompany this atrocious injury to the huſband, the courts, it ſhould ſeem, proceeded upon this principle, when they formerly held, that the huſband's conſent, as being to the commiſſion of an unlawful action, was not available as a juſtification; and that the defendant could not plead in bar, that the fact was by the plaintiff's licence; though it might be given in evidence in mitigation of damages. 12 Mod. 232. But it ſeems now thought that the huſband's privity will defeat the action, though it doth not appear to be any where ſaid, that it is pleadable. Bull. N. P. 27. 4 Term Rep. 651.]

And as the huſband may bring an action for the battery, carrying away and detaining of his wife; ſo, alſo, may he have an action againſt a perſon for having criminal converſation with her, although the wife conſent to the adulterer; for this is a matter in which ſhe cannot aſſent, by reaſon of the injury to the huſband, and his intereſt in her.

Morris v. Miller, 4 Burr. 3057. 1 Bl. Rep. 632. (*a*) Birt v. Barlow, Dougl. 171. But among ſome diſſenters, marriages are not regiſtered, in which caſe other proof muſt neceſſarily be admitted. *Ibid.* The fact of a marriage may be eſtabliſhed by the ſentence of a foreign court, having competent juriſdiction, in a ſuit properly inſtituted there. 1 Vez. 159.

[In this action, it is neceſſary to bring proof of the actual ſolemnization of the marriage; cohabitation and reputation are not ſufficient, nor is any collateral proof whatever. But a copy of the regiſter (*a*) is ſufficient evidence of the fact of marriage; and the identity of the parties married may be proved by other means, and other perſons, beſides the miniſter, clerk, and ſubſcribing witneſſes.]

Howard v. Burtonwood, C. B. Sittings at Weſtminſt. Tr. 1776. Eſpin. N. P. 343.

In an action for criminal converſation, the marriage was proved by a perſon who was preſent when it was ſolemnized in the *Fleet*, in the year 1737, and the plaintiff's counſel offered to give in evidence the *Fleet* regiſter, as a confirmation of the teſtimony. *De Grey*, C. J. rejected the evidence, for that the whole of the tranſaction was illegal, and the regiſter made by a perſon under no tie, and therefore not entitled to credit.

Woolſton v. Scott, *per* Denniſon, J.

It has been doubted, whether the ceremony muſt not be performed according to the rites of the church; but as this is an action

action againſt a wrong-doer, and not a claim of right, it ſeems ſufficient, if the plaintiff is of any religious ſect, to prove the marriage according to the religious form of that ſect. at Thetford, 1753, where plaintiff was an Anabaptiſt, and recovered 500 *l.* Bull. N. P. 28.

The confeſſion of the wife will be no evidence againſt the defendant; but a diſcourſe between her and the defendant may be proved. So, letters written to her by the defendant may be read as evidence againſt him, but her letters to him will be no evidence for him. Baker v. Morley, Guildhall, 1739, Bull. N. P. 28.

In actions of aſſault, the time of limitation is *four* years; but the criminal converſation, and not the aſſault, being the giſt of this action, not guilty within *ſix* years is the proper plea to it under the ſtatute of limitations. And upon the ſame principle, the defendant is entitled to his coſts, though the damages ſhould be under forty ſhillings (*a*).] Cooke v. Sayer, Bull. N. P. 28. 2 Burr. 753. (*a*) Batchelor v. Bigg, 3 Wilſ. 319. 2 Bl. Rep. 855.

Alſo, the huſband may not only bring an action at law for the criminal converſation, in which he ſhall be repaired in damages, but may alſo proceed in the eccleſiaſtical court for the adultery and ſolicitation of chaſtity; and the proceedings in the one court ſhall be no bar to the other. 2 Salk. 553.

But where there was an indictment for aſſaulting, beating, wounding, and endeavouring to raviſh the wife of *B.*, upon which the party was convicted; and afterwards the huſband brought an action of treſpaſs for the ſame cauſe; and the party being alſo libelled againſt in the ſpiritual court for the ſame fact, *viz.* for ſoliciting her chaſtity, moved for a prohibition to the proceedings in the ſpiritual court; though it was urged for the juriſdiction of the ſpiritual court, that they may puniſh for the ſolicitation and incontinence, and that this ſuit was *pro ſalute animæ*, the others for fine and damages; yet, a prohibition was granted; for it being an attempt and ſolicitation to incontinence, coupled with force and violence, it does by reaſon of the force, which is temporal, become a temporal crime *in toto*; as if one ſays, *thou art a whore and a thief*, or *thou keepeſt a bawdy-houſe*, which are temporal matters, the party ſhall not proceed in the ſpiritual court; whereas if it were only, *thou art a whore*, a libel lies in the ſpiritual court: ſo, if it be ſaid of a woman, that ſhe is a bawd only, and not that ſhe keeps a bawdy-houſe. But *per Holt*, C. J. If one commit adultery, and the huſband bring aſſault and battery, this ſhall not hinder the ſpiritual court; for it is a criminal proceeding there, and no indictment lies at common law for adultery.

3. Of the ſeveral Kinds of Divorces.

Divorces are either ſuch as (*b*) diſſolve *a vinculo matrimonii*, and ſet the parties entirely at liberty, ſo that they may marry whom they pleaſe afterwards; or ſuch as ſeparate *a menſa & thoro*, from bed and board only; in which laſt the marriage continues in force, ſo that if either of them marry any other, ſuch marriage is void. Co. Lit. 235. a. Cro. Car. 462. (*b*) Where ſuch ſentence of divorce is given in the ſpiritual court, the iſſue ſhall be perpetually bound, ſo long as that ſtands in force; and ſhall not at common

common law be admitted to make any proof to the contrary. 7 Co. 43. Ken's caſe. Jenk. 289. Cro. Jac. 186.

47 E. 3. 78. 38 H. 6. 34. Roll. Abr. 360. (a) *Per* 32 H. 8. c. 38. No

A divorce by reaſon of (*a*) precontract * diſſolves *a vinculo matrimonii*; for the party being under a prior engagement, the ſecond marriage is null and void, and, conſequently, the iſſue of ſuch ſecond marriage are baſtards.

divorce could be for any precontract after marriage ſolemnized in the face of the church, and conſummate with bodily knowledge, or fruit of children; but *quoad* this matter, this was repealed *per* 2 & 3 E. 6. c. 23., and the whole act *per* 1 & 2 Ph. & M. c. 8. § 20., and the 32 H. 8. c. 38. *quoad* ſo much only as was not repealed by 2 & 3 E. 6. c. 23. was revived *per* 1 Eliz. c. 1. § 11. ſo that *quoad* this matter, the 32 H. 8. c. 38. ſtands repealed.——* *Qu.* If ſince 26 Geo. 2. c. 33. any ſuch divorce can now be had, as no ſuit or contract of marriage, to compel the ſame, can be ſupported in the eccleſiaſtical courts?

Co. Lit. 235. *Vide ſupra*, letter (A).

So, a divorce by reaſon of conſanguinity and affinity diſſolves *a vinculo matrimonii*; ſuch marriage being againſt the divine poſitive law, and therefore void.

Co. Lit. 235. 5 Co. 98. But for this kind of di-

So, a divorce by reaſon of frigidity, or impotence, diſſolves the marriage abſolutely (*b*), becauſe the end of the contract cannot be anſwered.

vorce, *vide* 5 Co. 9. Moor, 225. 2 Leon. 169. Anô. 185. Dyer, 178. pl. 40. (*b*) But if a man be divorced from one woman *propter perpetuam generandi impotentiam*, and then marry another, and have iſſue by the ſecond marriage, which continues without divorce, the iſſue are lawful; for a man may be *habilis & inhabilis diverſis temporibus*; and the ſecond marriage is not avoided by any divorce, and therefore ſtands good in law. 5 Co. 98. Bury's caſe. Noy, 72. Moor, pl. 366. S. C. by the name of Morris v. Webber.

Roll. Abr. 681. 2 Leon. 169. Moor, 226. Cro. Car. 462. 2 Inſt. 684. 687.

A divorce *cauſâ profeſſionis* is reckoned by ſome amongſt the cauſes that diſſolve the *vinculum matrimonii*, the monks and nuns, by their being profeſſed, having vowed perpetual chaſtity; but others hold, that in ſome caſes it does not, and that in ſuch the wife ſhall be endowed; but it is ſaid, this divorce is now taken away by 32 *H.* 8. *c.* 38. and other acts, made on purpoſe to take away that and other ſcrupulous divorces.

Roll. Abr. 357.

And though theſe kinds of divorces diſſolve *a vinculo matrimonii*, yet the iſſue between the parties are not baſtards, till there be a divorce actually had; for though ſuch marriages be unlawful, yet they remain good till ſentence of divorce be pronounced; and, conſequently, the iſſue muſt be eſteemed legitimate, till ſuch a diſſolution.

Roll. Abr. 681. Co. Lit. 32. a. 33. b. 7 Co. 70. 5 Co. 98. 2 Leon. 169. (*c*) But though in caſe of inceſt a divorce cannot be had after the death of one of the parties, ſo as to baſtardize the iſſue, yet the ſpiritual court may proceed to puniſh the ſurvivor for the inceſt. Carth. 271. 4 Mod. 182. Salk. 121.

Alſo, though a divorce *cauſâ præcontractus*, *cauſâ conſanguinitatis*, *cauſâ affinitatis*, or *cauſâ frigiditatis*, diſſolve the *vinculum matrimonii*, and leave the parties at liberty to marry again; yet, if either of the parties die before ſuch ſentence of divorce be actually pronounced, it cannot be pronounced (*c*) after; and therefore if the huſband die before ſuch divorce, the iſſue are legitimate, and his wife *de facto* ſhall have dower; for it was *legitimum matrimonium quoad dotem*, and the biſhop ought to certify, that they were *legitimo matrimonio copulati*.

Co. Lit. 32. a. 33. b. 235. Cro. Car 462. 7 Co. 42. Noy, 108.

A divorce *propter adulterium* does not diſſolve the marriage, but only makes a ſeparation *a menſâ & thoro*; leſt married perſons ſhould commit the crime in order to diſſolve the marriage; and though ſuch a divorce does not baſtardize the iſſue, yet the children

dren born in ſuch a ſtate of ſeparation are *primâ facie* not preſumed to be the huſband's, unleſs it can be proved that they cohabited afterwards; but ſuch divorce does not bar the wife of dower (*a*).

[(*a*) So laid down as to the point of dower, Tr. 10 E. 3. pl. 24.

1 Ro. Rep. 426. *arguend.* and Powell v. Weeks, Noy, 108. Godb. 145. S. C. by the name of Lady Stowell's caſe, 1 R. Abr. tit. Baron and Feme, A. pl. 21. S. C. by the name of Stowel v. Wikes, and Cro. Car. 463. S. C. cited. But Mr. Hargrave, in note 9, on Co. Litt. 32. a. ſaith, that according to Rolle's report of this laſt caſe, 1 R. Abr. 681., it was adjudged, that the divorce for adultery was a bar of dower. And Lord Thurlowe, in the debate in the Houſe of Lords upon Shadwell's Divorce Bill, is reported to have ſaid, that in a divorce *a menſâ et thoro* for adultery a woman forfeits her dower. Woodf. Parl. Rep. vol. 11. p. 339.——The reaſon why a divorce *propter adulterium* does not diſſolve the marriage is, that the eccleſiaſtical court cannot divorce *a vinculo matrimonii* for any cauſe ariſing *ſubſequent* to the marriage: for if there has been a marriage *de jure*, it is not competent to that court to reſcind it. In fact, the ſentence of the ſpiritual court in a divorce *a vinculo matrimonii* is not ſo properly a diſſolution of the contract, as a declaration of its abſolute nullity *ab initio*. But the legiſlature, uncircumſcribed in its powers, has frequently for adultery wholly diſſolved the conjugal union. It has gone ſo far too in ſome caſes as to baſtardize children born after a certain time prior to the paſſing of the act, ſee Wakeman's and Briſcoe's Divorce Bills, in 1796; and though it has in general made ſome proviſion for the unhappy woman whoſe criminal conduct has occaſioned its interference, yet, where the caſe has been of a very atrocious nature, it has left her wholly at the mercy of her injured huſband. See Shadwell's Divorce Bill, in 1796, and Woodf. Parl. Rep. *ubi ſupra*.——In the debate which took place upon Mr. Shadwell's Bill, the Lords Thurlowe, Loughborough, and Grenville expreſſed a wiſh, that the ſubject of divorce for adultery were ſubmitted by an enactment of the legiſlature to ſome regular judicial court, where the crime and the provocation to the crime would be carefully balanced, where facts and circumſtances could be inveſtigated with the temper, the deliberation, the caution, that ought to accompany ſuch an inveſtigation.]

So, a divorce *propter ſævitiam* or *metum* is of the ſame nature, and does not diſſolve the bond of matrimony; but is only a proviſion for the woman's ſafety, that ſhe may avoid her huſband's cruelty and ill uſage. Cro. Car. 462.

Maſter and Servant.

THE relationſhip between a maſter and a ſervant from the ſuperiority and power which it creates on the one hand, and duty, ſubjection, and, as it were (*b*), allegiance, on the other, is in many inſtances applicable to other relationſhips, which are both in a ſuperior and a ſubordinate degree; ſuch as lord and bailiff, principal and attorney (*c*), owners and maſters of ſhips, merchants and factors, and all others having authority to enforce obedience to their orders, from thoſe whoſe duty it is to obey them, and whoſe acts, being conformable to their duty and office, are eſteemed the acts of their principals. But theſe being treated of under their proper heads, we ſhall here conſider this relationſhip, as it more particularly affects maſters and thoſe who are more properly called ſervants and apprentices.

(*b*) Hence by the ſtatute 25 E 3. ſtat. 5. c. 2. it is petit treaſon for a ſervant to kill his maſter; in the conſtruction whereof it hath been held to extend to a miſtreſs, or maſter's wife. Plow. 86.

3 Inſt. 20. 4 Co. 46. (*c*) Where a maſter of a ſhip is expreſsly ſaid to be a ſervant to the owners, and the owners ſhall anſwer for him as ſuch. 3 Mod. 323. 2 Vern. 643.

(A) Of the Manner of Hiring and Binding a Perſon Servant or Apprentice.

(B) Who may ſerve, or are capable of binding themſelves Servants or Apprentices.

(C) Of the Juriſdiction of Juſtices of Peace in binding out Apprentices, in obliging Maſters to provide for them, in compelling them to refund the Money had with them, and in diſcharging Apprentices from their Maſters.

(D) Of the Neceſſity of ſerving an Apprenticeſhip, as a Qualification to follow a Trade within the 5 *Eliz. c.* 4.: And herein,

1. What ſhall be ſaid a Trade, which a Perſon is prohibited to follow, within the Statute.
2. What Manner of following or exerciſing a Trade ſhall be ſaid within the Statute.
3. What Kind of Service will be a ſufficient Qualification within the Statute.
4. By whom the Offence of following a Trade without a Qualification is cognizable.
5. Of the Form of the Proceedings in order to a Conviction, for following a Trade without being qualified.

(E) Of aſſigning and turning over Apprentices to other Maſters.

(F) Of making Apprentices free.

(G) How Apprentices are to be taken Care of when their Maſters happen to die.

(H) Of Servants' Wages, how recoverable.

(I) What Acts of the Servant are deemed the Maſter's, of which the Maſter may take Advantage.

(K) What Acts of the Servant ſhall be deemed the Maſter's, for which the Maſter ſhall anſwer and be bound.

(L) For what Acts of his ſhall the Servant himſelf anſwer to others.

(M) For

(M) For what Acts of his ſhall the Servant anſwer, and be reſponſible to his Maſter: And herein,

1. Where by an implied Truſt or Confidence a Servant ſhall anſwer in a Civil Action.
2. Where Servants and Apprentices ſhall be puniſhed criminally, for Acts done in relation to their Maſters.

(N) Of the Maſter's Authority over his Servant, and how far he may correct and puniſh him.

(O) Of the Maſter's Remedies againſt others for enticing away, and other Injuries done, in relation to his Servant.

(P) What a Maſter or Servant may juſtify doing in each other's Defence.

(A) Of the Manner of Hiring and Binding a Perſon Servant or Apprentice.

THE retaining a menial ſervant and taking an apprentice differ greatly as to the manner; for as to the firſt it may be by parol (*a*) contract, or agreement only, and therefore ſuch a one may be diſcharged by parol, and without writing; but an apprentice muſt be by deed, and cannot be diſcharged without deed, and muſt be retained by the name of an apprentice expreſsly, otherwiſe he is no apprentice though bound. 21 H. 6. 23. 3 Keb. 304. 6 Mod. 182. Ld. Raym. 1117. Salk. 68. pl. 7.

(*a*) That by the contract he is conſidered as ſervant, though he has not yet actually done any ſervice for his maſter. Dalt. Juſt. c. 58. ——And on ſuch contract the maſter may have an action againſt him, if he either refuſes to ſerve at all, or departs before the time is expired for which he agreed to ſerve. Dalt. Juſt. c. 58.——And where the maſter has his remedy againſt another detaining him, *vide infra*, letter (O).

A ſervant may hire himſelf for what time he pleaſes; but it is ſaid, that if a man retain a ſervant generally, without expreſſing any time, the law will conſtrue it to be for one year, becauſe that retainer is according to law. Co. Lit. 42. b. F. N. B. 168. H. 1 Bl. Com. 425.

Alſo, it hath been adjudged, that if a perſon retain a ſervant for a year, *& ſic de anno in annum quamdiu ambabus partibus placuerit*, that after the ſecond year begun, the retainer holds good for another year; and that it ſhall not be a retainer for a year certain, and afterwards at will. 2 Keb. 16. Cotes v. Sadler.

And as an apprentice can only be bound by deed, ſo it is neceſſary, according to the cuſtom of (*b*) ſome places, that ſuch deed or indenture be enrolled; as, in *London*, if the indentures be not enrolled before the chamberlain within a year, upon a petition to the 2 Roll. Rep. 305. Palm. 261. Mod. Rep. 271. pl. 22.

(*b*) Where

perſons binding themſelves apprentices to mariners, their indentures are to be enrolled in the next corporate towns.

the mayor and aldermen, &c. a *ſcire fac.* ſhall iſſue to the maſter, to ſhew cauſe why not enrolled; and if it was through the maſter's default, the apprentice (*a*) may ſue out his indentures, and be diſcharged; otherwiſe, if through the fault of the apprentice; as, if he would not come to preſent himſelf before the chamberlain, &c. for they cannot be enrolled, unleſs the apprentice be in court and acknowledge them.

3 Lev. 389. (*a*) Where it is neceſſary in order to prove him an apprentice. Skin. 579. pl. 2. And ſee a certificate relating to the enrolment of apprentices in vol. 3. of Lord Bac. Works, 4to, 353. [By 5 G. 3. c. 46. § 18. the chamberlain, or other proper officer of every city, &c. where any apprentice obtains his freedom by ſervitude, ſhall enrol the name of every apprentice, who ſhall be placed out within ſuch city, the name of the maſter and miſtreſs, the apprentice fee, the trade, and the dates of the indenture, on pain of twenty pounds. And by § 41. all printed indentures ſhall have the notice or memorandum deſcribed in the act, printed under the ſame.]

6 Mod. 69. Salk. 68. pl. 8.

But it hath been held, that this cuſtom does not extend to one bound apprentice to a waterman, under 21 years of age; for the company of watermen are but a voluntary ſociety, and being free of that does not make one free of *London*.

Smith v. Birch, 1 Seſſ. Ca. 222.

[By 5 *Eliz.* c. 4. § 25. an apprenticeſhip can only be created by INDENTURE: therefore, where the writing by which one perſon agreed to ſerve another for ſeven years began, "THIS INDENTURE "witneſſeth," but was in fact a *deed poll*, and not an indenture, it was holden, that the maſter could not maintain any action upon it againſt a perſon for enticing away and detaining *his* APPRENTICE.

Rex v. Stratton, Burr. Sett. Ca. 272. Rex v. Whitchurch Canonicorum, 1 Conſt's Bott's P. L. 464. pl. 650. S. P. Rex v. Mannam, Burr. Set. Ca. 290.

So, an *agreement* to execute indentures of apprenticeſhip will not conſtitute a ſufficient binding under 5 *Eliz.* c. 4. although a ſervice of ſeven years is performed under it; for there muſt be an *indenture* duly executed: and of courſe, where there is neither indenture nor agreement, but only a binding by parol, there can be no apprenticeſhip.

Caſe of St. Saviour's, Southwark, 1 Conſt's Bott's P. L. 463. pl. 648.

An indenture, however, though loſt, ſhall be ſufficient, on proof being made, that it was duly executed; but a declaration of the mother, that ſhe heard the apprentice's father ſay, he was bound by indenture, is not ſufficient evidence of the fact.

It is provided by 31 *G.* 2. *c.* 11. that although the inſtrument by which the contract is formed ſhould not be indented, the apprentice ſhall nevertheleſs gain a ſettlement under it.

By the ſeveral ſtamp acts, the indenture (except in the caſe of a pariſh apprentice) muſt be ſtamped with a ſix ſhilling ſtamp, or it cannot be given in evidence.

And by 8 *Ann.* c. 9. § 32. a duty is impoſed of ſixpence for every twenty ſhillings for every ſum of fifty pounds, or under, and one ſhilling on all ſums above fifty pounds, given, paid, contracted, or agreed for, with, or in relation to every clerk, apprentice, or ſervant; and proportionably for greater or leſs ſums; which duty ſhall be paid by the maſter or miſtreſs.

By § 33. this duty ſhall be under the management of the commiſſioners of the ſtamp office.

By

By § 35. the monies paid or agreed to be paid with every clerk, apprentice, and ſervant, ſhall be truly inſerted and written in words at length in the indenture or other writing which contains the covenants, &c. for ſuch ſervice; and ſuch indenture or writing ſhall bear date upon the day of ſigning, ſealing, or otherwiſe executing the ſame, upon pain to every maſter or miſtreſs of double the ſum given, one moiety to the king, and the other to the informer; with full coſts to be recovered by action, &c. within one year after the term appointed for the ſervice is expired.

By § 36. the commiſſioners of the ſtamp-office are to provide two additional ſtamps, denoting the *ſixpenny* and *ſhilling* duties; and all indentures, &c. executed in the bills of mortality, ſhall be ſtamped at the head ſtamp-office, and the duties paid to the Receiver-General within one month from the date of the indenture.

By § 37. all ſuch indentures, &c. executed in any other part of *Great Britain* ſhall, at the option of the party, be ſent either to the head ſtamp-office within the bills of mortality, or to ſome of the collectors reſiding without the bills of mortality, within two months after the date of ſuch indentures, and the duties paid thereon: and in caſe the ſaid payment ſhall be made immediately to the Receiver-General, the indenture ſhall be forthwith ſtamped with one of the new ſtamps; but, if made to the collector, he ſhall indorſe on ſuch indenture a receipt for the monies ſo paid in words at length, bearing date the day on which ſuch payment ſhall be made, and ſubſcribe his name thereto, and then deliver back the indenture to the bringer thereof.

By § 38. the indenture, &c. ſo indorſed, if made within fifty miles from the bills of mortality, ſhall, within three months after the date thereof, be brought or ſent to the ſtamp-office in *London*, and immediately ſtamped, as the caſe ſhall require.

By § 39. all indentures, &c. wherein ſhall not be truly inſerted the full ſum received with ſuch apprentice, &c., or which ſhall not be ſtamped according to the tenor of this act, within the time limited, ſhall be void, and not available in any court; and the apprentice be incapable of being free of any city, &c., or of following the intended trade.

But by § 40. this act ſhall not extend to apprentices put out at the common publick charge of any pariſh.

By § 43. no indenture required by this act to be ſtamped, ſhall be given in evidence in any ſuit brought by the parties, unleſs the party producing it do firſt make an oath, that the ſums inſerted were all that were paid on behalf of the apprentice.

And by § 45. where any thing, not being money, ſhall be given, &c. to any maſter or miſtreſs with any apprentice for whom a duty is chargeable by this act, the duty ſhall be paid to the full value of the thing given.

By 9 *Ann.* c. 21. § 66. if any maſter or miſtreſs ſhall neglect to pay the rates or duties, they ſhall forfeit fifty pounds, one moiety to the king, the other to him who ſhall ſue for the ſame, &c.

If

Cuerden v. Leland, 1 Bott's P. L. 483. pl. 679.

If a perſon agrees to go apprentice to another, and enters upon the ſervice accordingly, and after a trial of three months is bound apprentice by indenture, but the indentures are dated at the time he entered on the ſervice, and not at the time of the execution, the indentures are abſolutely void to all intents and purpoſes, by 8 *Ann. c.* 9. § 35.

Id. ibid.

So alſo, where a mother bound her ſon apprentice, and paid twenty ſhillings to the maſter, which ſum was recited in the indenture purſuant to 8 *Ann. c.* 9. § 45. but the ſixpence duty was never paid, nor the indentures ſtamped with the additional ſtamp, they were held void.

Rex v. Lanvari Dyffryn Clwyd, Burr. Set. Ca. 236.

So alſo, if on production of the indentures, they are not ſtamped though the duty paid.

Rex v. Ditchingham, 4 Bur. Set. Ca. 4 Term Rep. 769.

Rex v. Highnam, 1 Conſt's Bott's P. L. 495. pl. 689.

So, an agreement of apprenticeſhip, entered into with a view to ſave the expences of indentures, and to avoid the payment of the duties impoſed by the above ſtatute of 8 *Anne*, is void and of no effect.

Rex v. East Knoyle, Burr. Set. Ca. 151.

But, in caſes where the indenture is not produced, and evidence is given that indentures actually exiſted, and were duly executed, the court will preſume that they were regularly ſtamped, and the duty paid.

Rex v. Badly, 1 Conſt's Bott's P. L. 490. pl. 687.

But, before parol evidence is given of the contents of indentures, proof muſt be made of their being loſt; and it ſeems, that ſome evidence ought to be given, not only that they were duly executed, but that the duty was paid.

Rex v. Northowram, 2 Str. 1132. Rex v. St. Peter's, Cheſter, 1 Conſt's Bott's P. L. 486. pl. 682. S. P. Rex v. St. Petrox, in Dartmouth, 4 Term Rep. 196. S. P.

The additional ſtamp is only required, where the money, or other thing, is given, paid, contracted, or agreed for, with, or in relation to, the apprentice; and therefore, when the mother of a lad propoſed to put him out an apprentice, but the intended maſter refuſed to take him, becauſe he wanted clothes, and the grandfather agreed to give the maſter thirty ſhillings, which the maſter was to, and did, lay out for the boy in clothes, the court held, that there was not any ſtamp neceſſary on this account; for the ſtatute means money given for the benefit of the maſter; and, in this caſe, he laid out the money merely as an agent to the boy's friends.

Baxter v. Faulam, 1 Wilſ. 129. Rex v. Yarmouth, Burr. Sett. Ca. 379. S. P.

So, where in an indenture ſixpence was the ſum mentioned to have been given to the maſter, as a fee with the apprentice; the court reſolved, that the ſtatute intended, that when more than fifty pounds was paid, a twentieth part thereof ſhould be paid for duty, and a fortieth part when the ſum was under fifty pounds; but that in the preſent caſe, there would not, under this mode of calculation, be any coin ſmall enough to pay the duty in; and *de minimis non curat lex.*

Pennington v. Sudal, 1 Conſt's Bott's P. L. 488. pl. 686.

So alſo, where in indentures of apprenticeſhip, there was a covenant, that the father would provide the apprentice meat, drink, waſhing, lodging, and clothes, and that the maſter ſhould pay the apprentice five pounds a-year in conſideration of his faithful ſervices and of the due performance of the covenants; the court

court ſeemed to think, that the indentures did not require a ſtamp under the ſtatute of 8 *Anne*.

But this point was afterwards more ſolemnly decided. Thus, where it was agreed in the indentures, that "ſufficient meat, "drink, apparel of all kinds, phyſick, ſurgery, and lodging, and "all other neceſſaries during the term, ſhould be found and "provided for the apprentice by the father, for which purpoſe "the maſter was to allow him four ſhillings a-week during the "term;" the court held the indentures good, although they were not ſtamped, and no duty paid. Rex v. Portſea, Burr. Sett. Ca. 834.

So alſo, where in an indenture the apprentice covenanted, that "he would at his own expence provide for himſelf meat, drink, "waſhing, lodging, apparel, and phyſick, at all times during "the term; and the maſter covenanted to pay him five ſhillings "a-week for the firſt three years, and ſeven ſhillings a-week for "the remainder of the term;" it was ruled, that the indenture did not require the additional ſtamps impoſed by 8 *Anne*. Rex v. Walton Dale, 3 Term Rep. 515.

And where an indenture was, that the father of the apprentice would, at his own charge, find and provide for his own ſon good, competent, and ſufficient meat, drink, and lodging, every *Sunday* in the year during the term; and would provide him with clothes and apparel of all ſorts (except working aprons and ſhoes); and the maſter covenanted to provide him with meat, drink, and lodging, except on *Sundays*, during the term; the court thought the point ſo clearly ſettled, that they would not ſuffer it to be argued. Rex v. Leighton, 4 Term Rep. 732.

So alſo, money given by pariſh officers (in the caſe of a voluntary binding), as the conſideration of the pauper's being taken apprentice, is not liable to the duty impoſed by the 8 *Anne;* for it comes within the exception of § 40. as being at the publick charge of the pariſh. Rex v. St. Petrox, in Dartmouth, 4 Term Rep. 196.

By 18 *G.* 2. *c.* 22. § 24. if any maſter or miſtreſs neglect to pay the rates and duties within the reſpective times limited by 8 *Ann. c.* 9. and 9 *Ann. c.* 21. they ſhall further forfeit for every neglect double the rates and duties charged.

By 18 *G.* 2. *c.* 22. § 25. if any apprentice, *&c.* on the neglect of his maſter or miſtreſs to pay the rates and duties, ſhall, on notice to his maſter or miſtreſs, pay the ſaid rates and duties, and alſo the penalties and forfeitures of this act, within one year after the ſame became incurred, ſuch apprentice may, within three months afterwards, demand back the apprentice-fee; and if the ſame be not paid within three months after ſuch demand, he may recover the ſame by action, and ſhall be diſcharged from his apprenticeſhip.

And by § 26. ſuch apprentice ſhall have the ſame benefit of the time he ſhall have ſerved, as he could have had in caſe of any aſſignment or turning-over to any new maſter or miſtreſs.

By 20 *G.* 2. *c.* 45. § 5. if any maſter or miſtreſs, who ſhall become liable to the double duties, ſhall pay them to the perſons who ought to receive them; and alſo tender the indentures to be ſtamped at any time within two years after the end of the appren-

ticeſhip, and before any ſuit for them is commenced, the indentures ſhall be good and available in law and equity, and the apprentice as capable of following his trade, as if the ſingle duties had been regularly paid.

By § 6. if any apprentice ſhall, after ſuch double duties incurred, make requeſt in writing before one witneſs, to his maſter or miſtreſs to pay them, and ſhall, on the neglect of his maſter or miſtreſs to pay the ſaid double duties within three months after ſuch requeſt, pay the ſame at any time within two years after the determination of his apprenticeſhip, he may, within three months after ſuch payment, demand of his maſter or miſtreſs double the apprentice-fee; and if the ſame be not paid within three months after ſuch demand, he may recover the ſame by action, and ſhall, immediately after ſuch payment, and upon ſignifying by writing under his hand, that he deſires to be diſcharged from his apprenticeſhip, be diſcharged from the ſame.

And by § 7. he ſhall have the ſame benefit of the time ſerved, as if he had been aſſigned or turned over.

But by § 8. if, where any proſecution ſhall be commenced againſt any maſter or miſtreſs for penalties, the apprentice ſhall pay ſuch double duties within two years after his apprenticeſhip expires, the indenture ſhall be good, &c.]

(B) Who may ſerve, or are capable of binding themſelves Servants or Apprentices.

Dalt. c. 58. IT is ſaid, that if a married man and his wife bind themſelves to ſerve, they ſhall be compelled thereto, according to their covenant or agreement; and that if a woman who is a ſervant ſhall marry, yet ſhe muſt ſerve out her time; and her huſband cannot take her out of her maſter's ſervice.

11 Co. 89. b. 2 Inſt. 379, 380. 3 Leon. 63. 7 Mod. 15. [8 Mod. 190. Dougl. 518.] (a) Nor in equity. Abr. Eq. 6.— But if an infant of five years of age, or other perſon who is not *potens in corpore*, be retained, and ſerve in the beſt manner he can, his maſter muſt pay him his wages. Bro. tit. Labour, 46. Dalt. Juſt. c. 58.

It ſeems clearly agreed, that by the (a) common law, infants, or perſons under the age of 21 years, cannot bind themſelves apprentices, in ſuch a manner as to entitle their maſters to an action of covenant, or other action, for departing their ſervice, or other breaches of their indentures; which makes it neceſſary, according to the uſual practice, to get ſome of their friends to be bound for the faithful diſcharge of their offices, according to the terms agreed on.

But by the 5 *Eliz.* c. 4. § 43. it is enacted in the words following: "And becauſe there hath been, and is ſome queſtion and "ſcruple moved, whether any perſon being within the age of "twenty-one years, and bounden to ſerve as an apprentice, in "any other place than in the ſaid city of *London*, ſhall be bound-"en, accepted, and taken as an apprentice; for the reſolution of "the ſaid ſcruple and doubt, be it enacted by the authority of this "preſent

" preſent parliament, That all and every ſuch perſon or perſons, " that at any time or times from henceforth ſhall be bounden by " indenture to ſerve as an apprentice in any art, ſcience, occupa- " tion or labour, according to the tenour of this eſtatute, and in " manner and form aforeſaid, albeit the ſame apprentice, or any " of them, ſhall be within the age of twenty-one years, at the " time of making their ſeveral indentures, ſhall be bounden to " ſerve for the years in their ſeveral indentures contained, as " amply and largely to every intent, as if the ſame apprentices " were of full age at the time of making ſuch indentures; any " law, *&c.*"

But notwithſtanding this ſtatute, it hath been held, in an action of covenant againſt an apprentice, for departing from his maſter's ſervice without licence, within the time of his apprenticeſhip; where the defendant pleaded, that at the time of making the indenture he was within age; and on demurrer to this plea, it was argued, that this indenture ſhould bind the infant, becauſe it was for his advantage to be bound apprentice, to be inſtructed in a trade; and it was alſo urged, that he was compellable by the 5 *Eliz.* *c.* 4. *ſupra*, to be bound out an apprentice; that although an infant may voluntarily bind himſelf an apprentice, and if he continue an apprentice for ſeven years, he may have the benefit to uſe his trade; yet neither at the common law, nor by any words of the above-mentioned ſtatute, a covenant or obligation of an infant, for his apprenticeſhip, ſhall bind him; but if he miſbehave himſelf, the maſter may correct him in his ſervice, or complain to a juſtice of peace, to have him puniſhed according to the ſtatute; but no remedy lieth againſt an infant upon ſuch covenant.

Cro. Car. 179. Gybert v. Fletcher. Cro. Jac. 494. S. P. [Whitby v. Loftus, 8 Mod. 459. S. P. Brand v. Ewington, Dougl. 518. S. P.]

By the cuſtom of *London*, an infant unmarried, and above the age of fourteen, may bind himſelf apprentice to a freeman of *London*, by indenture with proper covenants; which covenants, by the cuſtom of *London*, ſhall be as (*a*) binding as if he was of full age.

Moor, 134. 2 Bulſt. 192. 2 Roll. Rep. 305. Palm. 361. Mod. 271. 2 Keb. 687.

(*a*) And for a breach an action may be brought in any other court, as well as in the courts of the city. Moor, 136.

[Although an infant cannot bind himſelf apprentice ſo as to entitle his maſter to an action of covenant for breach of any of the clauſes in the indenture, yet it ſhould ſeem (but the point has never been directly determined,) that if in fact he does bind himſelf, he is not afterwards at liberty to avoid a contract ſo notoriouſly for his benefit.

St. Nicholas and St. Peter, in Ipſwich, 2 Str. 1066. Burr. Sett. Ca. 91. S. C. Ca. temp. Hardw. 323. S. C. Rex v. Evered, Cald. 26. Rex v. Hindringham, 6 Term Rep. 557. Aſhcroft v. Bertles, *id.* 652.

It has been determined, that an indenture of apprenticeſhip *to* an infant is not void, but only voidable.] Rex v. Petrox, in Dartmouth, 4 Term Rep. 196.

(C) Of the Juriſdiction of Juſtices of Peace in binding out Apprentices, in obliging Maſters to provide for them, in compelling them to refund the Money had with them, and in diſcharging Apprentices from their Maſters.

THE juriſdiction of juſtices of the peace herein depends on divers acts of parliament, particularly on the 5 *Eliz. c.* 4. the moſt material clauſe of which, as to this purpoſe, is § 35. which is as followeth: "That if any perſon ſhall be required by any houſe-
" holder, having and uſing half a plough-land, at the leaſt, in
" tillage, to be an apprentice, and to ſerve in huſbandry, or in
" any other kind of art, myſtery, or ſcience, before expreſſed, and
" ſhall refuſe ſo to do; that then, upon complaint of ſuch houſe-
" keeper, made to one juſtice of the peace of the county where
" the ſaid refuſal is, or ſhall be made, or of ſuch houſeholder in-
" habiting in any city, town corporate, or market-town, to the
" mayor, bailiffs, or head officer of the ſaid city, town corporate,
" or market-town, if any ſuch refuſal ſhall be there, they ſhall
" have full power and authority, by virtue hereof, to ſend for the
" ſame perſon ſo refuſing; and if the juſtice, or the ſaid mayor
" or head officer, ſhall think the ſaid perſon meet and convenient
" to ſerve as an apprentice in that art, labour, ſcience, or myſtery,
" wherein he ſhall be ſo then required to ſerve, that then the ſaid
" juſtice, or the ſaid mayor, or head officer, ſhall have power and
" authority, by virtue hereof, if the ſaid perſon refuſe to be bound
" as an apprentice, to commit him unto ward, there to remain
" until he be contented, and will be bounden to ſerve as an ap-
" prentice ſhould ſerve, according to the true intent and meaning
" of this preſent act; and if any ſuch maſter ſhall miſuſe or evil
" entreat his apprentice, or the ſaid apprentice ſhall have any juſt
" cauſe to complain, or the apprentice do not his duty to his
" maſter; then the ſaid maſter, or apprentice, being grieved, and
" having cauſe to complain, ſhall repair unto one juſtice of peace
" within the ſaid county, or to the mayor, or other head officer of
" the ſaid city, town corporate, market-town, or other place,
" where the ſaid maſter dwelleth, who ſhall, by his wiſdom and
" diſcretion, take ſuch order and direction between the ſaid
" maſter and his apprentice, as the equity of the cauſe ſhall require;
" and if for want of good conformity in the maſter, the ſaid juſtice
" of peace, or the ſaid mayor or head officer, cannot compound
" and agree the matter between him and his apprentice, then the
" ſaid juſtice, or the ſaid mayor, or other head officer, ſhall take
" bond of the ſaid maſter to appear at the next ſeſſions then to be
" holden in the ſaid county, or within the ſaid city, town corpo-
" rate, or market-town, if the ſaid maſter dwell within any ſuch;
" and upon his appearance, and hearing of the matter, before the
" ſaid juſtices, or the ſaid mayor, or other head officer, if it be
" thought

" thought meet unto them to diſcharge the ſaid apprentice of his " apprenticehood, that then the ſaid juſtices, or four of them at " the leaſt, whereof one of them to be of the *quorum*, or the ſaid " mayor, or other head officer, with the conſent of three other of " his brethren, or men of beſt reputation within the ſaid city, " town corporate, or market-town, ſhall have power, by authority " hereof, in writing under their hands and ſeals, to pronounce " and declare that they have diſcharged the ſaid apprentice of his " apprenticehood, and the cauſe thereof; and the ſaid writing, " ſo being made and enrolled by the clerk of the peace, or town- " clerk, amongſt the records that he keepeth, ſhall be a ſufficient " diſcharge for the ſaid apprentice againſt his maſter, his execu- " tors and adminiſtrators; the indenture of the ſaid apprentice- " hood, or any law or cuſtom to the contrary notwithſtanding; " and if the default ſhall be found to be in the apprentice, then " the ſaid juſtices, or the ſaid mayor, or other head officer, with " the aſſiſtance aforeſaid, ſhall cauſe ſuch due correction and " puniſhment to be miniſtered unto him, as by their wiſdom and " diſcretion ſhall be thought meet.

" *Provided*, That no perſon ſhall by force or colour of this " ſtatute be bounden to enter into any apprenticeſhip, other than " ſuch as be under the age of twenty-one years."

[By § 47. juſtices are authorized to grant warrants to apprehend apprentices or ſervants, who ſhall abſcond from ſervice, and to impriſon them, until they demean themſelves properly.

An apprentice apprehended under this act cannot object, in his defence, that he had been bound contrary to the directions of the act, and had therefore run away to avoid the indentures. Rex v. Evered, Cald. 26.

By 20 *G.* 2. *c.* 19. § 3. " any two juſtices where the maſter " dwells, may, upon complaint of any pariſh apprentice, or of " any other apprentice upon whoſe binding no larger a ſum than " five pounds was paid, ſummon ſuch maſter and examine the " caſe, and upon proof on oath of the fact alleged, may, whether " the maſter be preſent or not, if the ſervice of the ſummons be " proved, diſcharge ſuch apprentice by a certificate under their " hands and ſeals. And by § 4. the two juſtices, upon complaint " by the maſter on oath, may examine the ſame, and commit the " apprentice to the houſe of correction to hard labour for any " time not exceeding a calendar month (*a*), or may diſcharge " ſuch apprentice as aforeſaid." By § 5. " Perſons grieved may " appeal to the next general quarter ſeſſions, where the matter " ſhall be finally determined, and ſuch coſts paid to the appellant " or reſpondent as the ſeſſions ſhall think reaſonable, not exceed- " ing forty ſhillings."

(*a*) Enlarged to *three* months by 32 Geo. 3. c. 57. § 13.

By 6 *G.* 3. *c.* 25. " If any apprentice, except ſuch with whom " the ſum of ten pounds was paid, ſhall abſent himſelf during " the term, he ſhall ſerve for ſo long a time as he ſhall abſent " himſelf over and beyond the term of his apprenticeſhip, unleſs " he ſhall make ſatisfaction to his maſter for the loſs he ſhall have " ſuſtained by his abſence; and if he refuſe ſo to do, one juſtice, " on complaint of the maſter, may apprehend ſuch apprentice,

" and on hearing the complaint, determine the ſatisfaction that " ſhall be made; and if the apprentice do not conform to ſuch " determination, the juſtice may commit him to the houſe of cor- " rection for any time not exceeding three months." By § 3. " the application of the maſter to compel ſatisfaction for abſence " as aforeſaid, muſt be made within ſeven years next after the " expiration of the term of apprenticeſhip." And by § 5. " the " party grieved may appeal to the next general quarter ſeſſions, " on giving ſix days notice of his intention to bring ſuch appeal, " and of the cauſe and motive thereof, to ſuch juſtice, and enter- " ing into a recognizance within three days after ſuch notice, to " try ſuch appeal; and the ſeſſions ſhall finally determine the " ſame, and award coſts." But by § 6. " neither the ſtannaries, " nor the juriſdiction of the chamberlain, nor any other court " within the city, ſhall be affected by this act."]

Skin. 108. pl. 7. 5 Mod. 139. 2 Salk. 471. pl. 4.

The juſtices of peace may diſcharge an apprentice not (*a*) only on the default of the maſter, but alſo on his own (*b*) default; but it hath been holden, that their juriſdiction herein extends only to ſuch apprentices as were bound to trades within the ſtatute of 5 *Eliz.*(*c*), and were compelled by them to ſerve; for that in ſuch caſe it is but reaſonable that the contracts, which were made by their authority, ſhould be diſſolved by the ſame power, but that they cannot diſcharge any voluntary agreements made between the parties.

(*a*) The order of diſcharge need not be mutual; therefore if they order that the ſervant ſhall be diſcharged from his maſter, they need not diſcharge the maſter from his covenants; for when the ſervant is diſcharged, the other is no longer maſter. 5 Mod. 139. 2 Salk. 471. pl. 4. (*b*) A perſon, after three years ſervice, plainly appearing to be a natural idiot, diſcharged, and order affirmed. Skin. 112. —— That by the cuſtom of London, a freeman may turn away his apprentice for gaming. 2 Vern. 291. —— But if an apprentice marries without the privity of his maſter, yet that will not juſtify his turning him away, but he muſt take his remedy on his covenant. 2 Vern. 492. [Nor can he ſend him away on account of his being ſick, or ſo lame as to be unable to work, or having the king's evil to ſuch a degree as to be deemed incurable. Rex v. Hales-Owen, 1 Str. 99. Neither can the ſeſſions diſcharge an apprentice on *general allegations of unkind uſage* by the maſter, and the declaration of the maſter that he will not take his apprentice again; for by 5 Eliz. c. 4. § 35. the *particular cauſe* of the diſcharge muſt be ſtated in the order. Rex v. Davis, 2 Str. 704. Rex v. Heaſeman, Ca. temp. Hardw. 101. 2 Str. 1014. S. C. But a neglect on the part of the maſter to inſtruct his apprentice in the myſteries of that trade he was bound to learn, is a ſufficient cauſe of diſcharge. Rex v. Amies, 1 Conſt's Bott's P. L. 515. pl. 731. (*c*) But the contrary is now ſettled, Rex v. Amies, *ubi ſupra*. Rex v. Collingburne, 1 Str. 663.]

Carth. 366. 5 Mod. 138. 2 Salk. 471. pl. 4. Caſe of Set. & Rem. 20. pl. 29. The King v. Gately.

Therefore, where an order of ſeſſions was made to diſcharge a ſurgeon's apprentice from his maſter, for not inſtructing him in the art of ſurgery; but the maſter being a *mountebank* kept the apprentice for a tumbler on the ſtage; the order was quaſhed for want of juriſdiction in the juſtices, becauſe a ſurgeon is not one of the trades mentioned in the 5 *Eliz. c.* 4. and, there, it was held, that the juſtices have power only over ſuch apprentices who are bound to the trades therein named, and not over apprentices to other trades.

Saund. 314. Hawkeſworth and Hillarys, Salk. 67. pl. 3. Skin. 108. pl. 7.

And yet it hath been reſolved, that the juſtices may not only diſcharge a merchant's apprentice, (which has been agreed not to be a trade within the ſtatute 5 *Eliz. c.* 4.) but alſo oblige the maſter to refund part of the money which he had with him. And this doctrine of refunding ſeems to be now eſtabliſhed, as founded on (*d*) great reaſon, though not expreſsly mentioned in the act;

(*d*) Where

act; for the juſtices being authorized to diſcharge according to their diſcretions, when the end of the apprenticeſhip cannot be attained with one perſon, it is but juſtice the maſter ſhould return part of the money he has received with his apprentice, to place him out with a new maſter.

a court of equity will oblige a maſter to refund. Finch's Rep. 396.

Vern. 46. pl. 2. Vern. 64. pl. 57. 492. Atk. Rep. 149. pl. 89.

It hath been held, that an order on the maſter to return money is good, though it is not averred that he had any with the apprentice, for the order being to return money, is as neceſſary a proof of the receipt of it, as if it had been expreſsly alleged. And in this caſe the court ſeemed to be of opinion, that though the juſtices had juriſdiction as to diſcharging and obliging the maſter to refund, as well in other trades as thoſe mentioned in the ſtatute; that they are not obliged in their orders to ſet forth all the ſteps they take in their proceedings, there being nothing in the act which makes it neceſſary, and that there was a known and eſtabliſhed diſtinction between orders and convictions.

The King v. Amies, 2 Barnard. K. B. 244. 296. S. C. Seſ. Caſ. 190. pl. 170. S. C. 1 Conſt's Bott's P. L. 515. pl. 731. S. C. 2 Kel. 128. pl. 104. S. C. [But in Rex v. Vandeleer, 1 Str. 69., juſtices cannot order monies to be returned on diſcharge of an apprentice.]

It hath formerly been held, that the ſeſſions cannot make an original order of diſcharge; but that, according to the ſtatute, the parties ought firſt to apply themſelves to a juſtice of peace; and if he cannot compound the matter, then he is to bind the maſter to appear at the next ſeſſions. But it hath been ruled of (*a*) late, and ſeems now eſtabliſhed, that an order on an original application is good, and that the previous application to one juſtice is only diſcretionary.

Sand. 316. Carth. 198. Salk. 68. pl. 6. 5 Mod. 138. (*a*) So ruled in the caſe of the King v. Amies. Trin. 7 G. 2. 2 Barnard.

K. B. 244. 279. 2 Kel. 128. pl. 104. 296. Rex v. Gill, 1 Str. 143. Rex v. Davies, *id.* 704.

If the maſter, being bound to anſwer at the ſeſſions, does not appear, it is a forfeiture of his recognizance; but yet at the ſame time the (*b*) juſtices may proceed to make an order againſt him.

Salk. 67. pl. 3. (*b*) For though the ſtatute ſays the diſcharge muſt be made on the appearance of the maſter, yet it muſt have a reaſonable conſtruction, ſo as not to permit the maſter to take advantage of his own obſtinacy. 2 Salk. 490. pl. 53. [But the maſter muſt be ſummoned. Watkins v. Edwards, 1 Mod. 286. And it muſt appear on the face of the order, that the maſter either appeared, or was ſummoned. Reg. v. Rutter, 1 Conſt's Bott's P. L. 513. pl. 723. Rex v. Gill, 1 Str. 143. But it is ſaid, that although there muſt be a ſummons, it need not be ſet forth in the order; nor need the order ſtate, that the maſter was heard; for that ſummons and default is equal to appearance, Rex v. Amies, 1 Conſt's Bott's P. L. 515. pl. 731. But *qu.* of this opinion, for the ſtatute expreſsly requires appearance, and Lord Hardwicke quaſhed an order, becauſe it did not appear on the face of it, that the maſter had appeared *or* made default. Rex v. Heaſeman, Ca. temp Hardw. 101.]

The order of diſcharge muſt be under the hands and ſeals of the four juſtices, according to the expreſs appointment of the ſtatute; but it is (*c*) ſaid, that in a *certiorari* to remove the order, it is ſufficient in the return to take notice of the order ſo made, for it is not neceſſary to certify the diſcharge itſelf.

Sand. 316. Carth. 199. Comb. 344. (*c*) 2 Salk. 470. pl. 2.

[The order muſt ſtate the reaſon of the judgment, for the ſtatute requires the ſeſſions to expreſs the cauſe of the diſcharge.

Rex v. Heaſeman, Ca. temp. Hardw. 101.

Rex v. Hales-Owen, 1 Str. 99.

It muſt alſo be enrolled among the records of the ſeſſions.

Rex v. Collingburne, 1 Str. 663.

The ſeſſions of the place where the parties *live* have juriſdiction on this ſubject; and therefore, where *A.* was bound and enrolled apprentice to a freeman in *London*, but lived with his maſter in the county of *Middleſex*, it was holden, that the ſeſſions of the county have a concurrent juriſdiction with the ſeſſions of the city, and may diſcharge the apprentice in *Middleſex* for cauſes ariſing in *London*.]

[(a) Butby 18 Geo. 3. c. 4. "the apprenticeſhip of a *male* child put out purſuant to the 43 Eliz. ſhall be for no longer term than till ſuch child ſhall come to the age of *twenty-one* years."]

By the 43 *Eliz. c.* 2. § 5. it is enacted, "That it ſhall be lawful for the churchwardens and overſeers of the poor, or the greater part of them, by the aſſent of any two juſtices of the peace, to bind poor children apprentices, where they ſhall ſee convenient, till ſuch man-child ſhall come to the age of twenty-four years, (*a*) and ſuch woman-child to the age of twenty-one years, or the time of her marriage; the ſame to be as effectual to all purpoſes, as if ſuch child were of full age, and by indenture of covenant bound him or herſelf."

By the 1 *Jac. c.* 25. § 23. 21 *Jac. c.* 28. 3 *Car. c.* 4. § 22. this laſt-mentioned act is continued, with this further addition, "That all perſons, to whom the overſeers of the poor ſhall, according to this act, bind any children apprentices, may take and receive and keep them as apprentices; any former ſtatute to the contrary notwithſtanding."

By the 8 & 9 *W.* 3. *c.* 30. reciting, That whereas by an act made in the 43 *Eliz. c.* 2. § 5. it is, among other things, enacted, That it ſhall be lawful for the churchwardens and overſeers of the poor of any pariſh, or the greater part of them, by the aſſent of two juſtices of the peace, whereof one to be of the *quorum*, to bind poor children apprentices where they ſhall ſee convenient; but there being doubts, whether the perſons, to whom ſuch children are to be bound, are compellable to receive ſuch children as apprentices, that law hath failed of its due execution; therefore it is enacted and declared, "That where any poor children ſhall be appointed to be bound apprentices purſuant to the ſaid act, the perſon or perſons, to whom they are ſo appointed to be bound, ſhall receive and provide for them, according to the indenture ſigned and confirmed by the two juſtices of the peace, and alſo execute the other part of the ſaid indentures; and if he or ſhe ſhall refuſe ſo to do, oath being thereof made by one of the churchwardens or overſeers of the poor, before any two of the juſtices of the peace for that county, liberty, or riding, he or ſhe ſhall for every ſuch offence forfeit the ſum of 10*l.* to be levied by diſtreſs; the ſame to be applied to the uſe of the poor of that pariſh or place where ſuch offence was committed; ſaving always to the perſon to whom any poor child ſhall be appointed to be bound an apprentice, as aforeſaid, if he or ſhe ſhall think themſelves aggrieved thereby, his or her appeal to the next general

[By 20 G. 3. c. 36. the ſame proviſions are enacted with reſpect to poor perſons put out apprentices in any particular diſtrict of England by virtue of any private act of parliament for the regulating and ordering of the poor.]

"general or quarter-sessions of the peace for that county or riding, "whose order shall therein be final, and conclude all parties."

In the construction of these statutes the following opinions have been holden:

That by the 5 *Eliz.* *c.* 4. the justices of peace may bind a poor person to husbandry against the consent of his master; but that neither by that statute, nor the statute 43 *Eliz.* *c.* 2. which empowers the churchwardens, &c., to raise a stock of money, by way of assessment on the parish, for that purpose, they could impose an apprentice on a tradesman against his consent, but must assess and raise money to bind him out. T. Raym. 65. 177. Sid. 99. Lev. 84. Vent. 325. S. P. *cont.* Rex v. Fairfax, Carth. 94. Comb. 165.

S. C. 3 Mod. 269. S. C. Show. 76. S. C. resolved by three judges against Holt. [Although the several reporters, who have given us the history of the case of the King v. Fairfax, assign different reasons for the judgment of the court in that particular case, yet they all agree, that the three judges, *contra* Holt, C. J. were of opinion, that the stat. 43 Eliz. having empowered the churchwardens and overseers, with the assent of two justices, to bind parish apprentices where they should see convenient, the order for that purpose was compulsory on the master.]

That though by the statute 8 & 9 *W.* 3. *c.* 30. the master is bound under the penalty of 10*l.* to keep an apprentice bound to him pursuant to the statute 43 *Eliz.* *c.* 2. yet, if two justices bind a poor girl to a merchant, and he appeals to the sessions, where the order is reversed, it being thought unfit to compel a merchant to take an apprentice, the court of King's Bench, on removing the order before them, may confirm the order of sessions, (as they did in this case); for the statute having given an appeal to the sessions, they are made thereby proper judges, whether the person be a proper person to impose an apprentice on or not. 2 Salk. 491. pl. 57. Minchamp's case. [Rex v. Saltern, East. 24 G. 3. 1 Bot. P. L. 555. pl. 791. S. P.]

The churchwardens and overseers need not aver, that the parents were not able to maintain the child, for they have a discretionary power, by the statute, of determining that. Comb. 289. *per* Holt, C. J.

And as the justices of peace have a power of imposing an apprentice on a master, in consequence thereof, an indictment lies for disobedience to their orders, either in not receiving, or receiving and after turning off, or not providing for such apprentice; for though an act of parliament prescribes an easier way of proceeding by complaint, yet that does not exclude the remedy by indictment. 6 Mod. 163. Salk. 381. The Queen v. Gold. [But the indictment must state, that the binding or appointment

was a binding or appointment within the 43 Eliz. c. 2. Rex v. Trevilian, 2 Str. 1268.]

[It is said to have been the opinion of all the judges, that a parish apprentice may be put to a clergyman. 1 Const's Bott's P. L. 540. pl. 771.

So, a female parish apprentice bound to a day-labourer to learn the art and mystery of a housewife, has been holden good. Rex v. St. Margaret's, Lincoln,

1 Const's Bott's P. L. 549. pl. 787.

A person occupying land in a parish (*a*), but living out of it, is compellable to receive a parish apprentice. And a custom to bind only to occupiers of a particular description is not good. Rex v. Clapp, 3 Term Rep. 107. Rex v. St. Nicholas, in Nottingham, 2 Term Rep. 726. Rex v. Saltern, 1 Const's Bott's P. L. 555. pl. 791.

(*a*) It is said, *generally*, that the binding of parish apprentices may be to a person residing in another parish. Rex v. St. Margaret's, Lincoln, 1 Const's Bott's P. L. 549.

In

Rex v. Tunſtead, 3 Term Rep. 523.

In binding apprentices under 20 *G.* 3. *c.* 36. it is not neceſſary that the maſter ſhould actually reſide within the pariſh: if he be an occupier there, it is ſufficient; for *inhabitant* and *occupier* are for this purpoſe ſynonymous.

Rex v. Gillifer, Sir T. Raym. 63.

It is ſaid, that an order of apprenticeſhip need not ſtate the trade to which the pauper is intended to be bound.

Rex v. Wagſtaffe, Foley, 225.

But the juſtices cannot order, nor can the indentures covenant that the maſter, at the end of the term, ſhall give his apprentice two ſuits of clothes, one for holidays, and the other for working days; for this ſounds like *wages*, and they can only order *maintenance;* and not even that after the term is ended.

Rex v. Chalbury, 1 Conſt's Bott's P. L. 543. pl. 779.

A pariſh apprentice may be bound for a ſhorter, but not for a longer time than the ſtatutes require; and if the indenture (*a*) be not for any certain time, it is not therefore bad; for with reſpect to the time, the ſtatute is only directory.

(*a*) Rex. v. Woolſtanton, *id.* pl. 780.

Rex v. St. Petrox, Burr. Sett. Ca. 249.

So, an indenture binding a poor girl an apprentice is not void for want of the alternative, "or till married."

Id. ibid.

And neither a pariſh indenture, nor a common indenture, though voidable, can be avoided but by the parties to it.

Rex v. Hamſtall Redware, 3 Term Rep. 380.

Pariſh indentures muſt be aſſented to by two juſtices in the preſence of each other; for if it be done by them ſeparately, the indenture is void.

Rex v. Fleet, Cald. 31. 2 Conſt's Bott's P. L. 547. pl 482.

It is not neceſſary to the validity of the indentures of a pariſh apprentice, that the maſter ſhould ſign the counterpart. But after the maſter has ſigned the counterpart, he cannot appeal to the ſeſſions (*b*).

(*b*) Rex v. Saltern, 1 Conſt's Bott's P. L. 555. pl. 791.

Rex v. St. Nicholas, in Nottingham, 2 Term Rep. 726.

Nor is it neceſſary to their validity, that the apprentice ſhould ſign the deed.

Rex v. Langham, Cald. 126.

An infant pariſh apprentice and his maſter cannot by themſelves, without the aſſent of the pariſh officers, vacate the indentures. *Secùs*, after the apprentice has attained twenty-one years of age (*c*).

(*c*) Rex v. Harburton, 1 Conſt's Bott's P. L. 558. pl. 792.

By 32 *G.* 3. *c.* 57. § 11. "in every caſe where a pariſh apprentice ſhall be diſcharged under the 20 *G.* 2. *c.* 19. the two juſtices ſhall order the maſter or miſtreſs to deliver up the apprentice's clothes, and to pay a ſum not exceeding ten pounds to the pariſh officers, for the purpoſe of placing ſuch apprentice out again. And the two juſtices may compel the pariſh officers to enter into a recognizance to proſecute the maſter or miſtreſs of any ſuch pariſh apprentice for ill-treatment of the apprentice."

By § 12. "the juſtices may order any maſter convicted under 20 *G.* 2. *c.* 19. when liable to take a pariſh apprentice, to pay to the pariſh officers a ſum not exceeding ten pounds, nor leſs than

" than five pounds, for the binding out ſuch poor child. " But ſuch maſter may appeal to the quarter ſeſſions, on giv- " ing notice, &c."

By §8. " if any maſter or miſtreſs become inſolvent, two juſ- " tices, where ſuch maſter or miſtreſs live, may, on the application " of ſuch maſter or miſtreſs, diſcharge any ſuch apprentice from " the indentures, if upon inquiry they find the allegation of in- " ſolvency to be true." But by §9. " this ſhall not extend to " any indenture under the 43 *Eliz. c.* 2. where a larger ſum than " five pounds ſhall have been given."]

(D) Of the Neceſſity of ſerving an Apprenticeſhip, as a Qualification to follow a Trade within the 5 *Eliz. c.* 4.

AT common law, every perſon might follow what lawful trade he pleaſed; which being inconvenient in many inſtances, and a detriment to the publick, in permitting perſons to exerciſe trades in which they had little or no ſkill or experience; to prevent this miſchief, and the better to train up and enure perſons to labour and induſtry from their youth, and thereby make them more ſkilful and expert,

11 Co. 53. 2 Bulſ. 191. Skin. 133. Sand. 312.

It is enacted by the (*a*) 5 *Eliz. c.* 4. §31. " That it ſhall not " be lawful to any perſon or perſons, other than ſuch as now do " lawfully uſe or exerciſe any art, myſtery, or manual occupation, " to ſet up, occupy, uſe or exerciſe any craft, myſtery, or occu- " pation, now uſed or occupied within the realm of *England* or " *Wales*, except he ſhall have been brought up therein ſeven " years, at the leaſt, as an apprentice, in manner and form above- " ſaid; nor to ſet any perſon on work in ſuch myſtery, art, or oc- " cupation, being not a workman at this day, except he ſhall have " been apprentice, as is aforeſaid; or elſe having ſerved as an ap- " prentice, as is aforeſaid, ſhall or will become a journeyman, or " hired by the year; upon pain, that every perſon willingly of- " fending, or doing the contrary, ſhall forfeit and loſe for every " default forty ſhillings for every month."

(*a*) It is ſaid, that no encouragement was ever given to proſecutions upon this ſtatute, and that it would be for the common good, if it was repealed; for no greater puniſhment can be to the ſeller than to expoſe goods to ſale ill wrought; for by ſuch means he will never ſell more; *per* Dolben, Juſtice. 3 Mod. 317. See ſtat. 8 Ann. 9. § 39.

[But by the 15 *Car.* 2. *c.* 15. hemp-workers of all kinds, net-makers, and makers of tapeſtry hangings, may ſet up without having ſerved ſeven years.

By 24 *G.* 3. *ſeſſ.* 2. *c.* 6. §1. 4. all officers, mariners, and ſoldiers, who have been in the land or ſea ſervice, or in the marines, or in the militia, or any corps of fencibles, ſince the ſecond year of his majeſty's reign, and have not deſerted, their wives and children, may exerciſe ſuch trades as they are apt for, in any town or place.

By

By 26 *G.* 3. *c.* 107. § 131. every person having served in the militia, when drawn out into actual service, being a married man, may exercise any trade in any town or place.

By 6 & 7 *W.* 3. *c.* 17. an apprentice discovering two offenders guilty of coining, so as they be convicted, shall be deemed a freeman, and may exercise his trade, as if he had served out his time.

And by the 17 *G.* 3. *c.* 33. it shall be lawful for any person carrying on or using the trade of a dyer within the counties of *Middlesex*, *Essex*, *Surry*, and *Kent*, to employ journeymen who have not served an apprenticeship to the trade, without incurring any penalty.

The like liberty is given to hatters *generally* by the 17 *G.* 3. *c.* 55. § 5. and to woolcombers by 35 *G.* 3. *c.* 124.]

In the construction of the statute of the 5 *Eliz.* *c.* 4. it will be necessary to consider,

1. What shall be said such a Trade as a Person is prohibited to follow.

2 Salk. 611. pl. 3. 2 Ld. Raym. 1188. Ld. Raym. 514. 2 Ld. Raym. 1410. (*a*) Palm. 528. Sid. 175. S. P. adjudged.

Herein we must observe, that it hath been ruled, that there are many trades within the general words and equity of the act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently been (*a*) adjudged, that in every indictment, &c. it must be alleged, that it was a trade at the time of making the statute; for the words thereof are, *any craft, mystery, or occupation now used*, &c.; from whence it seems to follow, that a new manufacture, which to all other purposes may be called a trade, is yet not a trade within this statute.

2 Salk. 611. pl. 3. Ld. Raym. 513. 2 Ld. Raym. 1188, 1189. So, for not averring, that the trade of a tyler was an art or mystery used in England at the time of the making the statute, though the statute expressly mentions it. 4 Mod. 145-6. But Comb. 288. *contra*.

8 Co. 130. 2 Bulst. 191. Vent. 326. (*b*) But they are expressly mentioned in § 27. 29. (*c*) Cro. Car. 409. pl. 4.

Also, it seems agreed, that the act only extends to such trades as imply mystery and craft, and require skill and experience; and that therefore (*b*) merchants, husbandmen, gardeners, &c. are not within the statute; and on this foundation it hath been held, that (*c*) a hemp-dresser is not within the statute, as not requiring much learning or skill, and being what every husbandman uses for his necessary occasions.

(*d*) 2 Bulst. 186. but no resolution. 2 Salk. 611. pl. 3. S. C. and denied to be law.

It is said in (*d*) 2 *Bulst.* to have been adjudged, that an upholsterer is not a trade within the statute, as not requiring (*e*) skill; but this hath been contradicted by a later (*f*) resolution, wherein it is said to have been resolved, that a (*g*) barber and taylor were trades within the statute.

(*e*) But see Roll. Rep. 10. (*f*) 1 Lev. 243. Sid. 367. pl. 4. 2 Keb. Rep. 366. pl. 19. Ventr. 346. 2 Salk. 611. pl. 3. Ld. Raym. 514. (*g*) Lev. Rep. 87. 243. 2 Lev. Rep. 206. Sid. 367. pl. 4. Ventr. 326. Keb. Rep. 411. pl. 115. *id.* 422. pl. 143.

2 Bulst. 189, 190. Roll. Rep. 10.

Also, it is said in 2 *Bulst.* that a pippin-monger is not within the statute, because there is no mystery in buying apples, and all his skill

ſkill is in ſo laying his apples as to keep them from rotting: but this likewiſe hath been doubted in a late (*a*) caſe, where it was debated, whether the uſing of the trade of a coſtermonger or (*b*) fruiterer be within the ſtatute; but there is no reſolution. Ld. Raym. 514. 2 Salk. 611. pl. 2. (*a*) 2 Lev. 206. (*b*) 3 Keb. Rep. 816. pl. 38.

Vent. 326. 346. 2 Salk 611. pl. 2. S. C. cited, and ſaid not to be reſolved.

It is clearly agreed, that the following the common trade of a brewer, baker, or cook, is within the ſtatute, as unſkilfulneſs herein may be very prejudicial to the lives and health of his majeſty's ſubjects; but it is at the ſame time agreed, that the exerciſing of any of theſe trades in a man's own houſe or family, or in a private perſon's houſe, is not within the reſtraint of the ſtatute. 11 Co. 54. a. Cro. Car. 499. Mo. 886. Hob. 183. 211. 8 Co. 129. Palm. 542. Bridgm. 141. Lit. Rep. 251.

On motion to quaſh an indictment for uſing the trade of a fellmonger, it was urged, that this was a buſineſs which required no ſkill, for that it was only to pull the wool from the ſkin; but *per Holt*, Chief Juſtice, if in the indictment it be averred to be a trade at the time of making the ſtatute, we will not quaſh it; for whether it was a trade then or no, or whether any ſkill be requiſite to the exerciſe of it, is a matter of fact proper for the trial of a jury. 2 Salk. 611.

So, the court refuſed to quaſh an indictment for uſing the trade of a ſeamſtreſs, not having ſerved as apprentice; becauſe it was ſet forth in the indictment to be a trade in *England* at the time of making the act; ſo that if this trade of a ſeamſtreſs be not within the act, the defendant will have the advantage of it on the trial. Salk. 611. pl. 2 Ld. Raym. 1189.

But it is ſaid, that the court had quaſhed an indictment for following the trade of a merchant-taylor, becauſe they did not know what was meant by it, and it ſeemed to them nonſenſe and unintelligible. 2 Salk. 611. pl. 3. The King v. Harper. 2 Ld. Raym. 1189.

A coach-maker is within this ſtatute. Vent. 346.

[It hath been objected, that the uſing of a trade in a country village, is not within the ſtatute; and in the caſe of *Rex* v. *Langley*, *H.* 6 *G.* 2. Mr. J. *Page* ſaid, he had known indictments quaſhed upon ſuch exception. It is ſaid however (*c*) by a very reſpectable author, that he doth not apprehend it would be now allowed; for, in ſuch caſe, at the ſittings at *Weſtminſter* it was mentioned, but Lord Ch. J. *Lee* made ſlight of the objection. In a ſubſequent caſe (*d*), on motion to quaſh an information againſt the defendant for exerciſing the trade of a baker without having ſerved an apprenticeſhip at the pariſh of *S.* in *Kent*, one objection was, that it did not appear on the record that the offence was committed in a city, borough, or market-town; but the court held, that neither the enacting part of the ſtatute, nor the preamble, gave any foundation for this objection, and that the offence was clearly well laid; though they ſaid, if it came out in evidence, that the defendant followed the buſineſs only in a ſmall village, it had been the common practice to find for him.] 1 Mod. 26. 2 Keb. 583. 1 Ventr. 51. (*c*) Bull. N. P. 192. (*d*) Ball v. Cobus, 1 Burr. 366.

2. What

2. What Manner of following or exercising a Trade shall be said within the Statute.

11 Co. 54. Hob. 183.

It seems agreed, that the following a trade within this statute, must be such whereby the party gets his livelihood; and that therefore the using of a trade of a brewer, baker, cook, taylor, &c., in one's own house, or in the private family of another, without any reward, is not within the statute.

Carth. 162. 2 Salk. 610. pl. 1. 3 Mod. 313. Hobs *qui tam* v. Young. Show. 241. 266. Comb. 179. Holt, 66. pl. 1. Skin. 428. pl. 5.

But in an action for using the trade of a clothier, not having been apprentice to that trade; where by special verdict it was found that *A.* was a *Turkey* merchant, and exported great quantities of *English* cloth into the *Levant*; and for this purpose *only* he hired several cloth-workers, who had been all apprentices to the same trade, and kept also a master-workman of that trade to inspect their work; and that by these men he made great quantities of *English* cloth, all which he transported; and that he the said *A.* kept a dye-house, and hired men of that trade to dye his own clothes, and no other: It was resolved to be within the restraint of the statute, though the cloth was made for his (*a*) own merchandize only, and though made by persons who had been apprentices; for here they are not traders, but hirelings, and he is the tradesman who hath all the profit, as *A.* in this case has.

(*a*) For the cloth is not confined to the use of his own family, but vended out for the sake of commerce; and whether the utterance be in England or in Turkey is not material. 2 Salk. 610. pl. 1.

Carth. 164.

So, if a man keeps journeymen shoemakers to make shoes for exportation, this is an exercising the trade (*b*) of a shoemaker within this statute.

[(*b*) But if it be an exercising of the trade by the master, it cannot be also an exercising of it by the journeyman, so as to expose him to the penalties of the statute. Beach v. Turner, 4 Burr. 2449.]

Raynard v. Chase, 1 Burr. 2. 2 Wilf. 40. S. C.

[But if a person brought up to the trade take a partner, who hath not served an apprenticeship to the trade, such partner, if he share only in the profits or loss of the business, and do not actually exercise the business, is not liable to the penalties of this act.]

Carth. 163. 1 Ventr. 51. 2 Keb. Rep. 1 Black Com. 416. Show. Rep. 242.

It hath been also holden, that this statute doth not restrain a man from using several trades, so as he had been an apprentice to all; wherefore it indemnifies all petty chapmen in little (*c*) towns and villages, because their masters kept the same mixed trades there before.

(*c*) It seems to be the better opinion, that this statute hath not abrogated the particular customs concerning trades in particular towns and villages; and that therefore a widow, by custom, may continue her husband's business; and it seems, by some opinions, she may do it without any such custom, for that the wife serves as an apprentice; but for this *vide* Cro. Car. 347. 516, 517. 2 Bulf. 187. 8 Co. 130. Palm. 541. 11 Co. 54. Noy, 5. Hutt. 131. Hob. 211. Sand. 311. Carth. 163.

Carth. 163, 164. *per* Holt. Show. Rep. 267. Comb. 179.

If a coachmaker keeps servants to make his wheels, and workmen to curry his own leather, this is against the statute, because it is he only who receives all the profits of the several trades, and the wheelwright and the currier are but his servants.

Carth. 162. cited *per* Holt, C. J.

So, in a case upon this statute, prosecuted by the Horners Company against a comb-maker in *London*, for using the trade of a horner,

horner, *viz.* in preſſing horn for making combs, which preſſing did not belong to their trade; this was adjudged a breach of the ſtatute, for a horner is a particular trade, and a very ancient company in *London*. Comb. 180. Show. Rep. 242. 1 Mod. 190.

3. What Kind of Service will be a ſufficient Qualification within the Statute.

As to this it hath been reſolved, that there is no occaſion for an actual binding, but that the following a trade for ſeven years is a ſufficient qualification within the ſtatute. pl. 7. S. P. being a hard law. Ld. Salk. 67. pl. 5. 2 Salk. 613. Raym. 738.

So, where an action was brought on this ſtatute, and upon not guilty pleaded, it appeared, that the defendant's father kept the ſame trade, and that he the defendant for ſeveral years had been employed by his father therein; it was held, that he might lawfully uſe that trade, for that he had been (*a*) *quaſi* an apprentice to it, which was ſufficient to ſatisfy the ſtatute. Carth. 163. *per cur.* Sel. Caſ. 290. pl. 227. 1 Bl. Com. 428.

(*a*) And for the like reaſon it ſeems, that a wife living with her huſband ſeven years, may after his death continue the trade; for the act does not require a man or a woman to be an actual apprentice, but the words are *tanquam* an apprentice. *Vide* the authorities *ſupra*.

So, if a man lives with another, that uſes a trade which the other is not qualified for uſing, ſeven years, he may ſet up the trade as well as if he had lived with one never ſo well qualified. Ca. Law and Eq. 78.

Alſo, it hath been held, that the ſervice need not be in any particular country; and therefore an indictment for uſing the trade of a taylor, not having ſerved an apprenticeſhip ſeven years, was quaſhed, becauſe only ſaid, not having ſerved as an apprentice *infra regnum Angliæ aut Walliam*; for it may be he did ſo beyond ſea; and if it were any where, it ſuffices. Salk. 67. pl. 2. The King v. Fox.

So, it hath been held, that ſerving five years to a trade out of *England*, and two in *England*, is ſufficient to ſatisfy the ſtatute, but that there muſt be a ſervice of a full time either in *England* or out of *England*; and therefore ſerving five years in a country, where by the law of the country more is not required, will not qualify a man to uſe the trade in *England*. Ca. Law and Eq. 70. See 3 Keb. Rep. 550. pl. 55.

[So, it hath been holden, that if any man as a maſter has exerciſed and followed any trade as a maſter without interruption or impediment for the term of ſeven years, he is not liable to be proſecuted on this ſtatute. So, if he hath worked at or followed two or more different trades for the term of ſeven years or more.] French v. Adams, 2 Wilſ. 168. Wallen v. Holton, 1 Bl. Rep. 233. If he has exerciſed a trade for ſeven years without any proſecution with effect.

4. By whom the Offence of following a Trade without a Qualification is cognizable.

This matter depends chiefly on the ſtatute 31 *Eliz.* c. 5. § 7. whereby it is enacted, "That all ſuits for uſing a trade without "having been brought up in it, ſhall be ſued and proſecuted in "the general quarter-ſeſſions of the peace, or aſſiſes of the ſame "county where the offence ſhall be committed, or otherwiſe

" inquired of, heard and determined in the aſſiſes, or general " quarter-ſeſſions of the peace for the ſame county where ſuch " offence ſhall be committed, or in the leet within which it ſhall " happen, and not in anywiſe out of the ſame county where ſuch " offence ſhall happen or be committed."

Cro. Jac. 178. Hob. 184. Salk. 373. pl. 14.

In the conſtruction hereof it hath been holden, that it reſtrains not a ſuit in the King's Bench or Exchequer, for ſuch offence happening in the ſame county where theſe courts are ſitting; for the negative words of the ſtatute are not, that ſuch ſuits ſhall not be brought in any other *court*, but that they ſhall not be brought in any other *county*; and the prerogative of theſe high courts ſhall not be reſtrained without expreſs words.

Hob. 184. 327. Cro. Jac. 85. pl. 9.

But where the offence is in a different county, ſuch ſuits in theſe, or any other courts, out of the proper county, ſeem to be within the expreſs words of the ſtatute.

Sid. 303. Keb. 584. 2 Lev. 204. Vent. 8. 364. 2 Lev. 204. Salk. 372. pl. 13. 5 Mod. 425. [See 4 Term Rep. 109.]

Yet it hath been doubted, whether an action of debt, or information in the courts of *Weſtminſter-hall*, were not to be conſtrued to be out of the meaning of the ſtatute; but it ſeems to be now ſettled, in the conſtruction of the ſtatute 21 *Jac.* 1. *c.* 4. which provides, that no action of debt or information, or other ſuit whatever, can be brought in any court of *Weſtminſter-hall* on any penal ſtatute, made before the ſaid ſtatute of 21 *Jac.* 1. for any offence therein excepted, for which the offender may be proſecuted in the country; unleſs ſuch offence ſhall be committed in the ſame county in which ſuch court ſhall ſit.

Jon. 193.

But theſe ſtatutes hinder not the removal of any indictment into the King's Bench by *certiorari*, after which it may be tried there, or in the county by *niſi prius*.

6 Mod. 220. 2 Salk. 370. pl. 2. 2 Ld. Raym. 1038. 1179. Comb. 254. 255. 1 Burr. 251.

It hath been held, that quarter-ſeſſions of boroughs may receive indictments on the 5 *Eliz.* *c.* 4. as well as thoſe of the county at large, in that there is no danger of oppreſſion, becauſe a *certiorari* lies.

[So, they may proceed by information. Cowp. 369.]

5. Of the Form of the Proceedings in order to a Conviction, for following a Trade without being qualified.

Sid. 302. pl. 9. Dring v. Reſpaſs. [(*a*) Such allegation not neceſſary. 1 Burr. 367.]

The plaintiff, in an action on this ſtatute 5 *Eliz.* *c.* 4. muſt (*a*) allege in his declaration, that the defendant did not uſe the trade at the time of making the ſtatute; for though it cannot be preſumed that he did, after ſuch a length of time, yet as the ſtatute makes him liable, and ſubjects him to a penalty; the proſecutor muſt ſhew that he has tranſgreſſed the law, and that he is entitled to his action.

2 Kel. 212. pl. 165. The King v. Briton, Paſch. 5 Geo. 2. 2 Barnard, K. B. 147. 172. S. C.

An indictment for following the trade of a *cutler*, not being an apprentice, *contra form.* 5 *Eliz.* *c.* 4. was quaſhed on demurrer; becauſe the trade of a cutler was averred to be a trade then uſed *infra hoc regnum Angliæ*, whereas this kingdom was not then ſubſiſting.

It

It has been held, that an indictment against two, or more, for following a joint-trade, without having served a seven years apprenticeship, required by the statute, is naught, in that it would be absurd to charge them jointly, because the offence of each defendant arises from the defect peculiar to himself. 5 Mod. 180. Salk. 382. 2 Roll. Abr. 81. (N), pl. 6. 2 Sef. Caf. 221 pl. 154. 1 Str. 623.

2 Ld. Raym. 1248. Vent. 302.

[In an indictment on this statute it is not necessary to specify and aver the want of other qualifications allowed by subsequent statutes, for such other qualifications or exceptions ought to be shewn by the defendant.] Rex v. Pemberton, 2 Burr. 1035. 1 Bl. Rep. 230. S. C.

(E) Of assigning and turning over Apprentices to other Masters.

THE placing out an apprentice to a particular person arises from an esteem, and a good opinion of the party to whom he is so committed, that he will not only instruct him in his trade or calling, but will also be careful of his health and safety; and therefore the law has made it such a personal trust or confidence, that the master cannot assign or transfer it over to another. The master must also have the apprentice under his own care and inspection, and cannot send him abroad, though under the pretence of improvement, unless by express agreement, and unless the nature of his business requires it, and implies such a power as that of merchant-adventurer, sailor, &c. are said to do; therefore it hath been adjudged, that a surgeon sending his apprentice a voyage to the *East-Indies*, though in company with other surgeons, and the better to instruct him in the art of surgery, was a breach of his covenant, whereby he bound himself to retain, teach, keep, and employ the said apprentice in his own house and service, &c. Hob. 234. pl. 280.

But by the custom of *London*, a freeman of *London* may turn over his apprentice to another master, being a freeman; and such second master shall have the same benefit of the apprentice's covenants, as shall the apprentice of the covenants on the side of the master, as if he had been originally bound to him. March, 3. Keb. 250.

But it hath been held, that though justices of peace have a jurisdiction of discharging apprentices, and may bind them to other masters, that they cannot turn them over (*a*); and therefore an order that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband, was quashed; because the justices have nothing to do about turning over an apprentice; and that though he applied to them, that could not give them a jurisdiction. Comb. 324. The King v. Chaplain. [(*a*) They cannot judge of an assignment, for they cannot try the validity of a deed. Rex v. Barnes, 1 Str. 48.]

[By 32 *Geo.* 3. *c.* 57. § 5. any master or mistress taking a parish apprentice under the 8 & 9 *W.* 3. *c.* 30. § 5. may, by indorsement on the indentures, or by other instrument in writing, and with the consent of two justices, testified by such justices under their

hands, assign such apprentice for the residue of the term. And by § 7. the person to whom such apprentice is intended to be assigned, shall, at the same time, on the counterpart of the indentures, &c., declare his acceptance of such apprentice, and acknowledge himself bound by the covenants in the indenture; and such master or mistress, so taking an apprentice by assignment, may, from time to time, assign such apprentice over to any other master or mistress.]

(F) Of making Apprentices free.

Sid. 107. pl. 20. 2 Show. 154. pl. 138. [By the 12 G. 3. c. 21. where

WHerever by the custom of any town, borough, &c., the serving an apprenticeship entitles the party to his freedom, the persons refusing to admit him, without sufficient (*a*) cause, may be compelled thereto by *mandamus*.

any person entitled to his freedom shall apply to the mayor, &c. to be admitted, giving notice and specifying the nature of his claim, and the mayor, &c. shall not admit him within a month afterwards, a *mandamus* shall go, and if he be admitted, the mayor, &c. shall pay costs.] (*a*) Mr. Common Serjeant said, that if a man trade upon his own account within the seven years of his apprenticeship, the chamberlain of London will not make him free, because he has not fully served an apprenticeship of seven years. 1 Ld. Raym. 383.

Lev. 91. Sid. 107. Keb. Rep. 458. pl. 57. *id.* 470. pl. 79. *id.* 659. pl. 43. T. Raym. 69. Townsend's case.

Therefore, where to a *mandamus* to the mayor, &c. of *Oxford*, to admit a person to be free of that city, who had served seven years apprenticeship; to which it was returned, that he put himself apprentice seven years according to the custom, and that he covenanted to serve seven years, and not to marry within the time, and that within the first two years he married, and so broke his covenant; and that his master accepted of him to serve for the residue of the time, which he did, but not as an apprentice, but rather as a journeyman; though it was urged, that by his breach of covenant he lost his right of freedom, yet the court held the contrary; and that though an action of covenant might lie, yet that it was no loss of his freedom; and therefore awarded a peremptory *mandamus* to admit him.

Rex v. Mayor of Lincoln, 5 Mod. 402. Carth. 448. S. C. Ld. Raym. 337. S. C. [Rex v. Turkey Company, 2 Burr. 1004. S. P.]

So, where a *mandamus* to the mayor, &c. of *Lincoln*, to admit *A.* to his freedom, he having served an apprenticeship there; and the mayor returned, that *A.* (being a Quaker), refused to take the usual oath, according to the custom of the said city, but offered to take the solemn affirmation and declaration; the court held this sufficient to entitle him to his freedom, within the statute 7 & 8 *W.* 3. *c.* 34.

6 Mod. 227. 260. [1 Ld. Raym. 382.]

Also, it is frequent for masters to bind themselves to make their apprentices free at the end of their time, which they must perform according to their covenants.

(G) How Apprentices are to be taken Care of when their Maſters happen to (*a*) die.

IT ſeems agreed, that if a man be bound to inſtruct an apprentice in a trade for ſeven years, and the maſter die, that the condition is diſpenſed with, being a thing perſonal; but if he be bound further, that in the mean time he will find him in meat, drink, clothing, and other neceſſaries, here, the death of the maſter doth not diſpenſe with the condition, but his executors ſhall be bound to perform it, as far as they have aſſets. [For there is a great difference between a covenant to *maintain*, and a covenant to *inſtruct*; the firſt is a lien upon the executor, though not named, in right of the teſtator's aſſets being come to his hands; but the other is a *fiduciary* truſt annexed to the perſon of the maſter.] Sid. 216. pl. 21. Keb. 761. 820. Lev. 177. [1 Conſt's Bott's, P. L. 524. pl. 745. Cro. El. 553.] Burn, 58.

(*a*) There ſeems to be no ſufficient clear proviſion, what ſhall be done with an apprentice upon the maſter's dying, which is a caſe which muſt needs often happen. Burn's Obſerv. 245.

But if a perſon is bound apprentice by juſtices of peace, and the maſter happens to die before the term expired, the juſtices have no power to oblige his executor, by their order, to receive ſuch apprentice, and maintain him; for by this method the executor is deprived of the liberty of pleading *plene adminiſtravit*, which he may do, in caſe covenant be brought againſt him, and muſt maintain the apprentice, whether he hath aſſets or not. Carth. 231. Salk. 66. pl. 1. Show. 405. The King v. Peck.

But it is ſaid, that in the caſe of the maſter's dying, by the cuſtom of *London*, the executor muſt put the apprentice to another maſter of the ſame trade. Salk. 66. pl. 1. 204. pl. 2. *Per* Holt,

C. J. March, 3. pl. 6. Keb. Rep. 250. pl. 15. Boh. Priv. Lond. 339, 340.

[By 32 *G.* 3. *c.* 57. § 1. if the maſter or miſtreſs of any pariſh apprentice die during the term of ſuch apprenticeſhip, upon whoſe binding no larger ſum than five pounds ſhall have been paid, the covenant in the indenture for the maintenance of ſuch apprentice ſhall not continue in force longer than three calendar months after the death of ſuch maſter or miſtreſs; during which three months the apprentice ſhall continue to live with and ſerve the executors or adminiſtrators, or with ſuch perſon as they ſhall appoint. And in all ſuch pariſh indentures of apprenticeſhip there ſhall be annexed to the covenant for maintenance, a proviſo that ſuch covenant ſhall not continue longer than three calendar months after the death of ſuch maſter or miſtreſs; but if ſuch proviſo be omitted, the covenant on the part of the maſter or miſtreſs to maintain the apprentice ſhall continue only for three calendar months after his or her death: within which three calendar months, by § 2. two juſtices of the peace where the maſter or miſtreſs died, ſhall, on the application of the widow of ſuch maſter, or the huſband of ſuch miſtreſs, or of any ſon, daughter, brother, or ſiſter, or of any executor or executrix, adminiſtrator or adminiſtratrix, of the deceaſed, by indorſement on the indenture, direct the apprentice to ſerve another maſter for the remainder of his term. And by § 3.

the ſame regulations which are above directed to take place on the death of any original maſter or miſtreſs, ſhall alſo take place on the death of any ſubſequent maſter or miſtreſs. By § 4. if no application be made to two juſtices within the three months, or if, on application, the two juſtices ſhould not think fit to continue ſuch apprenticeſhip, the indentures ſhall be void. But by § 5. this act ſhall not extend to any pariſh apprentice not living with and ſerving ſuch original or ſubſequent maſter or miſtreſs at the time of his or her death. By § 6. if the original maſter or miſtreſs, or any ſubſequent maſter or miſtreſs, or the perſonal repreſentative of ſuch maſter or miſtreſs, having aſſets, during the three months, ſhall refuſe or neglect to maintain and provide for ſuch apprentice according to the form of ſuch covenant, two juſtices, on complaint of the apprentice, or the pariſh officers, may levy ſufficient for the purpoſe by diſtreſs and ſale of the effects or aſſets of ſuch maſter or miſtreſs.]

(H) Of Servants' Wages, how recoverable.

9 Co. 88. a. b. 2 Roll. Rep. 269.

IT is clearly agreed, that if a perſon retains a ſervant, and agrees to pay him ſo much by the day, month, or year, that the ſervant may have an action againſt the maſter on the contract, or againſt his executors; and that every ſuch retainer will be preſumed to be in conſideration of wages, unleſs the contrary appears.

Brownl. 54.

So, if a man be retained in *London*, to ſerve beyond ſea, he may have his action for his wages in *England*; and lay his action in any county, in like manner as an obligation bearing date at *Roan* in *France*, may be ſued in *England*, alleging the place to be in ſuch a county where he brings his action.

Bridgm. 119.

" As to the juriſdiction of juſtices of peace herein, by the " 5 *Eliz.* *c.* 4. § 15. for the declaration and limitation what " wages ſervants, labourers, and artificers, either by the year or " day, or otherwiſe, ſhall have and receive, it is enacted, That " the juſtices of peace of every ſhire, riding, and liberty, within " the limits of their ſeveral commiſſions, or the more part of them, " being then reſiant within the ſame, and the ſheriff of that " county, if he conveniently may, and every mayor, bailiff, or " other head officer within any city or town corporate, wherein " is any juſtice of peace, within the limits of the ſaid city or " town corporate, and of the ſaid corporation, ſhall yearly at " every general ſeſſions firſt to be holden and kept after *Eaſter*, or " at ſome time convenient within ſix weeks next following every " of the ſaid feaſts of *Eaſter*, aſſemble themſelves together; and " they ſo aſſembled, calling unto them ſuch diſcreet and grave " perſons of the ſaid county, or the ſaid city, or town corporate, " as they ſhall think meet, and conferring together, reſpecting " plenty or ſcarcity of the time, and other circumſtances neceſſary " to be conſidered, ſhall have authority by virtue thereof, within " the limits and precincts of their ſeveral commiſſions, to limit, " rate, and appoint the wages, as well of ſuch and ſo many of the " ſaid

" ſaid artificers, handicraftſmen, huſbandmen, or any other la-
" bourer, ſervant, or workman, whoſe wages in time paſt hath
" been by any law or ſtatute rated and appointed, as alſo the
" wages of all other labourers, artificers, workmen, or appren-
" tices of huſbandry, which have not been rated, as they the
" ſame juſtices, mayor, or other head officers, within their ſeve-
" ral commiſſions or liberties, ſhall think meet by their diſcretions
" to be rated, limited, or appointed by the year, week, month,
" or otherwiſe, with meat and drink, or without meat and drink;
" and what wages every workman or labourer ſhall take by the
" great for mowing, reaping, or threſhing of corn and grain, or
" for mowing or making of hay, or for ditching, paving, railing,
" or hedging by the rod, perch, lugg, yard, pole, rope, or foot, and
" for any other kind of reaſonable labour or ſervice," *&c.*

In the conſtruction of this ſtatute, the following opinions have been holden:

That though the ſtatute only gives the juſtices power to ſet the rate for wages, and not to order payment; yet grafting hereupon they may now, from the frequent practice, and the indulgence the law gives to remedies for wages, order payment, as well as aſſeſs the rates. — 2 Ld. Raym. 820, 821. Forteſc. Rep. 317, 318. 6 Mod. 91. 204. 10 Mod. 68. Sef. Caſ. 35. pl. 37. Caſe of Set. and Rem. 234. 2 Salk. 441. pl. 3. 442. pl. 5. 484, 485. 3 Salk. 262. Str. 8.

That though a ſingle juſtice may compel payment, yet the power of ſettling wages is only in the ſeſſions; and that a ſingle juſtice cannot arreſt the party refuſing to pay in the firſt inſtance. — Hil. 8 G. 2. Shergold and Halloway, in B. R. 2 Stra. 1002. S. C. 2 Sef. Caſ. 100. pl. 100. S. C.

That juſtices of peace have no juriſdiction to judge of wages, except in caſe of huſbandmen; but yet the court in favour of ſervants will always, unleſs the contrary appears upon the face of the order, preſume ſervants to be ſervants in huſbandry, and will admit of no collateral proof to the contrary. — Ca. Law and Eq. 68. 6 Mod. 91.

But an order, that a perſon ſhall pay ſo much to his coachman, was quaſhed; for here it appears, upon the face of the order, that he is not a ſervant in huſbandry. — 2 Jon. 47.

And on the authority of this caſe it hath been held, that the juſtices cannot make orders for the payment of footmen, brick-layers, carpenters, *&c.* ſervants' wages; becauſe their juriſdiction is confined to the wages of ſuch ſervants, whom they may compel to ſerve according to the ſtatute — 6 Mod. 204, 205.

So, where, upon the face of the order, it appeared to be for the payment of the wages of two perſons retained by *A.*, overſeer of the works in the gardens of *Hampton-Court*, the order was quaſhed. But in this caſe it was held, that had the order been general, *viz.* to pay ſo much to two of his labourers, or two of his ſervants, the court would have ſuppoſed them ſervants in huſbandry; but that here there was no room for ſuch an intendment, ſince the contrary appeared. — 2 Salk. 442. pl. 5. 6 Mod. 204. Forteſc. Rep. 317. Caſe of Set. & Rem. 234. 2 Salk. 261. pl. 20.

So, where one *Rycraft*, a juſtice of peace in *Middleſex*, made an order for the payment of a ſeaman's wages; upon an action brought againſt him, the plaintiff recovered 30 *l.* damages. — 5 Mod. 140.

Reg. v. Cecill, 2 Ld. Raym. 1305. 11 Mod. 266. S. C.

[It hath been holden, that this ſtatute extends to covenant-ſervants, if in huſbandry.

Id. ibid.

But if the order bear upon the face of it, that it was made upon the oath of the ſervant, it will be quaſhed; for there is no neceſſity to reſort to the oath of the party in this caſe, ſince evidence may be given of the ſervice.]

(I) What Acts of the Servant are deemed the Maſter's, for which the Maſter may take Advantage.

Lit. § 433. Co. Lit. 257. b.

THERE are ſeveral acts, which, being done by a ſervant, will be equally effectual and advantageous as if done by the maſter himſelf. Hence it is held, that continual claim made by a ſervant is good; as, if he enters into a part and claims, *&c.* or if the maſter ſays, that he dares not go to any part of the land, nor approach nearer than *D.*, and commands his ſervant to go to *D.* and claim, and the ſervant does ſo; this is ſufficient, though the ſervant had no fear, for he doth as much as he was commanded to do, and all that his maſter durſt, or ought by the law, to do.

Lit. § 435. Co. Lit. 258. b.

But if the maſter be in health, and command his ſervant to go to the land and claim, *&c.*, in this caſe, a claim made by the ſervant, as near as he dares, is void; for he does not do all that he is commanded, nor ſo much as the maſter durſt have done.

Co. Lit. 258. a.

But if the maſter be ſick, or a recluſe, (one who, by reaſon of his order, cannot go out of his houſe,) and he command his ſervant to go and claim for him, and the ſervant go as near as he dares by reaſon of fear, *&c.*, this is ſufficient, though the command were to go to the land; and yet, regularly, when a ſervant doth leſs than he is commanded, his act is void; but when a ſervant exceeds his maſter's command, it is void only ſo far as he hath exceeded.

2 Roll. Abr. 5.

If a feoffment with livery be made of land, the ſervant of the owner being in poſſeſſion, the livery is void, though made with the conſent of the ſervant; for the ſervant continuing in poſſeſſion, it muſt be only for the uſe and benefit of him that placed him there, and, conſequently, the poſſeſſion of the ſervant muſt be looked upon as the poſſeſſion of the maſter; and the ſervant having no intereſt, but in right of his maſter, his conſent was void, and he could neither make a ſurrender, nor a tenancy at will, to the feoffor.

Co. Lit. 117. a.

The maſter hath an intereſt in the labour and acquiſitions of his ſervant, and his acts herein are ſaid to be for the benefit of the maſter, according to the rule, *Quicquid acquiritur ſervo acquiritur domino*; but the maſter of a hired ſervant cannot maintain trover for any property acquired by the ſervant; nor can he have any

other remedy againſt a perſon who employs him, but an action on the caſe *per quod ſervitium amiſit.*

But it is otherwiſe of an apprentice; and therefore where a waterman's widow took an apprentice, who went to ſea, and earned two tickets, which came to the defendant's hands; the widow brought trover, and had judgment; for what the apprentice gains, he gains to his maſter; and whether legally apprentice, or not, is no ways material, for it is enough if he be ſo *de facto.* Salk. 68. pl. 8. Barber and Dennis. 12 Mod. 415.

It is ſaid, that the maſter ſhall have advantage of his ſervant's contracts, in the ſame manner as he ſhall be bound by them, as to thoſe matters which come within his compaſs as a ſervant; as, where a ſervant was ſent by a maſter to a debtor, and appointed by him *ad componendum et agreandum* the money due from the debtor; and there being a promiſe made to the ſervant, to pay what was due upon the balance and agreement, it was held, that the maſter might maintain an action in his own name, on the promiſe to his ſervant. Godb. 360, 361. Seignior and Walmer.

If the ſervant is robbed of the maſter's goods, the maſter or ſervant may have an appeal. Stamf. 60. Bro. tit. Appeal, 92.

Latch, 127. S. P. and he that begins firſt ſhall recover, and prevent the other of his action. *Per* Doddridge.

If a ſervant is couzened of his maſter's money, the maſter may have an action on the caſe againſt the couzenor. Roll. Abr. 98. Cro. Jac. 223. [Where a clerk had embezzled notes and money belonging to his maſter to a conſiderable amount, which he had paid away to the defendant, in the inſurance of tickets in the lottery, which inſurance was contrary to the ſtatute of 12 Geo. 3. c. 3. § 36. it was holden, that as theſe notes and money were not paid *bonâ fide*, but for an illegal conſideration, and their identity could be traced, the maſter ſhould recover them. Clarke v. Shee, Cowp. 197.]

If a ſervant be robbed of his maſter's money, though in the abſence of his maſter, the maſter may maintain an action for it againſt the hundred. But for this *vide* tit. Hue and Cry.

(K) What Acts of the Servant ſhall be deemed the Maſter's, for which the Maſter ſhall anſwer and be bound.

THE reaſon why the acts of a ſervant are, in many inſtances, eſteemed the acts of the maſter, ariſes from the relation between a maſter and ſervant; for, as in ſtrictneſs every body ought to tranſact his own affairs; and it is by the favour and indulgence of the law, that he can delegate the power of acting for him to another, it is highly reaſonable that he ſhould anſwer for ſuch ſubſtitute, at leaſt *civiliter;* and that his acts being purſuant to the authority given him, ſhould be deemed acts of the maſter.

Therefore, if a ſervant ſells a piece of cloth, and warrants it to be good, an action of deceit lies againſt the maſter. 11 E. 4. 6.

5 Co. Pilkington's caſe. 2 Roll. Abr. 695. Cro. Eliz. 181.

So, if a man brings a horſe to a ſmith to be ſhod, and the ſervant pricks it; or if the ſervant of a ſurgeon makes the wound worſe; in both theſe caſes an action lies againſt the maſter.

9 H. 6. 53. Roll. Abr. 95. (a) If a ſervant ſells an unſound horſe, or other merchandize, in a fair, no action lies againſt the maſter, unleſs he commanded him to ſell to a particular perſon. 9 H. 6. 53. Roll. Abr. 95. S. C. Fitz. *Action ſur la Caſe*, 5. S. C. Poph. 143. and 2 Roll. Rep. 6. S. C. cited. ——But if by the command and covin of the maſter, he ſells to a particular perſon, an action lies againſt the maſter, for it is then his own ſale. 9 H. 6. 53. Roll. Abr. 95. Bridgm. 128. S. C. cited.

So, if a goldſmith makes plate, wherein he mingles droſs, ſo that it is not according to the ſtandard, and by his ſervant ſells it; an action lies againſt the maſter, becauſe it fails in the price in ſilver.

Cro. Jac. 471. 2 Roll. Rep. 28.

2 Roll. Rep. 5. 26, 27. Bridg. 125. Poph. 143. Cro. Jac. 469 Southern v Haw. (b) According to the report of this caſe in Cro. Jac. it is ſaid, that the court inclined againſt the plaintiff, principally becauſe *A.* did not order *B.* to conceal their being counterfeit.

But if *A.* being poſſeſſed of certain artificial and counterfeit jewels of the value of 168*l.*, and, knowing them to be ſuch, delivers them to *B.* his ſervant, commanding him to tranſport the ſaid jewels to *Barbary*, and to ſell them to the king of *Barbary*, or ſuch other perſon as would buy them; but (*b*) gives *B.* no charge to conceal their being counterfeit; and thereupon *B.* goes into *Barbary*, and, knowing thoſe jewels to be counterfeit, ſhews them to *C.* for good and true jewels, and affirming to *C.* that they were worth 810*l.*, deſires *C.* to ſell them to the ſaid king for 810*l.*, which money *C.* pays *B.*, and *B.* thereupon immediately returns to *England*, and pays the 810*l.* to *A.* his maſter; and after the jewels being diſcovered to be counterfeit, *C.* is impriſoned by the ſaid king, till he repays the 810*l.* out of his own effects; of all which matters *C.* gives notice to *A.*, and demands ſatisfaction, *&c.*, yet no action lies againſt *A.*, for jewels are in themſelves of an uncertain value, and *B.* was not by *A.* particularly directed to *C.*, and all that was done *quoad C.* was the voluntary act of the ſervant, for which the maſter is not bound to anſwer.

Dyer, 161. a pl. 48. 3 Mod. 3 3 S. C. cited.

King *E.* 6. ſold a quantity of lead to *A.* and appointed the Lord *North*, who was then chancellour of his court of Augmentations, to take bond for payment of the money; the Lord *North* appointed one *B.*, who was his clerk, to take the bond, which was done, who delivered it to the lord; and he delivered it back again to his clerk, in order to ſend it to the clerk of the court of Augmentations; *B.* ſuppreſſed this bond; and it was held by all the judges, that the Lord *North* was chargeable to the king; becauſe the poſſeſſion of the bond by his ſervant, and by his order, was his own poſſeſſion.

Dyer, 258. b. pl. 38. 3 Mod. 323. S. C. cited.

So, where an officer of the cuſtoms made a deputy, who concealed the duties, and the maſter, being ignorant of the concealment, certified the cuſtoms of that part of the revenue into the Exchequer, upon oath; he was adjudged to be anſwerable for this concealment of his ſervant.

So,

So, where the leſſor was bound, that the leſſee ſhould quietly enjoy; and it was found, that his ſervant by his command, and he being preſent, entered; this was held to be a breach of the condition, for the maſter was the principal treſpaſſer. 4 Leon. 123. Seaman and Browning. 3 Mod. 323. S. C. cited.

Two are conſtituted poſtmaſters-general by letters patent, purſuant to the ſtatute 12 *Car.* 2. *c.* 35. and in the patent there is a power to make deputies, and appoint ſervants at their will and pleaſure, and to take ſecurity of them in the name and uſe of the king; and that they, the poſtmaſters-general, ſhall obey ſuch orders as from time to time ſhould come from the king; and as to the revenue, ſhall obey the orders of the treaſury: and it is farther granted to them, that they ſhall not be chargeable for their officers, but only for their own voluntary faults and miſbehaviour; and this granted with a fee of 1500*l. per annum*: And *A.* having Exchequer-bills, incloſes them in a letter, directed to *B.* at *Worceſter*, and delivers it at the poſt-office at *London*, into the hands of *J. S.*, who was appointed by the poſtmaſter-general to receive letters, and had a ſalary; the letter having miſcarried, and the Exchequer-bills loſt, it was held by three judges (*a*), againſt *Holt*, C. J. that the poſtmaſters-general are not liable; and this, from the multiplicity of ſervants they are obliged to employ, and againſt whom it is impoſſible for them to ſecure themſelves, the inconſiderableneſs of the *premium*, &c. Carth. 487. Salk. 17. pl. 8. 143. 5 Mod. 455. Ld. Raym. 646. Comyns, 100. pl. 68. Lane v. Robert Cotton and Sir Thomas Frankland. 12 Mod. 482. [(*a*) This opinion of the three judges hath ſince been confirmed by the deciſion of the court of K. B., in Whitfield v. Lord Le Deſpencer, Comp. 754. in which caſe it was holden, that the poſtmaſter was liable only for perſonal neglect or miſconduct.]

It hath been held, that owners of ſhips were anſwerable to freighters for the acts of the maſters and mariners, in the ſame manner as other maſters are for their ſervants; and ſhould anſwer for their embezzlements, ſecreting of goods, &c. But this proving a great diſcouragement to trade, by the 7 *G.* 2. *c.* 15. it is provided, that for ſuch embezzlements, &c., without the owners knowledge, the owners ſhall only forfeit the value of the ſhip or veſſel, with all her appurtenances, and the full amount of the freight due, or to grow, for and during the voyage wherein ſuch embezzlement, &c. Vent. 190. 233. Raym. 220. 3 Keb. 72. 112. 135. Mod. 85. 2 Lev. 69. Morſe v. Sluce. 2 Salk. 440. pl. 1. Carth. 58. 3 Lev. 259. Boſon v. Sandford.

The acts of a ſervant are deemed the acts of the maſter, in dealing and contracting for his maſter, in thoſe things in which he has a general authority; as (*b*), if a ſervant uſually buys for the maſter on tick, and the ſervant buys ſome things without the maſter's orders, yet, if the maſter were truſted by the trader, the maſter is chargeable, though the things never came to the maſter's (*c*) uſe. Doct. & Stud. Dial. 2. *c.* 42. 2 Vern. 643. Comb. 450. 1. Ld. Raym. 224. 3 Salk. 234. pl. 4.

(*b*) Show. 95. ſo ruled upon evidence, by Holt, C. J. (*c*) That coming to the maſter's uſe, clearly implies an authority from the maſter, and ſhall charge him. Brownl. 64.

But, if a man ſends his ſervant with ready money to buy meat, or other goods, and the ſervant buys upon credit, the maſter is not chargeable. Show. 95. *Per* Holt, C. J.

So, if the maſter had forbidden the tradeſman to truſt his ſervant, this ſhall excuſe the maſter on evidence. Brownl. 64.

And

Ca. Law and Eq. 110. (a) A caſe cited between Monk and Clayton, where the act of a ſervant though out of place, bound his maſter, by reaſon of the former credit given him by his maſter's ſervice, the other not knowing that he was diſcharged.

And herein it is ſaid, that a ſervant, by tranſacting affairs for his maſter, does thereby derive a general authority and credit from him; which general authority is not liable to be (a) determined for a time, by any particular orders or inſtructions, to which none but the maſter and ſervant are privy; for that if this ſhould prevail, there would be an end of all dealing, but with the maſter.

2 Salk. 442. pl. 4. 5 Mod. 398. 6 Mod. 36. Ld. Raym. 928. Com. Rep. 738. pl. 92.

If a maſter ſends his ſervant to receive money, and the ſervant inſtead of money takes a bill, and the maſter, as ſoon as told thereof, diſagrees, he is not bound by this payment; but acquieſcence, or any ſmall matter will be (b) proof of the maſter's conſent; and that will make the act of the ſervant the act of the maſter.

Ward and Evans, & *vide* 10 Mod. 109, 110. 11 Mod. 72. (b) If a merchant's apprentice draws a bill in this manner, *I promiſe to pay ſuch a ſum for my maſter*; to charge the maſter with this note, it is ſaid, there ought to be either an authority precedent, or a conſent ſubſequent; or that the maſter had intruſted him with his affairs; otherwiſe the maſter ſhall not be chargeable. Comb. 450. Ld. Raym. 224. 3 Salk. 234. pl. 4.

Salk. 282. pl. 11. ruled by Holt at *niſi prius*, and the plaintiff nonſuited accordingly. (c) That if a carrier's porter receives goods, the carrier ſhall be liable. Comb. 118. *Per* Dolben, Juſtice.

If *A.* brings caſe againſt the maſter of a ſtage-coach, on the cuſtom of the realm, for a trunk loſt by his negligence; and on evidence it appears, that the trunk was delivered to the ſervant who drove the coach, who promiſed to take care of it, and that the trunk was loſt out of his poſſeſſion; the action does not lie againſt the maſter; for a ſtage-coachman is not within the cuſtom as a (c) carrier is, unleſs he take a diſtinct price for the carriage of goods, as well as perſons; and though money be given to the driver, yet that is a gratuity, and cannot bring the maſter within the cuſtom; for no maſter is chargeable with the acts of his ſervant, but when he acts in execution of the authority given by his maſter; and then the act of the ſervant is the act of the maſter*.

——* Moſt, if not all, ſtage coaches now carry goods for hire, and therefore come within the deſcription of carriers.

2 Salk. 441. pl. 2. *per* Holt, C. J. at *niſi prius* at Guildhall. Ld. Raym. 738. Caſ. temp. Holt, 642. pl. 3.

The maſter muſt alſo anſwer for torts and injuries done by his ſervant, in execution of his authority; as, where a pawnbroker's ſervant took a pawn, the pawner came and tendered the money to the ſervant, who ſaid, he had loſt the goods; upon which the pawner brought trover againſt the maſter, and it was held well.

2 Salk. 441. pl. 2. cited Ld. Raym. 739.

So, where a ſervant of *A.* with his cart run againſt another cart, wherein was a pipe of ſack, and overturned the cart, and ſpoiled the ſack; it was held, that an action lay againſt *A.*

2 Salk. 441. pl. 2. cited. Ld. Raym. 739. Vent. 295. 2 Lev. 172. 3 Keb. 650. Michael and Aleſtree.

So, where a carter's ſervant run his cart over a boy; it was held, the boy ſhould have his action againſt the maſter, for the damage he ſuſtained by his negligence.

So, where the ſervant of *A.* brought a coach and two ungovernable horſes of his maſter's to *Lincolns-Inn-Fields*, a place much frequented by people, and there drove them to make them tractable, and fit them for a coach; and the horſes being unruly, and for want of care, &c., run upon the plaintiff, and hurt and wounded him;

him; in an action brought both againſt the maſter and ſervant, it was held, that it well lay; and that it ſhall be intended the maſter ſent the ſervant to train the horſes there.

[It was lately ruled on the authority of the precedent in *Turberville* v. *Stampe*, 1 *Ld. Raym.* 264. 3 *Ld. Raym.* 375. that a declaration charging the *maſter*, the defendant, with having negligently driven his cart againſt the plaintiff's horſe, was ſupported by evidence, that the *ſervant* drove the defendant's cart.] Brucker v. Fromont, 6 Term Rep. 659.

(L) For what Acts of his ſhall the Servant himſelf anſwer to others.

IF a maſter command his ſervant to do what is lawful, and he miſbehave himſelf, or do more, the maſter ſhall not anſwer for his ſervant, but the ſervant for himſelf, for that it was his own act; otherwiſe it would be in the power of every ſervant to ſubject his maſter to what actions or penalties he pleaſed. Skin. 228. pl. 7.

And on this foundation it hath been ruled, that if a man command his ſervant to do a lawful act, as to pull down a little wooden houſe, (wherein the plaintiff was, and would not come out, and which was carried upon wheels into the land, to trick the defendant out of poſſeſſion,) and bid him take care that he hurt not the plaintiff; if, in doing this, the ſervant hurt the plaintiff, in treſpaſs of aſſault and wounding brought againſt the maſter, he may plead not guilty, and give this in evidence; for that he was not guilty of the wounding, and the pulling down the houſe was a lawful act. Skin. 228.

But it is laid down as a rule, that, in every caſe where the maſter has not power to do a thing, whoever does it by his commandment is a treſpaſſer as well as the maſter. 8 E. 4. 45. *Per* Choke.

If a maſter locks a man into his houſe, and delivers the key to his ſervant, if the ſervant be ignorant that any body be there, the ſervant is not chargeable; but if he know that the maſter had impriſoned one tortiouſly, and he ſtill kept him in priſon, he is liable to an action. 22 E. 4. 45. *Per* Jenny.

If the ſervant of a taverner ſells wine that is corrupted (*a*), knowing it to be ſo, no action of deceit lies againſt the ſervant, for he did it but as a ſervant. Roll. Abr. 95. (*a*) If the attorney in an action of debt knows of, and was witneſs to, a releaſe of the debt, made before the action brought for it; yet no action lies againſt the attorney, for he acted only as a ſervant, and in the way of his calling. [*Sed. qu.*] Mod. 209.

If the ſervant of *A.* leaſe lands to another for years, reſerving a rent to *A.*, and, to perſuade the leſſee to accept thereof, he promiſe, that he ſhall enjoy the land, during the term, without incumbrances; if the land be incumbered, *&c.*, the leſſee may have an action on the caſe againſt the ſervant, becauſe he made an expreſs (*b*) warranty. Roll. Abr. 95. 2 Roll. Rep. 270. Broking v. Came. (*b*) If one command his ſervant to ſell an ill horſe, and the ſervant ſell him for a good one, whereby the ſervant is arreſted and indamaged; yet the ſervant ſhall not have his remedy againſt his maſter. Cro. Jac. 471. * *Qu.* If the ſervant did not know it was an ill horſe?*

If

Yelv. 137. Talbot v. Godbolt. (a) Whether he who speaks for or fetches goods for his master, without any particular promise of paying for them, is liable to pay for them; and where, upon the circumstances of such a case, though he may be held liable at law, a court of equity will relieve; *vide* Preced. Chan. 46. Abr. Eq. 308.

If a man draws a bill, to which he puts his seal in this form? *Memorandum, That I have received of* J. S., *to the use of my master, the sum of* 40*l.*, *to be paid at* Michaelmas *following*; the servant is liable hereby, for though in the premises it is said to be to the use of his master, yet the payment being indefinite, must be understood to be by him who sealed the bill: but it is said, that if it had been to be repaid by his master, that (a) the servant had not been liable.

Mich. 7 G. 2. in B. R. Thomas v. Bishop. 2 Kel. 136. pl. 116. S.C. 2 Barnard. K. B. 320. S. C. 2 Stra. 955. S. C.

So, Mr. *Mildmay*, agent to the *York Buildings* Company, residing in *Scotland*, drew a bill of exchange in favour of *J. S.*, on their cashier in *London*; which bill run thus: "To —— *Bishop*, Cashier to the "Honourable Governor and Assistants of the *York Buildings* Com-"pany, at their house in *Winchester-street*. Sir, pray pay to *J. S.*, or "his order, 200*l.*, and place it to the account of the Company for "value received, as *per* advice, by your humble servant, *Charles* "*Mildmay*." The letter of advice referred to, was directed to the governor and company, informing them of the draught made upon Mr. *Bishop*, in favour of *J. S.* (but it did not appear that this was the usual method of drawing bills on the company); Mr. *Bishop* accepted the bill generally, *viz.* Accepted by *J. Bishop*; and if this acceptance should charge him in his own right, was the question? It was saved for the judgment of the court, after a verdict at *nisi prius* for the plaintiff; and it was resolved it should.

(M) For what Acts of his shall the Servant answer, and be responsible to his Master: And herein,

1. Where by an implied Trust or Confidence a Servant shall answer in a Civil Action.

8 Co. 84. & *vide* tit. Bailment.

IF a man commits money to his servant to carry to such a place, and he is robbed, the servant shall not answer for it; for a servant only undertakes for his diligence and fidelity, and not for the strength and security of his defence, and therefore shall not be obliged to preserve his master's property at all adventures. And herein the law, as now settled, makes a difference between a servant and another independent person; for every other person has naturally no more than the single care of his own affairs; and is not bound in point of duty to defend or intermeddle with the property of another; but where he will officiously create to himself such an undertaking, he is obliged to answer the loss, if any happen; but a servant is, by the duty of his place, under the command of his master, and is bound, in point of necessity, to take care of another's affairs. Now the first contract, whereby he becomes a servant, implies no more than an undertaking for his care and obedience; and whenever he afterwards intermeddles in the affairs

affairs of his maſter, it is but in conſequence of that original contract, and therefore cannot be extended any further; and ſince, when he firſt contracted, it was no more than an undertaking for his own care and fidelity, whenever he intermeddles with his maſter's affairs, it is under that general undertaking, and, by conſequence, he cannot be charged but for deficiency, in point of care, or of faithfulneſs; and therefore is not anſwerable for any inevitable accident.

But if *A.* is employed by *B.* to ſail from *England* to the *Indies*, and *A.* covenants, that he or his ſervants will not thence import any callicoes, *&c.*, and *A.* retains *C.* as his ſervant in this voyage, and acquaints him with the covenants, and notwithſtanding *C.* falſely and fraudulently brings thence certain callicoes, *&c.*, *A.* ſhall have an action againſt *C.*, for though no action lies by a maſter for the bare breach of his command, yet, if a ſervant does any thing falſely and fraudulently, to the damage of his maſter, an action will lie. Sid. 298. Lev. 188. 2 Keb. 88. Huſſey and Pacey.

So, if a merchant's ſervant takes his maſter's goods that are arrived at a port in *England*, and, before payment of the cuſtoms, lands them, *per quod* the goods are forfeited and ſeiſed by the king; the maſter may have an action of treſpaſs upon the caſe againſt his ſervant. Roll. Abr. 105. Cro. Jac. 265. Lane, 65. S.C. Leveſon v. Kirk.

So, if a ſervant, that drives his maſter's cart, by his negligence ſuffers the cattle to periſh, an action upon the caſe lies againſt him. 7 H. 4. 14. Bro. tit. *Action ſur Caſe*, 34.

If a man deliver a horſe to his ſervant to go to market, or a bag of money to carry to *London*, which he neglects to do, the maſter may have an action of account or detinue againſt him. 21 H. 4. 14. Moor, 248.

A maſter ſends his ſervant, that uſed to tranſact affairs of that nature for him, on *Saturday* morning with a note drawn upon Sir *Stephen Evans*, with order to get from Sir *Stephen* either Bank-bills or money, and turn them into Exchequer-notes; but the ſervant having other buſineſs of his maſter's upon his hands, to ſave himſelf the time and trouble of going to Sir *Stephen*, goes to *B.* and prevails with him to give him a Bank-bill for Sir *Stephen*'s note, and then in purſuance of his maſter's orders inveſted it in Exchequer-notes, which he brought to his maſter, not letting him know but that he had gone to Sir *Stephen*; Sir *Stephen Evans* failing on the *Monday* following, it was adjudged, that this loſs ſhould fall on the maſter, and not on *B.*; and the court was of opinion, that the maſter could not recover it of the ſervant, the loſs being occaſioned by a mere accident, and not by either folly or negligence. 10 Mod. 109. Nixon v. Brohan.

2. Where Servants or Apprentices ſhall be puniſhed criminally, for Acts done in relation to their Maſters.

At common law, a ſervant or apprentice, without any regard to age, might be guilty of felony in felonioufly taking away the goods of their maſter, though they were goods under their charge, as a ſhepherd, butler, *&c.*, and may at this day for any ſuch offence Hale's Hiſt. P. C. 505. 666.

offence be indicted, as for a felony at common law; but at common law, if a man had delivered goods to his servant to keep or carry for him, and he carried them away *animo furandi*; this was considered only a breach of trust, but not felony.

But now by the statute of 21 *H.* 8. *c.* 7. it is enacted, "That "all and singular servants, to whom any caskets, jewels, money, "goods, or chattels, by his or their masters or mistresses, shall "from henceforth be delivered to keep, that if any such servant "or servants withdraw themselves from their masters or mis-"tresses, and go away with the caskets, jewels, money, goods, or "chattels, or any part thereof, to the intent to steal the same, "and defraud his or their masters or mistresses thereof, contrary "to the trust and confidence to him or them put by his or their "masters or mistresses, or else being in the service of his or their "masters or mistresses, without any assent or commandment of his "master or mistress, embezzle the same caskets, jewels, money, "goods, or chattels, or any part thereof, or otherwise convert the "same to his own use, with like purpose to steal it; that if the "said casket, jewel, money, goods, or chattels, that any such "servant shall go away with, or which he shall embezzle, with "purpose to steal as aforesaid, be of the value of 40*s.* or above, "that then the same false, fraudulent, or untrue act and "demeanor, shall from henceforth be deemed and adjudged "felony, *&c.* Provided it extend not to *apprentices*, nor to any "person under the age of *eighteen* years; but every such appren-"tice, or person within that age, doing that act, shall be, and "stand in the like case, as they were before the making of this "act."

Hale's P. C. 666-7.

By the act of 27 *H.* 8. *c.* 17. clergy was taken away in this case, if the indictment were laid specially upon the act of 21 *H.* 8. *c.* 7. and pursuant to the same, and by the act 28 *H.* 8. *c.* 2. this act of 21 *H.* 8. *c.* 7. was made perpetual; but by the act of 1 *E.* 6. *c.* 12. these acts were both repealed; but again, by the act of 5 *Eliz.* *c.* 10. § 3. this act of 21 *H.* 8. *c.* 7. was re-enacted and made perpetual; but it did not revive the act of 27 *H.* 8. *c.* 17. for taking away clergy. But now by 12 *Ann.* *c.* 7. clergy in such case is taken away from facts committed in any house or out-house, except as to apprentices under the age of *fifteen* years robbing their masters.

In the construction of this statute the following opinions have been holden:

Hawk. P. C. c. 33. § 12.

1. That it extends only to such as were servants to the owner of the goods both at the time they were delivered, and also at the time when they were stolen.

Dyer, 5. pl. 2, 3. 3 Inst. 105. Hawk. P. C. c. 33. § 23. (*a*) Or the master's wife, she being as well his mistress as if she were

2. That it is strictly confined to such goods as are delivered *to keep*; and therefore that a receiver, who having received his master's rents, runs away with them, or a servant, who being intrusted to sell goods, or to receive money due on a bond, sells the goods, *&c.* and departs with the money, is not within the statute; but that a servant who receives his master's goods from another (*a*) servant, to keep for the master, is as much guilty as if he had received

received them from the maſter's own hands; becauſe ſuch a delivery is looked upon as a delivery by the maſter. ſole. Hal.'s Hiſt. P. C. 668.

3. That it includes not the waſting or conſuming of goods, howſoever wilful it may be; nor the taking away of an obligation, or any other bare *choſe in action*. Hawk. P.C. c. 33. § 14.

4. That it extends not to the taking of ſuch things, whereof the actual property is not in the maſter at the time; and therefore, that if a ſervant having money or corn, *&c.* delivered to him, melt down the money of his own head, without the command of his maſter, into a piece of plate, or turn the corn into malt, and then run away with them, that he is not within the ſtatute; becauſe the property of theſe things is ſo far changed, by altering them in ſuch a manner, that they cannot be known again, and the maſter cannot afterwards take them, without being a treſpaſſer. But it is agreed, that if a ſervant make a ſuit of clothes of cloth, or a pair of ſhoes * of leather, delivered to him by the maſter, and then run away with them, that he is not within the ſtatute; becauſe the property is no way altered; and even in the firſt caſe, *Hawkins* ſeems to be of opinion, that the taking of the plate and malt is within the ſtatute; and that the whole act of the ſervant, taken together, ſhould be deemed a converſion of the maſter's goods to his own uſe, with an intent to ſteal them, which brings it within the expreſs letter of the ſtatute; on which foundation it hath been reſolved, that a ſervant who changes his maſter's money from ſilver to gold, and then runs away with it, is within the ſtatute. Cromp. 50. Dalt. c. 102. Hawk. P. C. c. 33. § 15.

* How can a pair of ſhoes be within the ſtatute, if the leather was not of the value of 40*s.* which is not very probable?

[By 15 *G.* 2. *c.* 13. § 12. "if any officer or ſervant of the "Bank of *England*, being intruſted with any note, bill, dividend, "warrant, bond, deed, or any ſecurity or effects of any other "perſon lodged or depoſited with the ſaid company, or with him "as an officer or ſervant of the ſaid company, ſhall ſecrete, embezzle, or run away with the ſame, or with any part thereof, he "ſhall ſuffer death without benefit of clergy."

By 5 *G.* 3. *c.* 35. § 17. and 7 *G.* 3. *c.* 50. "if any deputy, clerk, "agent, letter-carrier, poſt-boy, or rider, or any other officer or "perſon whatſoever, employed in receiving, ſtamping, ſorting, "charging, carrying, conveying, or delivering letters or packets, "or in any other buſineſs relating to the poſt-office, ſhall ſecrete, "embezzle, or deſtroy any letter, packet, or bag of letters, which "he ſhall be intruſted with, or which ſhall have come to his "poſſeſſion, containing any bank-note, bank poſt-bill, bill of exchange, Exchequer-bill, South-ſea or Eaſt-India bond, dividend warrant, navy, or victualling, or tranſport bill, ordnance "debenture, ſeaman's ticket, ſtate-lottery ticket or certificate, "Bank receipt for payment on any loan, note of aſſignment of "ſtock in the funds, letter of attorney for receiving annuity or "dividends, or for ſelling ſtock in the funds, or belonging to any "company, ſociety, or corporation, or of the Bank, South-ſea, "Eaſt-India or any other company, or ſociety, or corporation, "*American* provincial bill of credit, goldſmith's or banker's letter "of credit, or note for or relating to the payment of money or

"other

" other bond or warrant, draught, bill, or promiſſory note what-
" ſoever for the payment of the money, or ſhall ſteal and take any
" of the ſame out of any letter or packet that ſhall come to his
" poſſeſſion, he ſhall ſuffer death without clergy."

By 7 *Ja.* 1. *c.* 7. and 17 *G.* 3. *c.* 56. "perſons employed in the
" hat, woollen, linen, fuſtian, cotton, iron, leather, fur, hemp,
" flax, mohair, ſilk, or dying manufactures, who ſhall embezzle
" or clandeſtinely dye any of the materials with which they are
" intruſted, and any perſons who ſhall knowingly buy, ſell, pawn,
" or diſpoſe of the ſame, ſhall be liable to be puniſhed by fine,
" whipping, and impriſonment."]

(N) Of the Maſter's Authority over his Servant, and how far he may correct and puniſh him.

38 H. 6. 25. Sid. 175. (*a*) It is ſaid, that the maſter in his juſtification muſt ſet forth the retainer, the place where, and in what buſineſs, being matters iſſuable. Sid. 177. (*b*) Where the plaintiff replied *non moderate caſtigavit*, held well, though not ſo pertinent an iſſue as *immoderate caſtigavit*. Vent. 70. Sid. 444. 2 Keb. 623.

IT is clearly agreed, that a maſter may correct and puniſh his ſervant in a reaſonable manner for abuſive language, neglect of duty, *&c.*, and that in an action of aſſault and battery brought againſt him, he may juſtify, that he was (*a*) his ſervant, gave provoking language, *&c.*, and that therefore *moderate caſtigavit;* and on iſſue of (*b*) *immoderate caſtigavit*, if it appears in evidence, that the puniſhment was ſuch as is uſual from maſters to their ſervants, the maſter will be acquitted.

2 Mod. 167. 8 Mod. 120. 218. 330. 2 1 H. 6. 26. 2 Inſt. 316. * He ſhou'd have pleaded not guilty to the wounding, and now in ſuch caſe, by virtue of the ſtat. 4 Ann. c. 16. § 4. the defendant may plead double, not guilty to the whole, and juſtify as to a part of the treſpaſs.

But as ſuch correction muſt be moderate, it has been held, that the maſter cannot juſtify wounding his ſervant; as, in aſſault, battery, wounding, and impriſonment, *&c.*, defendant juſtifies, for that he and the plaintiff were ſervants to the ſheriff of *Suffolk;* and that the plaintiff, when he ſhould have been attending in court, was at a conventicle; and that he, by command of the ſheriff, *leviter & molliter manus impoſuit* upon the plaintiff, and brought him thence; which is the ſame treſpaſs, *&c.* On demurrer to this plea it was held ill; becauſe as to the wounding * he ſays nothing at all, and in that he cannot juſtify.

2 H. 4. 4. 21 H. 4. 75. 9 Co. 76. a. 2 Mod. 167.

Alſo it hath been held, that, though a maſter may beat his ſervant, yet he cannot delegate that power to another; for though a lord might beat his villein, either with cauſe or without, and he could have no remedy, yet if another by his command did it, the villein might have had an action.

Hale's Hiſt. P. C. 454.

From this authority which a maſter hath over his ſervant, it is held in law, that if a maſter deſigneth moderate correction to his ſervant, and accordingly uſeth it, and the ſervant, by ſome misfortune, dieth thereof, this is not murder, but *per infortunium;* becauſe the law alloweth him to uſe moderate correction; and therefore the deliberate purpoſe hereof is not *ex malitiâ præcogitatâ.*

But if the maſter deſign an immoderate or unreaſonable correction, either in reſpect of the meaſure, or manner, or inſtrument thereof, and the ſervant die thereof; this *per* (*a*) *Hale* cannot be excuſed from murder, if done with deliberation and deſign; nor from manſlaughter, if done haſtily, paſſionately, and without deliberation; and herein, ſays he, conſideration muſt be had of the manner of the provocation, the danger of the inſtrument which the maſter uſeth, and the age or condition of the ſervant that is ſtricken; and the like of a ſchoolmaſter towards his ſcholar.

(*a*) 1 Hale's Hiſt. P. C. 454. And *per* Hawkins, where a ſchool-maſter in correcting his ſcholar, or a father his ſon, or a maſter his ſervant, or an officer in whipping a criminal condemned to ſuch puniſhment, happens to occaſion his death, if ſuch perſons in their correction be ſo barbarous as to exceed all bounds of moderation, and thereby cauſe the party's death, they are guilty of manſlaughter at the leaſt; and if they make uſe of an inſtrument improper for correction, and apparently endangering the party's life, as an iron bar, or ſword, &c., or kick him to the ground, and then ſtump on his belly and kill him, they are guilty of murder. Hawk. P. C. c. 29. §5. for which are cited Bracton, lib. 1. c. 4. H. P. C. 31. Cromp. 28. Dalt. c. 96. Keilw. 136. Kelyn. 65. 5 Mod. 287. Foſt. Cr. Law, 262.

(O) Of the Maſter's Remedies againſt others for enticing away, and other Injuries done in relation to his Servant.

IT is clearly agreed, that from the intereſt a maſter has in the labour and ſervice of his ſervant, he may maintain an action for inciting (*b*) or taking him away. 21 H. 6. 31. pl. 18.

(*b*) But it is ſaid, that for taking away a man's ſervant out of his actual ſervice, treſpaſs will lie; but that for enticing him, only an action on the caſe. Salk. 380. pl. 17. 2 Ld. Raym. 1116.—[Treſpaſs will lie for enticing him away; and this though he be only a journeyman. Hart v. Aldridge, Cowp. 54.]

Alſo, if without any enticement a ſervant leave his maſter, without licence or juſt cauſe, and *J. S.* knowing him to be his ſervant, retain him, an action lies. Noy, 10. 106. Leon. 240. Keilw. 180. 2 Lev. 63.

But it hath been held, that an indictment does not lie for enticing away a ſervant, being a private injury, which may be redreſſed by civil action. Salk. 380. pl. 17. 3 Salk. 191. pl. 21. 6 Mod. 99. 182. 289. 2 Ld. Raym. 1116. The Queen v. Daniel.

In caſe the plaintiff declared, that *J. S.* 19 *Sep.* 16 *Car.* 2. was retained as an apprentice to ſerve the plaintiff for nine years, and continued in his ſervice till the 31ſt of *October* 21 *Car.* 2. when the defendant procured the ſaid *J. S.* to leave the plaintiff's ſervice, &c. (*c*) *per quod* the plaintiff *totum proficuum quod ratione ſervitii præd.* J. S. *per totum reſiduum termini recipere potuiſſet totaliter perdidit*, &c. and after (*d*) a verdict for the plaintiff, and general damages given, though it appeared the term was not expired, it was intended that damages were given for all the term, as well the time to come as paſt; for the damages muſt be intended to be taxed according to the declaration; and if it ſhould be intended otherwiſe, it would be uncertain to what time they were taxed, whether to the exhibition of the bill, or verdict given; and judgment arreſted accordingly. T. Raym. 200. 2 Saund. 169, 170. Lev. 299. Hambleton v. Veere.

(*c*) The plaintiff declared for a battery of his ſervant, 19 Jan. &c., *per quod* he loſt his ſervice for a long time, viz. for the ſpace of ſix months then next following, &c. After a verdict for the plaintiff, though the original bore *teſte* before the end of the ſix months, yet the plaintiff had his judgment; for the viz. was more than needed, being not of the ſubſtance of the action, but for aggravation of damages only. Hob. 284. All. 23. *per cur.*; but yet *vide* Cro. Jac. 619. Yelv. 94. (*d*) Where upon a demurrer it may be helped, for the plaintiff may take damages for the departure only. Mod. 271. pl. 22.

And. 13. 9 Co. 113. 10 Co. 131. Style, 94. 2 Bulſt. 158. Sid. 175.

For the battery of a ſervant, the maſter as well as ſervant may bring an action, and each ſhall recover damages, for both are injured; the ſervant in his perſon, and the maſter (*a*) by the loſs of his ſervant's labour; and therefore a recovery in an action brought by one of them, cannot be pleaded in bar to an action brought by the other.

(*a*) And as it is this that entitles the maſter to his action, he muſt always declare *per quod ſervitium amiſit*. Cro. Jac. 618. Roll. Rep. 393. —— And therefore the defendant may plead not guilty, and give it in evidence, that he did not loſe his ſervice. 2 Roll. Abr. 682.

Yelv. 89, 90. Brownl 205. 2 Roll. Abr. 568. 1 Salk. 11.

But if a man beats another's ſervant to that degree that he dies thereof, the maſter loſes his action, and muſt proceed by indictment; for the private injury to him is drowned in the general injury to the publick.

Roll. Abr. 98. Roll. Rep. 124. 2 Bulſt. 332.

If a ſurgeon, in conſideration of a ſum of money, undertakes to cure my ſervant of a hurt, and he applies unwholeſome medicines thereto, on purpoſe to make the wound worſe, by which I loſe the ſervice of my ſervant for a long time, I may have an action on the caſe againſt the ſurgeon.

3 Burr. 1878. 3 Wilſ. 18. 2 Term Rep. 166.

[If a daughter, who is under age, and lives with her father, be ſeduced, the father may maintain an action againſt the ſeducer to recover a compenſation for the loſs of her ſervice; and he may do ſo, whatever be her age, if ſhe lived with him at the time, and acts of ſervice be proved: and the ſlighteſt acts of ſervice will ſuffice.]

(P) What a Maſter or Servant may juſtify doing in each other's Defence.

Hale's Hiſt. P. C. 484.

FROM the relationſhip between a maſter and ſervant it hath been agreed, that a maſter killing a perſon in defence of his ſervant, or a ſervant in defence of his maſter, are not guilty of murder, and that in thoſe caſes, the act of the aſſiſtant ſhall have the ſame conſtruction, as the act of the party aſſiſted ſhould have had, if it had been done by himſelf.

2 Roll. Abr. 546. Owen, 151. *Cont.* Salk. 407. pl. 2.

Alſo, a ſervant may juſtify an aſſault in defence of his (*b*) maſter; and by ſome opinions, ſo may a maſter in defence of his ſervant; but others hold that he cannot; becauſe in ſuch caſe he may have an action *per quod ſervitium amiſit*.

(*b*) But he cannot juſtify in defence of his maſter's ſon, becauſe not ſervant to him. Dalt. c. 72. Crompt. 156. Nor in defence of his maſter's goods. 2 Lutw. 1481.

Roll. Abr. 687. 2 Brownl. 276.

A ſervant ſhall not avoid a deed made by dureſs to his maſter, nor *vice verſâ*.

Bro. Maintenance, 6. 14. 2 Roll. Abr. 116. Moor, 814.

As to a maſter's maintaining a ſervant, or a ſervant his maſter, in ſuits and legal proceedings, it is agreed, that a maſter may go along with his ſervant, or with his domeſtick chaplain, to retain counſel: alſo, he may pray one to be of counſel for him, and may go with him, and ſtand with him, and aid him at the trial, but ought not to ſpeak in court in favour of his cauſe: alſo, if the ſervant be arreſted, the maſter may aſſiſt him with money to keep him from priſon, that he may have the benefit of his ſervice; but the maſter cannot ſafely lay out money for the ſervant in a real action, unleſs

unleſs he have ſome of his wages in his hand; but theſe, with the ſervant's conſent, he may ſafely diſburſe.

As to a ſervant's maintaining his maſter, it is agreed, that a perſon retained generally as a ſervant, and not for a particular occaſion only, may lawfully ride about to ſpeed his maſter's buſineſs; and may go to counſel for him, and ſhew his evidence to the counſel, or to the jury, and ſtand by him at a trial; but cannot lawfully lay out his own money in the ſuit. Hetl. 79. 2 Roll. Abr. 116. Keilw. 50.

Merchant and Merchandize.

[THE protection of trade was very early a favourite object of the laws of this country. In the time of King *Athelſtan* we find a very remarkable law, which ſays, that any merchant who has made three voyages upon his own account, beyond the *Britiſh* channel, or narrow ſeas, ſhall be entitled to the privilege of a thane. *Et ſi mercator tamen ſit, qui per trans altum mare per facultates proprias abeat, ille poſtea jure thani ſit dignus.*] Wilkins Angl. Sax. Leg. Judicia Civitatis Lond. p. 71.

It ſeems agreed too, from the fundamental principles of our government, that the king cannot regularly prohibit trade, nor lay a penny impoſition on it; but that every man may uſe the ſea, and trade with other nations, as freely as he may uſe the air.

And this freedom of trade is not only allowed by the common law, but hath alſo been aſſerted and eſtabliſhed by the care and wiſdom of princes and parliaments; and to this purpoſe it is provided by *magna charta*, *c.* 30. That (*a*) all merchants, (*b*) if they were not openly prohibited before, ſhall have their ſafe and ſure conduct to depart, come and carry, buy and ſell, without any manner of evil tolts, by the old and rightful cuſtoms, *&c.*

(*a*) This reſpects aliens only; which ſtrongly proves that the Engliſh had this liberty before; o herwiſe they would not have extended it to aliens, and left the Engliſh without it. 2 Inſt 57. (*b*) This prohibition muſt be by act of parliament, becauſe it concerns the whole realm, which is implied in the word *openly*, and relates to aliens only. 2 Inſt. 57.

But notwithſtanding this freedom of trade, yet it ſeems agreed, that the king may in time of war, and for the publick ſervice and ſafety, lay an embargo on ſhips, and employ the ſhips of his ſubjects in the publick ſervice; but this, ſays my Lord Chief Juſtice *Holt*, ought to be upon great emergencies, and for the publick benefit, and not for the private intereſt of any perſon or ſociety: alſo it ſeems agreed, that the king may, by his writ of *ne exeat regno*, retain a ſubject from going out of the realm; and may by his privy ſeal command any of his ſubjects to return out of a foreign nation, on pain of having their lands ſeiſed, *&c.* It hath likewiſe been holden, that the king by his prerogative may reſtrain his ſubjects from trading with an infidel nation, ſtate, or people, Skin. 335. 3 Lev. 352. 4 Mod. 176. Sands v. Child and Lynch.

without his licence; and on this foundation principally it was held, in the case of *Sands* and *The East-India Company*, that the king's charter, which gave them an exclusive right to trade to the *East-Indies*, was good. But this doctrine seems now exploded, for nothing can exclude the subject from trade, but an act of parliament.

2 Roll. Rep. 113. Yelv. 135. 3 Mod. 226-7. Show. 127. Molloy, 418.

And as the freedom of trade and merchandize is supported by the common law, so likewise are there certain customs (*a*) and privileges annexed thereto by the common law, of which the judges will take notice *ex officio*. But these privileges are not to be extended (*b*) to every one who buys and sells; nor is he from thence, says *Molloy*, to be denominated a merchant, which appellation peculiarly belongs to him who trafficks in the way of commerce by importation or exportation; or otherwise, in the way of emption, vendition, barter, permutation, or exchange; and who makes it his living to buy and sell, and that by a continued assiduity, or frequent negotiation in the mystery of merchandizing; but those, who buy goods to reduce them by their own art or industry into other forms than formerly they were of, are properly called artificers, not merchants.

[(*a*) These customs were first established to supply the want of laws, and afterwards admitted as laws.]

(*b*) There are four sorts of merchants, *viz.* merchants adventurers, merchants dormant, merchants travelling, and merchants residents. 2 Brownl. 99. *per* Coke.——But it is said, that a merchant includes all sorts of traders, as well and as properly as merchant adventurers; and that a merchant taylor is a common term. 2 Salk. 445. *per* Holt; & *vide* head of Bankrupts.

Carth. 82. 2 Vent. 293. Show. 127. Comb. 45. Sarfield v. Witherly.

It hath been adjudged, that a gentleman who is abroad on his travels, and draws a bill of exchange, makes himself a merchant within the custom as to this special purpose, to make him responsible to the party upon non-payment; and this the rather from the inconveniences that might ensue, and the suspicion that might increase amongst foreign merchants upon bills of exchange, if persons who took upon themselves to draw such bills should not be liable to the payment thereof.

But as the laws and customs of merchants are of various kinds, and most of them chiefly known (*c*) to merchants themselves, we shall here only insert what we find in our law-books relating to the following heads:

(*c*) The custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice; and if any doubt arise to them about the custom, they may send to the merchants to know their custom, as they may send for the civilians to know their law. Winch. 24.——May direct an issue for trial of a custom among merchants. Hard. 486.——* The law of merchants cannot be proved by witnesses, for it is the law of the land. Pillan v. Van Microp. 3 Burr. 1663.

(A) Of Alien Merchants.
(B) Of Principals and Factors.
(C) Of Partners and Joint-Traders.
(D) Of Owners and Masters of Ships.
(E) Of Mariners.
(F) Of Average.

(G) Of

(G) Of Hypothecation.

(H) Of Charter-Parties.

(I) Of Policies of Insurance: And herein,

[1. Of Marine Insurances.
2. Of Insurances upon Lives.
3. Of Insurances against Fire.]

(K) Of Bottomry [and Respondentia].

[(L) Of Bills of Lading.]

(M) Of Bills of Exchange.

[(N) Of the Provisions for the Encouragement of Shipping and Navigation.]

(A) Of Alien Merchants.

ALTHOUGH, by the policy of our constitution, aliens lie under several disabilities, and are denied in many instances the benefits of our laws; yet are they (*a*) here, as in most other countries, allowed to trade and merchandize, which privilege is confirmed to them by (*b*) *magna charta*, and (*c*) divers other acts of parliament.

Vide tit. Alien.

(*a*) The law of England rather contracts than extends the disability of aliens; because the shutting out of aliens tends to the loss of people, which, laboriously employed, are the true riches of any country. Vent. 427. *per* Hale, C. J.—The king pardons his loving and obedient subjects; this extends to aliens, if here at the time, though not made denizens. *Per* Hob. 271. (*b*) For this *vide supra*, and 2 Inst. 57. Molloy, 417. (*c*) By the 2 E. 3. c. 9. merchant strangers and others shall go and come with their merchandize ——By 9 E. 3. c. 1. all merchant strangers and others may freely buy and sell their commodities from whencesoever they came without interruption, notwithstanding charters or usage to the contrary, which charters or usage (if any be) the king, lords, and commons hold to be of no force, as being to the damage of the king and his great men, and to the oppression of the commons, &c.

And as foreigners and aliens are allowed to trade amongst us, so are they allowed to maintain personal actions; because, otherwise they would be incapacitated to merchandize: but they cannot maintain any real action, because it is not necessary that they should purchase lands, or settle amongst us.

Co. Lit. 129. b. And. 25. Dyer, 2. b.

An alien merchant may upon a statute extend lands, and upon office the king shall not have them; and upon ouster he shall have an assise; for the main end and design of both the statute staple and merchant was to promote and encourage trade, by providing a sure and speedy remedy for merchant strangers, as well as natives, to recover their debts at the day assigned for payment.

11 E. 3. Rot. 87. Dyer, 2. b. in margine.

So, an alien (*d*) merchant may take a lease of a (*e*) house for his habitation for years only, and this also is for the encouragement of commerce: for if an alien trade, he must have an abode amongst us; but if he (*f*) depart the kingdom, or die, it goes to the king, not to his executors or administrators, because it was

Co. Lit. 2. b. (*d*) That he must be a merchant. Poph. 36. Roll. Abr.

only a perſonal privilege annexed to the alien as a merchant, for the encouragement of merchandize, and conſequently muſt expire with him, without going to his executors or adminiſtrators.

194.—For leaſes of any dwelling-houſe or ſhop, made to alien artificer or handicraftman, are void by 32 H. 8. c. 16. § 13. and the perſon taking ſuch leaſe forfeits 100 *l.*, and the perſon letting 100 *l.* for which *vide* Sid. 308, 309. 357. 2 Keb. 104. 116. 118. Sand. 6. 8. 2 Keb. 315. 3 Mod. 94. (*e*) But he cannot take a leaſe for years of land, meadow, &c., not being neceſſary for his trade or traffick. Co. Lit. 2 b. 7 Co. 17. Dyer, 2 b. *cont.* And. 25. Bendl. 36. By 27 E. 3. c. 2. it is enacted, that all merchant ſtrangers, and not enemies, may ſafely dwell in the realm, &c.; upon which ſtatute, at a reading in Lincolns-Inn, 35 Eliz. it was agreed a merchant alien might take a leaſe of a houſe with gardens at will, but not for years; *per* Dyer, 2. b. in margin. (*f*) Not if he goes beyond ſea, and leaves ſervants in his houſe during his abience. Dyer, 2. b.

Yelv. 198. Bulſ. 134. S. C.

A merchant ſtranger ſhall have an action for ſaying he is a bankrupt, for by law he may have perſonal actions; and theſe words tend to impair his credit in his trade.

Alſo, by the 21 *Jac.* 1. *c.* 19. it is provided, that that act, and all other acts heretofore made againſt bankrupts, ſhall extend to ſtrangers born, as well aliens as denizens, as effectually as to natural-born ſubjects, both to make them ſubject to the laws as bankrupts, as alſo to make them capable of the benefit or contribution as creditors by theſe laws.

Lit. Rep. 140. Hard. 335. S. P. (*a*) For this *vide* Molloy, 305. 322.

The ſons of an alien, though born here, being merchants, for the firſt generation ſhall pay alien (*a*) cuſtoms and duties: ſaid to be the practice of the Exchequer.

Palm. 14.

But though alien merchants, in the payment of cuſtoms and otherwiſe, lie under ſome diſadvantages different from natural ſubjects; yet in other reſpects are they ſaid to have advantages above them; in that by the common law an action of account lay for a merchant ſtranger againſt executors; that a defendant could not wage his law to an action of debt brought by a merchant ſtranger, and that merchant ſtrangers were not to be ſworn in leets, *&c.*

7 E. 4. 13, 14. Bro. tit. Property, 38. 2 Inſt. 58. Molloy, 417, 418. Skin. 204.

As to merchant ſtrangers, whoſe prince is in war with the crown of *England*, if they are found within the realm at the beginning of the war, they ſhall be attached with a privilege and limitation without harm of body or goods, until it be known to the king, how merchants of *England* are uſed and entreated in their country, and accordingly they ſhall be uſed in *England*, the ſame being *jus belli*; but for merchant ſtrangers that come into the realm after war begun, they may be dealt withal as open enemies.

Salk. 46. pl. 1. Ld. Raym. 282. Wells v. Williams. (*b*) But an alien enemy who has ſuch protection, muſt plead it. 7 Mod. 150. Sylveſter's caſe. Ld. Raym. 283. 853. 2 Stra. 1082. —— * By ſtat. 14 G. 3. c. 84. Perſons naturalized ſhall not have Britiſh privileges of trade in foreign countries, unleſs they ſhall have reſided *ſeven* years in Britiſh dominions, without being above two months abſent at a time.

If an alien enemy comes here *ſub ſalvo conductu*, he may maintain an action: ſo, if an alien amy comes hither in time of peace, *per licentiam domini regis*, as the *French* proteſtants did, and lives here *ſub protectione*, and a war afterwards happens between the two nations, he may maintain an action; for ſuing is but a conſequential right of protection; and therefore an alien enemy, that is here in peace under (*b*) protection, may ſue upon a bond; *aliter* of one commorant in his own country*.

[But

[But no action can be maintained by or in favour of an alien enemy. Therefore it was adjudged, that alienage was pleadable to an action on a policy of insurance brought in the name of an *English* agent for his principal an alien enemy, such interest appearing on the record; and that a replication to such a plea, that the alien was indebted to the agent (the plaintiff) in more money than the value of the property insured could not be supported.] Brandon v. Nesbitt, 6 Term Rep. 23.

(B) Of Principals and Factors.

AS no one person, whose trade is extensive, can transact all his own affairs; so it is necessary for him to depute another in his place, on whose ability and honesty he can rely; and such person so deputed is called a factor, who is in nature of a servant, whose acts shall bind his master or principal, so far as he acts pursuant to the authority given him. Molloy, 421.

If the commission be general, as to *dispose, do, and deal therein as if it were your own*, hereby the factor is excused if a loss happens; but if the commission be to *sell and dispose*, hereby the factor is not enabled to sell upon tick, nor can he sell for an unreasonable time, as ten or twenty years, though there be the words *as if it were your own*, but he must sell according to the usual time, for which credit is given for the commodities he disposes of. Molloy, 422. Bulst. 103.

If in account the defendant pleads before auditors, that the goods for which he is to account were *bona peritura*, and notwithstanding his care in keeping them, grew worse, and that they remained in his hands for want of buyers, and were in danger of growing worse, and that therefore he sold them upon credit to a man beyond sea; this is no good plea, for a factor cannot sell, even *bona peritura*, upon (*a*) credit, without a particular commission so to do. 2 Mod. 100. adjudged. (*a*) It is the common practice to give factors power to sell upon credit. Bulst. 101.

In favour of trade and merchandize, an action of account lies at common law against a factor as against a bailiff, in which he shall have all (*b*) reasonable allowances. 2 H. 4 12. b. Co. Lit. 90. b. 172. a. 11 Co. 90. a.

F. N. B. 117. 2 Roll. Abr. 161. (*b*) Therefore it is a good discharge before auditors for a factor to say, that in a tempest, because the ship was surcharged, the goods were cast overboard into the sea. Roll. Abr. 124. Bro. tit. Account, 10.—So, that he was robbed of the goods without his default or negligence. Co. Lit. 89.—So, that he durst not buy for fear of loss. Roll. Abr. 124.

Also, if a man by obligation acknowledges that he has received money *ad proficiendum & computandum*, the obligee may either sue the (*c*) bond, or have an action of account at his election. Roll. Abr. 118. Dyer, 20. Cro. Eliz. 644.

(*c*) Where a man covenanted to render a true account, &c., and held that an action of covenant lay on the deed. Roll. Rep. 52. 2 Bulst. 256.—So, an *assumpsit* will lie on a promise to dispose of goods, and to give an account thereof. Salk. 9. pl. 1. Carth. 89. Comb. 149.—But where the demand is of consequence, and the matter of an intricate nature, it is most usual to resort to a court of equity, where matters of account are most commodiously adjusted, and more advantageously determined for both parties; the plaintiff being in that court entitled to a discovery of books, papers, the defendant's oath, &c. *Vide* tit. Account.

If goods are consigned to a factor, and upon arrival he makes a false entry at the custom-house, or lands them without paying the customs, whereby they become forfeited and are seized, whatever Molloy, 423. Cro. Jac. 265. Lan. 65.

the principal hereby ſuffers, the factor muſt inevitably make good, although his commiſſion was general; but if the factor makes his entry according to the invoice, or his letter of advice, and it falls out the ſame are erroneous, though the goods are loſt, yet is the factor excuſed.

Chan. Ca. 25. Smith v. Oxenden. Two merchants, having certified the cuſtoms to be ſo againſt two others, who held that the benefit belonged to the principal. Chan. Ca. 76. S. P. and Skin. 149. S. P. ſo held to have been determined by Lord Clarendon.——But North, L. K. ſaid, he was not ſatisfied herewith, for that though in the ſaving the cuſtoms the factor ventured his own life, yet the principal's goods were ventured alſo.

If a factor beyond ſea be brought to account in equity, he ſhall be allowed the cuſtoms payable beyond ſea, becauſe he runs the venture; and if the goods had been loſt by non-payment of ſuch cuſtoms, he muſt have anſwered the value of them.

Chan. Ca. 30. Boer v. Landall.

But if a home factor be brought to account, he ſhall not be allowed the cuſtoms, unleſs he ſwear that he hath paid them; becauſe it were a matter of great ſcandal, that any thing ſhould paſs the allowance of a court of juſtice, that is gotten by defrauding the government.

Molloy, 423. & *vide* tit. Maſter and Servant.

The principal ſhall anſwer for his factor in all caſes where he is privy to the act of wrong; and ſo in contracts, if a factor buy goods on the account of the principal, eſpecially where he has been uſed ſo to do, the contract of the factor will oblige the principal to a performance of the bargain.

Bridgm. 125, 126. Cro. Jac. 469. 2 Roll. Rep. 5. 26. Poph. 143. Southern v. Haw.

But if *A.* being poſſeſſed of certain artificial and counterfeit jewels of the value of 168 *l.*, and knowing them to be ſuch delivers them to *B.* his ſervant, commanding him to tranſport the ſaid jewels to *Barbary*, and to ſell them to the king of *Barbary*, or to ſuch other perſon as would buy them, but gives *B.* no charge to conceal their being counterfeit, and thereupon *B.* goes into *Barbary*, and knowing theſe jewels to be counterfeit, ſhews them to *C.* for good and true jewels, and affirming to *C.* that they were worth 810 *l.*, deſires *C.* to ſell them to the ſaid king; whereupon *C.* does ſell them to the ſaid king for 810 *l.*, which money *C.* pays *B.*, and *B.* thereupon immediately returns to *England*, and pays the 810 *l.* to *A.* his maſter; and after the jewels being diſcovered to be counterfeit, *C.* is impriſoned by the ſaid king till he repays the 810 *l.* out of his own effects; of all which matter *C.* gives notice to *A.*, and demands ſatisfaction, *&c.*, yet no action lies againſt *A.*, for jewels are in themſelves of an uncertain value, and *B.* was not by *A.* particularly directed to *C.*, and all that was done *qucad C.* was the voluntary act of the ſervant, for which the maſter is not bound to anſwer.

Salk. 160. pl. 13. Whitcomb v. Jacob.

It hath been ruled in equity, that if one employs a factor, and intruſts him with the diſpoſal of merchandize, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears by evidence, that this money was veſted in other goods, and remains unpaid, thoſe goods ſhall be taken as part of the merchant's eſtate, and not the factor's. But if the factor have the money, it ſhall be looked upon as the factor's eſtate, and muſt firſt anſwer the debts of ſuperior creditors, *&c.*; for as money has no

no ear-mark, equity cannot follow that in behalf of him who employed the factor.

If *A.* employs *B.* as his factor to ſell cloth, and *B.* ſells the cloth on credit, and, before the money is paid, *B.* dies indebted by ſpecialty more than his aſſets will pay; this money ſhall be paid to *A.* and not to the adminiſtrator of *B.* as part of his aſſets, but thereout muſt be deducted what was due to *B.* for commiſſion; for a factor is in nature only of a truſtee for his principal. 2 Vern. 638. Burdett v. Willett.

The plaintiff, being a factor in *Blackwell-Hall*, advanced money for his principal, relying, as was ſurmiſed, on the credit of cloths reſting in his hands to reimburſe himſelf: the clothier died, his adminiſtrator ſued at law for the cloth, and the factor prayed that he might be allowed on account the monies he advanced: but his bill was diſmiſſed; for if there are debts of a higher nature, it would be a *devaſtavit* in the adminiſtrator to pay or diſcount the plaintiff's debt. 2 Vern. 117. Chapman v. Derby.

[But it has been long ſettled, that a factor has a lien on goods conſigned to him not only for incident charges, but as an *item* of mutual account for the general balance due to him. And though it be in general true, that by parting with the poſſeſſion of the goods he parts with the lien, yet (*a*), if the factor ſell the goods, he has ſtill a lien on the price of them in the hands of the buyer; for though he has not the actual poſſeſſion in ſuch caſe, yet as he has the power of giving a diſcharge, or bringing an action for them, he muſt alſo have a right to retain the money for them. Krutzer v. Wilcox, in Canc. 12th March 1754. Gardiner v. Coleman, 2d June 1755. Godin v. London Aſſurance Company, 1 Burr. 493.——(*a*) Drinkwater v. Goodwin, Cowp. 251.

But though the general rule of law be, that a factor has a lien on the goods of his principal for the general balance, yet this, like other general rules, may be controlled by the agreement of the parties: as, if *A.* depoſit goods with *B.* for ſale, and *B.* promiſe to pay the proceeds to *A.* when ſold, *B.* has no lien on theſe goods (if not ſold), for the balance of his general account ariſing from other articles, the expreſs ſtipulation in this caſe negativing the general rule of law. Walker v. Birch, 6 Term Rep. 258.

A factor has no authority to pledge the goods of his principal as a ſecurity for his own debt, nor even to the amount of his lien for a general balance. Where he has done ſo (*b*), the principal has recovered the value of the goods in trover againſt the pledgee, on tendering to the factor what was due to him, without making any tender to the pledgee. Paterſon v. Taſh, 2 Str. 1178. (*b*) Daubigny v. Duval, 5 Term Rep. 606.

Per Buller and Groſe, J., *hæſitante* Kenyon, C. J. who inclined to think, that the principal ought to tender to the pledgee the ſum for which they are pledged, if under or to the amount of the money due from him to the factor, but not more.

Where a factor to one beyond the ſea buys or ſells goods for the perſon to whom he is factor, an action will lie againſt or for him in his own name; for the credit will be preſumed to be given to him in the firſt caſe, and in the laſt, the promiſe will be preſumed to be made to him; and the rather ſo, as it is ſo much for the benefit of trade. If a factor who receives cloths, and is authoriſed Gonzales v. Sladen, Tr. 1 Ann. Guildhall, Salk. MSS. Bull. N. P. 130.

thoriſed to ſell them in his own name, makes the buyer debtor to himſelf; though he is not anſwerable for the debt, yet he has a right to receive the money. His receipt is a diſcharge to the buyer, and he has a right to bring an action againſt him to compel the payment; and it will be no defence for the buyer in that action to ſay, that, as between him and the principal, he (the buyer) ought to have that money, becauſe the principal is indebted to him in more than that ſum; for the principal himſelf can never ſay that, but where the factor has nothing due to him.

Cowp. 255-6.

However, a factor's ſale by the general rule of law creates a contract between the owner and the buyer; and therefore if a factor ſell for payment at a future day, if the owner give notice to the buyer to pay him and not the factor, the buyer will not be juſtified in afterwards paying the factor: and it is the ſame, notwithſtanding the factor acts upon a *del credere* commiſſion (*a*), as in the following caſes.

Bull. N. P. 130. Cowp. 255. (*a*) Scrimſhire v. Alderton, 2 Str. 1182. A *del credere* commiſſion is, where a factor in conſideration of an additional premium, acts as an inſurer, and takes upon himſelf all riſks. Thus, the common factorage between St. Peterſburgh and London is 2 *per cent.*; but in conſideration of an additional 3 *per cent.*, the factor engages to ſtand as the middle man, and to run the hazard of bad debts. Commiſſions *del credere* are more common in this country, than perhaps in any other, the characters of the buyers being better known, and the riſk of courſe leſs.

Eſcot v. Milward, Sittings at Guildhall, after Mich. Term, 1783. Co. Bankrupt Laws, 456.

The plaintiffs were merchants in *London*, and in *June* 1783 had a quantity of wheat conſigned to them from *Oſtend*, the ſale of which they intruſted to one *Farrer*, as their factor. The factors in the corn trade, like thoſe in the linen trade, receive a *del credere* commiſſion, beſides their factorage, and never communicate the names of the purchaſers to the owners, except in caſe of the factor's failure. *Farrer*, on the 9th *June* 1783, ſold 211 quarters of the plaintiff's wheat to the defendant *Milward*. On the 16th *June*, *Farrer*, being about to ſtop payment, gave up the wheat under his care to the plaintiffs, and ſent them the names of the buyers. On the 20th *June*, *Farrer* ſtopt payment, and a ſhort time afterwards his creditors executed a deed of compoſition. On the 21ſt *June*, the plaintiffs delivered the defendant a bill of parcels of the wheat ſold to him by *Farrer*, as their factor, and deſired him to accept a bill at a month for the amount, which he refuſed, inſiſting, that he had a right to ſet off a debt due to him from *Farrer*, againſt the price of the wheat.—Mr. Juſtice *Buller*, in his charge to the jury, declared the doctrine laid down by Lord Chief Juſtice *Lee*, in *Scrimſhire* v. *Alderton*, to be law, and the plaintiffs recovered a verdict.

Ex parte Murray, Dec. 1783. Co. Bankrupt Laws, 457.

Again, one *Murray* of *Belfaſt*, in 1782, conſigned a quantity of linens to *Bate* and *Henkell* of *London*, to be diſpoſed of by them as his factors, upon a *del credere* commiſſion. *Bate* and *Henkell* ſold the linens for 192*l.* 14*s.*, and before they received the money became bankrupts. The aſſignees afterwards received the money of the purchaſer, which *Murray* demanded of the aſſignees, who refuſed to pay it, inſiſting, that *Murray* might come in as a creditor under the commiſſion. *Murray* preſented a petition to the Lord Chancellour, praying, that the aſſignees might be ordered to pay him the money his linen ſold for, after deducting the commiſſions

miſſions and charges, and a ſmall ſum due from *Murray* to the bankrupts, on another account. His Lordſhip, after hearing the point of law argued, was clearly of opinion, that the purchaſer, not being paid for the linens previous to the bankruptcy, *Murray* the conſignor was entitled to receive the price of the linens, and accordingly ordered the aſſignees to pay him the money.

Upon this principle it has been determined, that goods of the principal found in the poſſeſſion of the factor at the time of his becoming bankrupt, though he have a *del credere* commiſſion, will not paſs by the aſſignment. Garrett v. Cullum, Bull. N. P. 5th ed. 42. Godfrey v. Furzo, 3 P. Wms. 185. *Ex parte* Dumas, 2 Vez. 586. 1 Atk. 232. *Ex parte* Ourſell, Ambl. 297.

So, bills remitted by the principal to his factor, whilſt unpaid, are in the nature of goods unſold, and if the factor become bankrupt, the principal may recover them in an action for money had and received, ſubject to ſuch lien as the factor may have upon them. Zinck v. Walker, 2 Bl. Rep. 1154.

But a *del credere* commiſſion will have the effect of enabling a policy-broker, under the clauſe in the 5 *G.* 2. *c.* 30. for ſetting mutual debts one againſt the other, to give in evidence upon the general iſſue, a loſs upon a policy happening before the bankruptcy in an action by the aſſignees of the underwriter, for premiums upon policies underwritten by him.] Grove v. Dubois, 1 Term Rep. 112. Bize v. Dickſon, *id.* 285. That without a *del credere* commiſſion, he cannot ſet off the loſſes on goods which he inſured for other perſons, the debts being properly due to them, and not to the broker. Wilſon v. Watſon, 1 Eſpin. 274.

(C) Of Partners and Joint-Traders.

[PArtners are joint-tenants in all the ſtock and partnerſhip effects; and they are ſo not only of the particular ſtock in being at the time of entering into the partnerſhip, but they continue joint-tenants throughout, whatever changes may take place in the courſe of trade; for if it were otherwiſe, it would be impoſſible to carry on partnerſhip trade. Hence aſſignees under a commiſſion of bankrupt againſt one partner, can only be tenants in common of an undivided ſhare, ſubject to all the rights of the other partner. And if a creditor of one partner takes out execution againſt the partnerſhip effects, he can only have the undivided ſhare of his debtor; and muſt take it in the ſame manner the debtor himſelf had it, and ſubject to the rights of the other partner. So that one partner can have no right againſt the other, in his capacity of partner, but to what is due from him out of the joint ſtock, after making all juſt allowances, let the fluctuations of trade be what they may. The whole of this doctrine ſeems to ariſe out of the very principle upon which partnerſhip is founded, namely, probable profit, and the riſk of loſs; the advantages or diſadvantages of which cannot, in common juſtice, be confined to one ſide only, but muſt be reciprocal throughout. 1 Vez. 242. Cowp. 449. 12 Mod. 446.

If

Willett v. Chambers, Cowp. 814.

If two are *partners* as *attornies* and *conveyancers*, and *one* of them receives money to be laid out on mortgage, the *other* is *liable* for the amount, though his partner ſhould even have given a *ſeparate receipt* for it.

Grace v. Smith, 2 Bl. Rep. 998.

On a motion for a new trial, the following facts were diſcloſed: An action was brought againſt *Smith* alone as a ſecret partner with one *Robinſon*, to whom the goods were delivered, and who became bankrupt in 1770. On the 30th of *March* 1767, *Smith* and *Robinſon* entered into partnerſhip for ſeven years, but in *November* afterwards, ſome diſputes ariſing, they agreed to diſſolve the partnerſhip. The articles were not cancelled; but the diſſolution was open and notorious, and was notified to the publick on the 17th of *November* 1767. The terms of the diſſolution were, that all the ſtock in trade and debts due to the partnerſhip ſhould be carried to the account of *Robinſon* only. *Smith* was to have back 4200 *l.* which he brought into the trade, and 1000 *l.* for the profits then accrued, ſince the commencement of the partnerſhip: He was to lend *Robinſon* 4000 *l.* part of this 5200 *l.*, or let it remain in his hands for ſeven years, at five *per cent.* intereſt, and an annuity of 300 *l.* *per ann.* for the ſame ſeven years. For all this *Robinſon* gave a bond to *Smith*. In *June* 1768, *Robinſon* advanced to *Smith* 600 *l.* for two years' payment of the annuity and other ſums by way of intereſt, and gratuities, and other large ſums at different times to enable him to pay the partnerſhip debts, *Smith* having agreed to receive all that was due to the partnerſhip, and to pay its debts, but at the hazard of *Robinſon*. On the 1ſt of *Auguſt* 1768, the demands of *Smith* were all liquidated and conſolidated into one, *viz.* 5200 *l.* due to him on the diſſolution of the partnerſhip; 1500 *l.* for the remaining five years of the annuity, and 300 *l.* for *Smith*'s ſhare of a ſhip: in all 7000 *l.*; for which *Robinſon* gave a bond to *Smith*. On the 22d of *Auguſt* 1769, an aſſignment was made of all *Robinſon*'s effects to ſecure the balance then due to *Smith*, which was ſtated to be 10,000 *l.* Soon after the commiſſion was awarded.

De Grey, C. J.—The only queſtion is, What conſtitutes a ſecret partnerſhip? Every man who has a ſhare of the profits of a trade, ought alſo to bear his ſhare of the loſs. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trade relies for his payment. If any one advances or lends money to a trader, it is not lent on his general perſonal ſecurity. It is no ſpecifick lien upon the profits of the trade, and yet the lender is generally intereſted in thoſe profits; he relies on them for repayment: and there is no difference whether that money be lent *de novo*, or *left behind* in trade by one of the partners who retires: and, whether the terms of that loan be kind or harſh, makes alſo no manner of difference. I think the true criterion is, to inquire whether *Smith* agreed to ſhare the profits of the trade with *Robinſon*, or whether he only relied on thoſe profits, as a fund of payment: a diſtinction not more nice, than uſually occurs in queſtions of trade or uſury. The jury have ſaid this is not payable out of the profits; and I think there is no foundation

foundation for granting a new trial.—*Blackſtone*, J. concurring in opinion with the Chief Juſtice, ſaid, I think the true criterion (when money is advanced to a trader) is to conſider whether the profit or premium is certain and defined, or caſual, indefinite, and depending on the accidents of trade. In the former caſe it is a *loan* (whether uſurious or not, is not material to the queſtion), in the latter a *partnerſhip*. The hazard of loſs and profit is not equal and reciprocal, if the lender can receive only a limited ſum for the profits of his loan, and yet is made liable to all the loſſes, all the debts contracted in trade, to any amount.

Where the defendant had been partner with one *Brooke*, and they agreed to ſeparate, and *Brooke* agreed to give him his bond for 2485 *l.* with intereſt, which ſum had been brought by the defendant into trade, and an annuity of 200 *l.* for ſeven years, if *Brooke* ſo long lived, as in lieu of the profits of the trade; and the defendant had at all times liberty to inſpect *Brooke*'s books; he was adjudged to be a partner and liable; for the charge had reference to the profits; it was *caſual* as depending on *Brooke*'s life, and his right to inſpect the books was that of a partner. Bloxam v. Pell, 2 Bl. Rep. 998.

But, in order to conſtitute a partnerſhip, and to make a perſon liable as a partner, there muſt be an agreement between him and the oſtenſible perſon to *ſhare in all riſks of profit or loſs*, or he muſt have permitted the other to uſe his credit, and to hold him out as jointly liable with himſelf. A man entering into an agreement, and afterwards ſubdividing his beneficial intereſt under it, among others, is alone liable to the performance, and the ſubcontract does not conſtitute a partnerſhip. Thus, an action was brought by the plaintiffs, who were the owners of a *Greenland* ſhip, againſt the defendants, upon an agreement to purchaſe a cargo of oil. The declaration ſtated, that on the 29th of *Auguſt* 1786, the plaintiffs ſold the cargo to the defendants, at the rate of 20 *l. per* ton, to be received as ſoon as it was boiled and ready. That by way of collateral ſecurity, two bills of exchange were depoſited in the hands of the plaintiffs, one of which was accepted by the defendants *Eyre*, *Atkinſon*, and *Walton*. That the ſale being ſo made, and it being expected that the defendants would not take away the oil purſuant to the terms of the ſale, it was afterwards agreed between the plaintiffs and defendants, by the name of *Benjamin Eyre* and Co., that the plaintiffs ſhould keep the oil in their poſſeſſion, till the 1ſt of *January* following; and if the defendants did not pay for it on or before that day, the plaintiffs were to be at liberty to authoriſe the broker to reſell it at the beſt price he could get; and if upon ſuch reſale, the oil ſhould not produce 20 *l. per* ton, with all charges, the plaintiffs were to deduct the difference of the price out of the bills placed in their hands as a collateral ſecurity. The declaration then ſtated, that the defendants neither paid for the oil, nor took it away, and therefore the plaintiffs authoriſed the broker to reſell it. That the deficiencies upon the reſale amounted to 400 *l.* beſides brokerage, &c. 100 *l.*, and that the bill of exchange accepted by the defend- Hoare v. Dawes, Dougl. 371. Coope v. Eyre, 1 H. Bl. 37.

ants was presented to them for payment, and refused. Before this action was brought, *Eyre* and Co. had become bankrupts. It appeared in evidence on the trial, that on the 24th of *August* 1786, the defendants, *Eyre* for himself and partners, who were *Atkinson* and *Walton*, general merchants, *Hattersley* for himself and *Stephens*, who were oil merchants, and *Pugh* for himself and son, who were also oil merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise; that *Eyre* should be the ostensible buyer, and the others share in his purchase, at the same price which he might give. *Hottersley* and Co. were to have one-fourth, *Pugh* one fourth, and *Eyre* and Co. the remaining moiety. That they bought large quantities of oil, belonging to other ships, and other traders, besides the plaintiffs, in the name of *Eyre* and Co. That *Hattersley* and *Pugh* occasionally came forwards, and gave directions as to the delivery of the oils, and otherwise interfered in the transaction; and also made many declarations, that they were all jointly interested in the different purchases, and that there was a general concern between them. On the part of the defendants it was insisted, that the contract of sale was made between the plaintiffs and *Eyre* and Co. only; and that the agreement entered into between themselves was only a subcontract, and did not constitute a partnership; and the learned Judge who tried the cause being of the same opinion, directed a verdict to be found for the defendants, which was accordingly done. The plaintiffs therefore moved the court for a new trial, on the ground of misdirection; and after the case had been fully argued, the court refused to grant a new trial, being of opinion that the verdict was proper. For as this was an action on a contract of sale, the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership; in which case all the partners are liable as one individual. It was justly observed that a secret partnership can be no consideration to the vendor, though, for reasons of policy and general expedience, the law is positive with respect to the secret partner, that when discovered he shall be liable to the whole extent. In many parts of *Europe* limited partnerships are allowed, provided they be entered on a register; but the law of *England* is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages. In order to constitute a partnership, a communion of profit and loss is essential: and the shares must be joint, though it is not necessary that they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale; otherwise they are not partners. In the present case *Eyre* was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may by other purchases have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them, which is necessary to make them part-

ners; their agreement was a ſubcontract, which may be executory; as it was to ſhare in a purchaſe to be made. The ſeller looked to no other ſecurity than *Eyre* and Co. To them the credit was given, and they only were liable.]

If two or more engage in a joint undertaking in the way of trade, or enter into copartnerſhip, it is not neceſſary to provide againſt ſurvivorſhip; for, by a maxim of the common law, *jus accreſcendi inter mercatores locum non habet;* and this is for the benefit of trade and commerce, that the fruits of each perſon's labour and induſtry ſhould deſcend to his children and family. Vern. 217. *& vide* tit. Joint-tenants and Tenants in Common.

But if two joint merchants make *B.* their factor, and one dies, leaving an executor, this executor and the ſurvivor cannot join in an action (*a*) againſt the factor; for though the duty does not ſurvive, yet the remedy does; and therefore, on recovery, the ſurvivor muſt be accountable to the executor for that. 2 Salk. 444. pl. 3. Ld. Raym. 340. Martin v. Crump.

(*a*) Nor can an executor and the ſurviving merchant be jointly ſued, becauſe the firſt is to be charged *de bonis teſtatoris*, and the other *de bonis propriis*. Carth. 170, 171. 3 Lev. 290. 2 Lev. 228. Forteſc. Rep. 181.

The plaintiff's huſband (to whom ſhe is adminiſtratrix) and the defendant were copartners for many years in the trade of a druggiſt; the plaintiff brought her bill for a diſcovery of the eſtate, and her proportion and dividend thereof, *&c.* the defendant anſwered; and it appearing that many debts owing to the joint trade ſtood out, it was moved on behalf of the plaintiff, that an able attorney might be appointed to ſue for and recover thoſe debts; it being alleged in the bill, that the defendant carrying on a diſtinct trade for himſelf, with the perſons that were debtors to the joint trade, to oblige them, he forbore to call in their debts; and it was ordered accordingly, unleſs the defendant, within a week, would give ſecurity to the plaintiff, to anſwer her moiety of the debts that were ſtanding out. Vern. 118. Eſtwick v. Conninſby.

By the cuſtom of *England*, where there are two joint traders, and one accepts a bill, drawn on both for him and partner, it binds both if it concerns the trade; otherwiſe, if it concerns the acceptor only in a diſtinct intereſt and reſpect. Salk. 126. pl. 3. Pinkney v. Hall. Ld. Raym. 175.

A. and *B.* were partners as woollen-drapers, *A.* received money in the ſhop of *S. S.* and gave a note for it ſigned by himſelf and partner; *A.* and *B.* being both dead, and *A.* not leaving ſufficient aſſets, it was held, on a bill brought by *S. S.* againſt the executors of both the partners, that this note being given by one of the partners, it ſhould bind them both; and that though at law it binds only the executor of the ſurviving partner, yet in equity the creditor may follow the eſtate of the other, though no (*b*) proof was made that this money was brought into the ſtock, or uſed in trade. 2 Vern. 277. Lane v. Williams.

(*b*) That the act of one partner ſhall be preſumed the act of the other, and ſhall bind him, unleſs he can ſhew a diſclaimer, and a refuſal to be concerned. Salk. 292. pl. 33.

[Two entered into articles of copartnerſhip, and each brought in 1000*l.* ſtock. There was to be no benefit of ſurvivorſhip, neither was to become indebted without the other, nor either to take out of the ſtock without the other. One became *indebted without the conſent of his partner*, and made his wife executrix, and died. 2 Ch. Ca. 38.

died. The wife *confeſſed judgment* for the debt. The other ſues for an account and relief againſt the creditor and the wife. They confeſs the *articles*, and the obtaining judgment. Lord Chancellour granted an injunction againſt the judgment, becauſe the debt related not to the partnerſhip, ſaying, if this be ſuffered, no trade could be in ſuch caſe.

Minnitt v. Whitney, Vin. Abr. tit. Partners (A), pl. 12.

So, where three perſons entered into partnerſhip in the trade of ſugar-boiling, and agreed that no ſugars ſhould be bought without the conſent of the majority; one of them afterwards makes a proteſt that he would no longer be concerned in partnerſhip with them: the two other perſons after make a contract for ſugars: the ſeller having notice that the third had diſclaimed the partnerſhip, he ſhall not be charged.]

Salk. 392. pl. 1. Heydon v. Heydon; & *vide* Show. 273-4. Comb. 217.

A. and *B.* are copartners, and a judgment is had againſt *A.*, and the goods of both are taken in execution: it was held *per cur.* that the ſheriff muſt ſeize all, becauſe the moieties are undivided; for if he ſeize but a moiety and ſell that, the other will have a right to a moiety of that moiety; therefore he muſt ſeize the whole, and ſell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.

Eddie v. Davidſon, Dougl. 650.

[The *defendant* was partner with one *Bernie*, againſt whom a commiſſion of bankrupt had iſſued, but, before the bankruptcy, the *plaintiff* had ſued out execution on a bond of the *defendant's* for 700 *l.*, and the ſheriff had levied on the partnerſhip effects. *Bernie's* aſſignees obtained this rule, to ſhew cauſe why the ſheriff ſhould not pay them a moiety of the money ariſing from the ſale of the goods ſo taken in execution, upon an affidavit of *Bernie's*, that he was entitled to an equal ſhare of the partnerſhip effects, as partner with *Davidſon*. The *plaintiff's affidavit*, on ſhewing cauſe, denied that *Bernie* had an equal ſhare in the partnerſhip effects, and ſtated that he had embezzled the joint ſtock to a conſiderable amount. The court directed that it ſhould be referred to the maſter to take an account of the ſhare of the partnerſhip effects to which *Bernie* was entitled; and that the ſheriff ſhould pay a part of the money levied, equal to the amount of ſuch ſhare, to the aſſignees.

Jacky v. Butler, 2 Ld. Raym. 871.

Judgment was entered againſt one of two partners, and upon a *fieri facias*, all the goods, being undivided, were ſeized in execution. Upon application to the King's Bench by him againſt whom the judgment was not, the court held, that the ſheriff could not ſell more than a moiety, for the property of the other moiety was not affected by the judgment, nor by the execution.

Richardſon v. Goodwin, 2 Vern. 293.

Richardſons ſenior and junior, and one *Janſon* were partners together in trade, and *Janſon* embezzled and waſted the joint ſtock, and contracting private debts became a bankrupt. The court ſeemed to think, that out of the produce of the goods, the debts owing to the joint trade ought to be paid in the firſt place; and that, out of *Janſon's* ſhare, ſatisfaction muſt be made for what *Janſon* had waſted or embezzled; and that the aſſignees could be

in no better caſe than the bankrupt himſelf, and were entitled only to what his third part would amount unto, clear after debts paid, and deductions for his embezzlement.

A bill was brought, ſetting forth that *Goſs*, *Neaulme*, *Gromvegan*, and *Prevoſt* became partners: that *Prevoſt* was intruſted with the goods in the ſhop and warehouſe, but became profuſe, and embezzled the partnerſhip ſtock, and applied the ſame to his own uſe, and ſuffered the partnerſhip debts to be unpaid; and having contracted private debts on his own account, became a bankrupt, and a ſeparate commiſſion was taken out againſt him. Goſs v. Dufreſney, Dav. Bankrupt Laws, 371.

A queſtion was raiſed, whether *Prevoſt*'s ſhare of the partnerſhip ſtock ought to be applied, in the firſt place, to pay what he was indebted to the partnerſhip?

Lord *Talbot* ordered an account of what *Prevoſt* had embezzled of the partnerſhip eſtate, and that the partnerſhip debts ſhould in the firſt place be paid to the joint creditors in proportion to their debts, and as far as the partnerſhip eſtate would extend; and that if any of the partnerſhip eſtate remained, after the joint debts were paid, then the ſame to be divided, and the partnerſhip to be paid out of *Prevoſt*'s ſhare what he had embezzled.]

Although a moiety of a joint ſtock may be taken in execution on a judgment againſt one partner; yet, if copartners become bankrupts, the joint eſtate is to diſcharge the joint debts in the firſt place, and the ſeparate eſtate to pay the ſeparate debts; and if there be no ſeparate eſtate, then the reſidue of the joint eſtate, after the joint creditors are ſatisfied, to be applied among the ſeparate creditors, and ſo *vice verſâ*; for the commiſſioners of bankrupts are intruſted both with a legal and equitable juriſdiction, and may therefore marſhal (*a*) the different effects, and apply them in diſcharge of the different creditors according to equity and juſtice. 2 Chan. Rep. 228. 2 Vern. 293. 706. Paſch. 4 Geo. 2. Grace v. Hyam. Barnard. K. B. 469. [(*a*) But not without an order. 1 Atk. 68. pl. 23.]

[*A.* and *B.*, goldſmiths and partners, were bound to *J. S.* in a bond for payment of 1000 *l.* and intereſt in 1693. Afterwards in the ſame year they diſſolved the partnerſhip, when *A.* by money and bond ſecured to *B.* his ſhare of the ſtock, and took upon himſelf the partnerſhip debts. Publick notice was given to creditors of the joint ſtock to receive their money, or to look upon *A.* only as their paymaſter. *J. S.* in 1708 called in his money from *A.*, but continued it on *A.*'s ſubſcribing the bond at *6 per cent.* *A.* was ſolvent till 1711, and till then *J. S.* might have had his money when he pleaſed; but then *A.* became a bankrupt. Lord Chancellour *Parker* held, that the executor of *B.* was ſtill liable; that the notice was *res inter alios acta*, and could not bind *J. S.*; and that changing the intereſt did not alter the ſecurity; for ſtill it was the bond of both; but *B.*'s executor could not be liable to more than 5 *l. per cent.* intereſt; and *J. S.* was decreed his debt and coſts. Heath v. Percival, 1 P. Wms. 682.

Gibſon and *Sutton* were partners in the buſineſs of a ſcrivener and banker. The mother of the plaintiff Mrs. *Jacomb*, and the mother of the plaintiff Mrs. *Long*, both kept caſh in this ſhop; and each of them, out of the caſh belonging to her, ordered a ſum Jacomb v. Harwood, 2 Ves. 265.

to be written off from her account, and that a note or security for each of these sums should be given to each of the plaintiffs; which was done, and signed by the cashier belonging to the partnership. *Gibson* survived this about a year, and made *Sutton* and another executors. The cashier, by his answer, (there being no other evidence,) believed, from entries in the books, that interest for this was paid to the death of *Gibson*, and mentioned payments of interest also for three years at 4 *per cent.* by *Sutton* after *Gibson's* death, when in point of law the partnership effects survived to *Sutton*; but after that the two plaintiffs separately called upon *Sutton* for a further security than those bare notes; and therefore judgment was entered up in an action against him, not as executor of *Gibson*, but as surviving partner for a partnership debt. That judgment was defeasanced by an instrument signed by the plaintiffs as to their respective demands, agreeing, that no execution should be taken on either of these judgments till such a time. In that agreement it was particularly inserted, that these judgments thus obtained by the two plaintiffs should not hinder either of them from any remedy they might be entitled to in a court of equity against *Gibson's* estate or effects, if they were not otherwise paid or discharged. Immediately before the respite of the execution expired, *Sutton* being called on, or knowing that the time was near, mortgaged part of a leasehold estate, which was confessedly part of the separate estate of *Gibson* his deceased partner. The plaintiffs filed their bill, as copartnership creditors, to subject the chattel interest in that mortgage to a satisfaction of both their demands, by a sale thereof. It did not appear, otherwise than from the two notes, in what manner the money, that had been ordered by the mothers of the plaintiffs, to be carried from their two accounts, was left in the hands of the partners, whether, as cash kept generally, or only those two sums. The Master of the Rolls strongly inclined to think, that the debt, notwithstanding the judgment, still continued a partnership debt, being obtained against defendant as surviving partner. But if not so, if it were his own debt, it was certain, that the defendant, possessed as executor of the personal estate of *Gibson*, might apply any part thereof even to the satisfaction of his own demand, unless there was fraud or collusion, of which there was no evidence in the present case. The plaintiffs were most undoubtedly creditors unsatisfied; and therefore it was not an application of the separate estate of *Gibson* to demands, which ought not to be countenanced in equity, but to that which the executor had a right to apply it, and which perhaps that estate of his without this act of *Sutton* must have been subject to have made satisfaction; for the partnership creditors would have a right to go against the separate estate of either of the partners after the partnership effects. But that this was nothing to the justice of the plaintiffs' demands, who had used diligence to get at their money in a lawful and honest way; that they were not to be blamed, supposing their demands were against *Sutton* on the judgment, in getting the best security they could for their money, which was this mortgage. His Honour therefore held them entitled to the relief they prayed.]

(D) Of Partners and Maſters of Ships.

IF there are ſeveral part-owners of a ſhip, and ſome of them refuſe to navigate the ſhip, or to ſend her to ſea; thoſe, who are willing, may compel the others in a court of Admiralty, on giving ſecurity to anſwer for the ſhip in caſe ſhe be loſt. Alſo, if a partner diſlikes the voyage, but does not expreſsly prohibit it, and the ſhip is loſt in the voyage, he ſhall have no recompence for his part; but if the ſhip return, he ſhall have an account for what is earned, and it ſhall be intended a voyage with his conſent, without an expreſs prohibition proved. Molloy, 202, 203. Skin. 230. pl. 9. 2 Chan. Ca. 36.

But if the major part of the owners refuſe to navigate the ſhip, there, ſays *Molloy*, by reaſon of the inequality, they cannot be compelled; but then ſuch veſſel is to be valued and ſold in like manner, as where part of the owners become deficient, or unable to ſet out the ſhip. Molloy, 203.

If there are ſeveral part-owners of a ſhip, and the major part of them are for ſending her a voyage to ſea, to which the reſt diſagree; whereupon, according to the common uſage in ſuch caſes, the greater number ſuggeſt in the Admiralty court the diſagreement of their partners; and then, according to their uſage there, they order certain perſons to appraiſe the ſhip, who accordingly ſet a value thereon; and then the major part, who agreed to the voyage, enter into a recognizance, wherein they bind themſelves jointly and ſeverally, to the diſagreeing parties, in a ſum proportionable to their ſhares, according to the value ſet by the appraiſers, to ſecure the ſhares in the ſhip of thoſe who diſagree to the voyage, againſt all adventures; though there can be no ſuit on this agreement or ſtipulation in the Admiralty court (*a*), the contract being made on land, and therefore of common law conuſance; yet a ſpecial action on the caſe lies for the violation thereof at common law. Carth. 26. Knight v. Berry. Hard. 473. S. P. 6 Mod. 162. S. P. [(*a*) That the Admiralty have juriſdiction upon ſuch a ſtipulation, ſee Grave v. Hedges, Holt, 470. Lambert v. Aeretree, 1 Ld. Raym. 223. Blacket v. Anſley, *Id.* 235. Dimock v. Chandler, 2 Str. 890. Fitzg. 197. S. C. Ouſton v. Hebden, 1 Will. 101.]

A maſter of a ſhip is one who, for his knowledge in navigation, fidelity, and diſcretion, hath the government of the ſhip committed to his care and management; but he hath no (*b*) property either general or ſpecial by the conſtituting of him a maſter; yet the law looks upon him as an officer, who muſt render and give an account for the whole charge, when once committed to his care and cuſtody, and upon failure to render ſatisfaction; and therefore if misfortunes happen, if they be either through negligence, wilfulneſs, or ignorance of himſelf or his mariners, he muſt be reſponſible. Molloy, 208. Hob. 11. (*b*) But hath uſually ſhares or parts in the veſſel. Molloy, 203.— He is eligible by the part-owners in proportion to their ſhares, and not according to the majority. Molloy, 203.

But where a maſter of a ſhip brought an action on the caſe, and declared, that the ſhip was laden with corn in ſuch a harbour, ready to ſail for *Dantzick*, and that the defendant entered and ſeized the ſhip, and detained her, *per quod impeditus & obſtructus fuit in viago*; it was held, that it well lay; for though the Salk. 10. pl. 4. Pitts v. Gaince. Ld. Raym. 558.

master has not the property of the ship, but the owners, and he is only a particular officer, and can only recover for his particular loss; yet he may bring trespass, as a bailiff of goods may; and then as bailiff he can only declare on his possession, which is sufficient to maintain trespass.

Vent. 190. 238. Raym. 220. 3 Keb. 72. 112. 135. Mod. 85. 2 Lev. 69. More and Sluce. 3 Lev. 259. S. C. cited. 2 Ld. Raym. 918.

If the master of the ship takes goods on board for hire, and is robbed in port, he must answer the damage; otherwise it is, if he be robbed by pirates on the high sea, for then the owner must be the loser; for if he undertakes for hire to carry the goods, the common law cannot look upon him in a different aspect from a common carrier; for he cannot be looked upon as a mere servant to the owner, but rather as an officer of the ship, and to sell the *bona peritura*, which is beyond the condition of a servant: but the civil law of the Admiralty excuses the masters when robbed by pirates, or on losing the goods by any inevitable accident, for the dangers of the sea are so various and so formidable, that a master shall not be understood to undertake against them, unless it had been included in the express words of the contract; for where, in a well-ordered society, a man undertakes for the custody of another's property, he secures him against all loss; but where a man is bound to encounter dangers, which civil society cannot guard against, he cannot be supposed to undertake farther than for his care; and by the general custom of commerce, the merchant is the person that runs the venture, and not the master of the ship; and it is the merchant that makes the gain of the venture.

Carth. 58. 2 Salk. 440. pl. 1. 3 Lev. 258. 3 Mod 322. Boson v. Sandford.

And as the master himself is answerable in the cases *supra*; so likewise hath it been held, that the owners are liable to the freighters, in respect of the freight, for the embezzlement, &c. of the master and mariners.

[This act was made in consequence of the case of Boucher v. Lawson, H. 5 Geo. 2. where the goods were lost by the negligence or embezzlement of the master, and the master was entitled to the freight of those goods for his own benefit, and the action was brought against the owners. The court thought,

But this proving a great discouragement to trade, by the 7 *G.* 2. *c.* 15. reciting that, *Whereas it is of the greatest consequence and importance to this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein; and whereas it has been held, that in many cases owners of ships or vessels are answerable for goods and merchandize shipped, or put on board the same, although the said goods and merchandize, after the same have been so put on board, should be made away with by the masters or mariners of the said ships or vessels, without the knowledge or privity of the owner or owners; by means whereof, merchants and others are greatly discouraged from adventuring their fortunes, as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom; therefore for ascertaining and settling how far owners of ships and vessels shall be answerable for any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize which shall be made away with by the master or mariners, without the privity of the owners thereof; it is enacted,* "That no person or persons, who is, are, or shall "be owner or owners of any ship or vessel, shall be subject or "liable to answer for, or make good to any one or more person or "persons

" perſons, any loſs or damage by reaſon of any embezzlement, " ſecreting, or making away with (by the maſter or mariners, or " any of them) of any gold, ſilver, diamonds, jewels, precious " ſtones, or other goods or merchandize, which, from and after " the 24th of *June* 1734, ſhall be ſhipped, taken in, or put on " board any ſhip or veſſel, or for any act, matter, or thing, damage " or forfeiture done, occaſioned, or incurred from and after the " ſaid 24th day of *June* 1734, by the ſaid maſter or mariners, or " any of them, without the privity and knowledge of ſuch owner " or owners, further than the value of the ſhip or veſſel, with all " her appurtenances, and the full amount of the freight, due or " to grow due, for and during the voyage wherein ſuch embezzle- " ment, ſecreting, or making away with, as aforeſaid, or other " malverſation of the maſter or mariners, ſhall be made, commit- " ted, or done; any law," *&c.*

that it was not to be diſtinguiſhed from the common caſe of the carrier, and that the owner was liable for the act of the maſter where he acted within the compaſs of his employment. 1 Term Rep. 78.]

And, by § 2. it is further enacted, " That if ſeveral freighters " or proprietors of any ſuch gold, ſilver, diamonds, jewels, pre- " cious ſtones, or other goods or merchandize, ſhall ſuffer any " loſs or damage by any of the means aforeſaid, in the ſame voy- " age, and the value of the ſhip or veſſel, with all her appurte- " nances, and the amount of the freight, due or to grow due, " during ſuch voyage, ſhall not be ſufficient to make full com- " penſation to all and every of them, then ſuch freighters or pro- " prietors ſhall receive their ſatisfaction thereout in average, in " proportion to their reſpective loſſes or damages; and in every " ſuch caſe it ſhall and may be lawful to and for ſuch freighters " or proprietors, or any of them, in behalf of himſelf, and all " other ſuch freighters or proprietors, or to or for the owners of " ſuch ſhip or veſſel, or any of them, on behalf of himſelf, and " all the other part-owners of ſuch ſhip or veſſel, to exhibit a bill " in any court of equity for a diſcovery of the total amount of " ſuch loſſes or damages, and alſo of the value of ſuch ſhip or " veſſel, appurtenances and freight, and for an equal diſtribution " and payment thereof amongſt ſuch freighters or proprietors, in " proportion to their reſpective loſſes or damages, according to " the rules of equity.

" Provided (by § 3.), that if any ſuch bill ſhall be exhibited by " or on the behalf of the part-owners of ſuch ſhip, the plaintiff " or plaintiffs ſhall annex an *affidavit* to ſuch bill or bills, that he " or they do not collude with any of the defendants thereto; and " ſhall thereby offer to pay the value of ſuch ſhip or veſſel, appur- " tenances and freight, as ſuch court ſhall direct; and ſuch court " ſhall thereupon take ſuch method for aſcertaining ſuch value, " as to them ſhall ſeem juſt; and ſhall direct the payment there- " of in like manner, as is now uſed and practiſed in caſes of bills " of interpleader.

" Provided alſo (by § 3.), that nothing in this preſent act con- " tained ſhall extend, or be conſtrued to extend to impeach, leſſen, " or diſcharge any remedy, which any perſon or perſons now " hath, or ſhall or may hereafter have, againſt all, every, or any " the maſter or mariners of ſuch ſhip or veſſel, for or in reſpect

" of any embezzlement, ſecreting, or making away with any gold,
" ſilver, diamonds, jewels, precious ſtones, or merchandize, ſhip-
" ped or loaded on board ſuch ſhip or veſſel, or on account of
" any fraud, abuſe, or malverſation of and in ſuch maſters and
" mariners reſpectively; but that it ſhall and may be lawful to
" and for every perſon or perſons, ſo injured or damaged, to pur-
" ſue and take ſuch remedy for the ſame, againſt the ſaid maſter
" and mariners reſpectively, as he or they might have done before
" the making of this act."

Sutton v. Mitchell, 1 Term Rep. 18.

[Upon this ſtatute it hath been adjudged, that the owner of a ſhip is liable to the value of the ſhip and freight in the caſe of a robbery, in which one of the mariners is concerned, by giving intelligence, and afterwards ſharing the ſpoil, the latter part of the firſt ſection being ſufficiently comprehenſive to include a tranſaction of this nature.

However, by ſtat. 26 *G.* 3. *c.* 86. which is explanatory and in amendment of the above act of 7 *G.* 2. the owners are not liable beyond the value of the ſhip and freight for any goods ſhipped without their privity, although the maſter or mariners be in no-wiſe concerned in or privy to the robbery, embezzlement, ſecreting, or making away therewith.

By § 2. no owners of any ſhip or veſſel ſhall be liable to anſwer for any loſs or damage which may happen by fire to any goods or merchandizes that may be ſhipped on board. Nor by § 3. for any loſs or damage to any gold, ſilver, diamonds, watches, jewels, or precious ſtones, that may be ſhipped on board, by reaſon of any robbery, embezzlement, making away with, or ſecreting thereof, unleſs the owner or ſhipper thereof ſhall, at the time of ſhipping the ſame, inſert in his bill of lading, or otherwiſe declare in writing to the maſter, or owners of the ſhip or veſſel, the true nature, quality, and value of ſuch gold, *&c.*

By § 4. if the freighters or proprietors of any ſuch gold, *&c.* or other merchandize, ſhall ſuffer any loſs or damage by any of the means aforeſaid, in the ſame voyage, (fire only excepted,) and the value of the ſhip or veſſel, with all her appurtenances, and the amount of the freight due or to grow due during ſuch voyage, ſhall not be ſufficient to make compenſation to all of them, then ſuch freighters or proprietors ſhall receive their ſatisfaction thereout in average, in proportion to their reſpective loſſes or damages. And in ſuch caſe the freighters or proprietors, or any of them, or on behalf of himſelf and all other the freighters or proprietors, or the owners of ſuch ſhip or veſſel, or any of them, or on behalf of himſelf and all other the part-owners, may exhibit a bill in any court of equity, for a diſcovery of the total amount of ſuch loſſes or damages, and alſo of the value of ſuch ſhip or veſſel, appurtenances, and freight, and for an equal diſtribution and payment thereof amongſt ſuch freighters or proprietors, in proportion to their reſpective loſſes or damages, according to the rules of equity; provided, that if any ſuch bill be exhibited on behalf of the part-owners of ſuch ſhip, the plaintiff ſhall annex an affidavit to ſuch bill, that he does not collude with any of the

defendants

defendants thereto; and ſhall thereby offer to pay the value of the ſhip, appurtenances, and freight, as the court ſhall direct; and the court ſhall thereupon take ſuch method for aſcertaining the value as to them ſhall ſeem juſt, and ſhall direct the payment thereof, in like manner as is uſed and practiſed in caſes of bills of interpleader.

By § 5. it is provided, that this act ſhall not leſſen or diſcharge any remedy which any perſon now hath, or ſhall hereafter have, againſt any maſter or mariners for embezzlement, *&c.*

The defendant was ſole owner of a ſhip which he let to *J. S.* for a voyage at a certain ſum, and *J. S.* was to have the benefit of carrying the goods. The plaintiff had ſhipped a quantity of moidors, and the bills of lading were ſigned by the captain: the moidors being loſt, an action was brought againſt the defendant as owner, to charge him under the ſtat. 7 *G.* 2. to the amount of the ſhip and freight. For the defendant it was inſiſted, that though the ſhip was his property, yet he was not *ſo* owner as to be liable to the plaintiff; and that *J. S.* was for this purpoſe the owner. But it appearing that the defendant had covenanted for the condition of the ſhip, and the behaviour of the maſter; the Chief Juſtice held, he was liable to the plaintiff, and the freight he had in general from *J. S.* was ſufficient, though the identical freight for the gold belonged to the other, and *J. S.* had only the uſe of the ſhip, and no ownerſhip. Pariſh v. Crawford, 2 Str. 1251.

The maſter of a veſſel was leſſee of her for a term of years by agreement with the owners, in which there were covenants on *their* part, that he ſhould have the ſole management of the ſhip, and employ her for his own ſole benefit; and on *his* part, that he ſhould repair her at his own ſole coſt and charge, *&c.* It was holden, that notwithſtanding this agreement, the owners were liable for neceſſaries furniſhed for the ſhip by order of the maſter, though without their knowledge, and though the owners were not known to the perſons who ſupplied them. Rich v. Coe, Cowp. 636.

In general, whoever ſupplies a ſhip with neceſſaries, has a *treble* (*a*) ſecurity. 1. The perſon of the maſter. 2. The ſpecifick ſhip. 3. The perſonal ſecurity of the owners, whether they know of the ſupply or not. 1. The maſter is perſonally liable, as making the contract. 2. The owners are liable in conſequence of the maſter's act, becauſe they chooſe him: they run the riſk, and they ſay, whom they will truſt with the appointment and office of maſter. Such is ſtated to be the general law, which however is liable to be varied by any private agreement between the maſter and owners. For if it appear, that the perſon ſupplying the neceſſaries gave credit to the maſter individually as the reſponſible perſon, or on the other hand, that he conſidered the maſter merely as a ſervant, and gave the credit to the owners only, in either of thoſe caſes, he can have his remedy againſt that party only to whom he originally looked for payment (*b*). *Ibid.*

(*a*) But according to Mr. J. Buller, the creditor, when he advances his money, has only two ſecurities, viz. the body of the ſhip, and the perſon of the maſter. It is only in reſpect of the *ſhip*, that the maſter can bind the *owners*. If the owner keeps the ſhip, he keeps her ſubject to the charge the maſter has brought upon her. If he relinquiſh the ſhip, he is not liable to the charge.—His keeping the ſhip is proof of his aſſent. Upon this ground, that learned judge diſſented from the reſt of the court, who held, that a promiſe by a captain on behalf of the owners, when the ſhip was taken, to

pay monthly wages to one of the ſailors, in order to induce him to become a hoſtage, was binding upon the owners, although they abandoned the ſhip and cargo. Yates v. Hall, 1 Term Rep. 73. (*b*) Hoſkins v. Slayton, Ca. temp. Hardw. 376.

Speering v. Degrave, 2 Vern. 643.

J. S. as maſter of the ſhip, of which the other defendants were part-owners, bought ſeveral goods of the plaintiffs; as, beef, biſcuit, ſails, and cordage. *J. S.* the maſter failed. The bill was brought to compel the defendants, the part-owners, to pay. They inſiſted, that *J. S.* only was liable; and, beſides, that he had money from them to pay the plaintiffs. *Per curiam.*—*J. S.* the maſter was but a ſervant to the owners; and where a ſervant buys, the maſter is liable. If the owners paid their ſervant, yet, if he paid not the creditors, they muſt ſtand liable. It was decreed, that the owners ſhould pay the plaintiffs their debts in proportion to their reſpective ſhares and intereſts in the ſhip.

Lex Mercat. 53. Hob. 11. Moor, 918.

But, if the maſter borrow money to repair or victual the ſhip when there is no occaſion for it, he alone is debtor, and not the owners.

By the law of nations the captain has a power to ranſom. This is for the benefit of the owners: but it being doubted, whether it is for the benefit of the publick, it is taken away by ſtatute of 22 *G.* 3. *c.* 25.]

(E) Of Mariners.

Molloy, 209.

MAriners are perſons choſen and appointed by the maſter to navigate the ſhip, for whoſe faults and miſcarriages he muſt anſwer; and, as they are his ſervants, he may correct and puniſh them according as the uſage is at ſea.

Roll. Abr. 530. & *vide* Roll. Rep. 285.

But though the maſter muſt anſwer for them, yet are the owners likewiſe anſwerable for their faults and miſcarriages; as, if the owner of a ſhip victuals it, and furniſhes it to ſea with letters of repriſal, and the maſter and mariners, when they are at ſea, commit piracy upon a friend of the king, without the notice or conſent of the owner, the owner ſhall loſe his ſhip by the admiral law, of which our law ought to take notice.

1 Sid. 179. 3 Mod. 93. 1 Ventr. 46. [Moll. Bk. 2. c. 3. Com. Dig. tit. Navigation, I. 5.]

By the civil law and cuſtom of merchants, if the ſhip be caſt away, or periſh through the mariners' default (*c*), they loſe their wages. So, if taken by pirates (*d*), or if they run away; for, if it were not for this policy, they would forſake the ſhip in a ſtorm, and yield her up to enemies in any danger. [So, if they refuſe aid and aſſiſtance to their companions on the ſea. So, if they do not help to ſave the goods, when the ſhip periſhes. So, if they abſent themſelves, when the ſhip is ready to ſail.]

(*c*) But whether the executors of thoſe mariners, who died before the ſhip was caſt away, may recover the wages due to their teſtators, *quære*, & *vide* Sid. 179. Keb. 684. (*d*) So, by 8 Geo. 1. c. 24.

And by the 22 & 23 *Car.* 2. *c.* 11. § 7. it is enacted, "That "if the mariners or inferior officers of an *Engliſh* ſhip, laden "with goods and merchandize, ſhall decline or refuſe to fight "and defend the ſhip, when they ſhall be thereunto commanded "by

" by the maſter or commander thereof, or ſhall utter any words " to diſcourage the other mariners from defending the ſhip, every " mariner, who ſhall be found guilty of declining or refuſing as " aforeſaid, ſhall loſe all his wages due to him, together with ſuch " goods as he hath in his ſhip, and ſuffer impriſonment, not ex- " ceeding the ſpace of ſix months; and ſhall, during ſuch time, " be kept to hard labour for his or their maintenance."

And, by § 9. of the ſaid ſtatute, " every mariner, who ſhall " have laid violent hands on his commander, whereby to hinder " him from fighting in defence of his ſhip and goods committed " to his truſt, ſhall ſuffer death as a felon."

[By the cuſtom of merchants, mariners are entitled to wages at every delivering port; and it hath been holden that they are ſo, though an agreement was made with them, that they ſhould not demand wages till the return of the ſhip to the port of *London*; when the freight was to be paid; and a proviſion was made before the voyage, that, every ſix months, wages ſhould be paid for one month, during the voyage. Edwards v. Child, 2 Vern. 727.

It was ſaid by *Holt*, C. J. that if the ſhip be loſt before the firſt port of delivery, the ſeamen loſe all their wages: but, if after ſhe has been at the firſt port of delivery, then they loſe only thoſe from the laſt port of delivery. But if they run away, although they have been at a port of delivery, yet they loſe all their wages. 1 Ld. Raym. 639.

It was alſo ruled by the ſame judge at *niſi prius*, that if a ſhip be bound for the *Eaſt Indies*, and thence to return to *England*, and the ſhip unlade at a port in the *Eaſt Indies*, and take freight to return to *England*, and in her return ſhe be captured; the mariners ſhall have their wages for the voyage to the *Eaſt Indies*, and for half the time that they ſtaid there to unlade, and no more. *Id.* 739.

In an action brought for mariners' wages for a voyage from *Carolina* to *London*, it appeared, that the plaintiff ſerved three or four months, and before the ſhip came to *London*, which was the delivering port, he was impreſſed into the queen's ſervice; and afterwards the ſhip arrived at the delivering port. It was ruled by *Holt*, C. J. that the plaintiff ſhould recover *pro tanto* as he ſerved, the ſhip coming ſafe to the delivering port. But when afterwards, in ſuch an action between *Chandler* and *Meade*, it appeared, that the plaintiff was hired by the defendant at *Carolina* to ſerve on board the *Jane* ſloop, whereof the defendant was maſter, from *Carolina* to *England*, at 3 *l. per* month; that he ſerved two months; that then the ſhip was taken by a *French* privateer and ranſomed; that juſt as ſhe came off *Plymouth*, the plaintiff was impreſſed; and then the ſhip came ſafe into the *Thames*, where ſhe diſpoſed of her cargo; it was ruled by *Holt*, that the plaintiff could have no wages, the ſhip having been captured and ranſomed. It was inſiſted by the plaintiff's counſel, that in that caſe he ſhould recover *pro ratâ*, and that the uſage among merchants was ſo; which *Holt* ſaid, if he could prove, it would do; but wanting proof of it, he was nonſuited. Wiggins v. Ingleton, 2 Ld. Raym. 1211.

If a ſailor hired for a voyage take a promiſſory note from his employer for a certain ſum, provided he proceed, continue, and do Cutter v. Powell, 6 Term Rep. 320.

do his duty on board for the voyage, this contract is indiviſible, and if he die before the arrival of the ſhip, no wages can be claimed either on the contract, or on a *quantum meruit*.

Hernaman v. Bawden, 3 Burr. 1844.

In a voyage from *England* to *Newfoundland*, and thence with fiſh to *Spain*, *Newfoundland* is not the delivering port; and if the ſhip is taken between *Newfoundland* and *Spain*, the mariner loſes his wages.

Conſolat. del Mere Moll Bk. 2. c. 3. § 7. (*a*) For this Molloy cites 1 Ro. Abr. 530. but nothing to this effect appears in that page of the book.

If a ſhip be ſeized upon for debt, or otherwiſe become forfeited, the mariners muſt receive their wages, unleſs in ſome caſes, where their wages are forfeited as well as the ſhip; or, if they have letters of marque, and inſtead of that they commit piracy, by reaſon of which there becomes a forfeiture of all. But (*a*) lading prohibited goods aboard a ſhip, as wool and the like, though it ſubjects the veſſel to a forfeiture, yet it does not deprive the mariner of his wages, for the mariners having honeſtly performed their parts, the ſhip is tacitly obliged for their wages.

Minett v. Robinſon, Hunb. 121.

A. B. libelled in the Admiralty court, as adminiſtratrix to her huſband, for his wages due as mariner on board the *Prince Frederick*. *Minett* and *Heys* moved for a prohibition, upon a ſuggeſtion, that this ſhip was ſeized for importing wines from *Holland*, not being *Rheniſh* or *Hungarian* wines, and therefore forfeited by ſtat. 12 *Car.* 2.; that claim being put in by *Bowen* the maſter, an information was filed by the ſeizor, and *Bowen* pleaded the general iſſue; but before trial ſubmitted, and compounded according to the courſe of the court; and upon payment of 136*l.* to the informer, there was judgment *quod vas deliberetur*, &c. It was likewiſe ſuggeſted, that the libel was for wages due before the ſeizure. Upon this motion it was inſiſted, that the act of parliament had ſo altered the property of the ſhip, that by the ſeizure, ſubmiſſion to a fine, and judgment *quod deliberetur*, upon it, all precedent incumbrances were diſcharged. But the court diſcharged the rule, though they admitted, if there had been a condemnation, that would have been a good ground for a prohibition, and a diſcharge of all precedent incumbrances. But the reporter adds a *quære*, for the fine implies a condemnation, although not actually given, but prevented by the ſubmiſſion.

By 2 *G.* 2. *c.* 36. made perpetual by 2 *G.* 3. *c.* 31. no maſters of ſhips ſhall proceed on any voyage without firſt coming to an agreement with the mariners for their wages, which agreement ſhall be made in writing, declaring what wages each ſeaman or mariner is to have reſpectively during the whole voyage, or for ſo long time as he ſhall ſhip himſelf for, and ſhall alſo expreſs the voyage for which ſuch ſeaman was ſhipped, upon pain of forfeiting 5*l.* to the uſe of *Greenwich* Hoſpital.

§ 2. This agreement every ſeaman ſhall ſign within three days after he ſhall have entered himſelf; and ſo ſigned, it ſhall be concluſive to all parties for the time contracted for.

§ 3. And any ſeaman deſerting before or during the voyage, or refuſing to proceed on the voyage, after he has ſigned ſuch agree-

§ 4. ment, ſhall forfeit his wages; and further, upon complaint to any

any juſtice of the peace by the maſter or other perſon having charge of the ſhip, may be committed to the houſe of correction for any time not exceeding 30 days, nor leſs than 14.

If any ſeaman abſent himſelf from the ſhip without the leave of the maſter or other chief officer having charge of the ſhip, he ſhall forfeit for every day's abſence two days' pay to the uſe of *Greenwich* Hoſpital. § 5.

If any ſeaman, not entering into the king's ſervice, leave the veſſel, before he ſhall have a diſcharge in writing from the maſter or other perſon having the charge of the ſhip, he ſhall forfeit one month's pay. § 6.

On the arrival of any veſſel in *Great Britain*, the maſter ſhall pay the ſeamen their wages, if demanded, in 30 days after the veſſel's being entered at the cuſtom-houſe, (except when a covenant ſhall be entered into to the contrary,) or at the time the ſeamen ſhall be diſcharged, which ſhall firſt happen, deducting out of the wages the penalties by this act impoſed, under penalty of paying to ſuch ſeamen that ſhall be unpaid 20 *s.* over and above the wages, to be recovered as the wages may be recovered; and ſuch payment ſhall be good in law, notwithſtanding any action, bill of ſale, attachment, or incumbrance whatſoever. § 7.

No ſeaman, by ſigning ſuch contract, ſhall be deprived of uſing any means for the recovery of wages, which he may now lawfully uſe; and where it ſhall be requiſite, that the contract in writing ſhall be produced in court, no obligation ſhall be upon any ſeaman to produce it, but on the maſter or owner of the ſhip; and no ſeaman ſhall fail in any action or proceſs for the recovery of wages, for want of ſuch contract being produced. § 8.

The maſters or owners of ſhips ſhall have power to deduct out of the wages of any ſeaman all penalties incurred by this act, and to enter them in a book, and to make oath, if required, to the truth thereof; which book ſhall be ſigned by the maſter and two principal officers, belonging to ſuch ſhip, ſetting forth, that the penalties contained in ſuch book are the whole penalties ſtopped from any ſeaman during the voyage; which penalties (except the forfeitures of wages to the owners, on the deſertion of any ſeaman, or on refuſing to proceed on the voyage) ſhall go to the uſe of *Greenwich* Hoſpital, to be paid and accounted for by the maſters of ſhips coming from beyond the ſeas, to the officer at any port who collects the 6 *d. per* month deducted out of ſeamen's wages, for the uſe of the ſaid Hoſpital, which officer is empowered to adminiſter an oath to the maſter touching the truth of ſuch penalties. § 9.

Any maſter or owner deducting the penalties as above, and not paying them to the officer collecting the 6 *d. per* month in the port where the deduction ſhall be made, within three months after the deduction, ſhall forfeit treble the value to the uſe of the Hoſpital; which, together with the money deducted, ſhall be recovered by the ſame means as the penalties for not duly paying the 6 *d. per* month. § 10.

By

By 8 *G.* 1. *c.* 24. § 7. (made perpetual by 2 *G.* 2. *c.* 28. § 7.) and alſo by 12 *G.* 2. *c.* 30. § 12. no maſter or owner of any merchant ſhip ſhall pay to any ſeaman beyond the ſeas any money or effects on account of wages, exceeding one *moiety* of the wages due at the time of ſuch payment, till ſuch ſhip ſhall return to *Great Britain*, *Ireland*, or the Plantations, or to ſome other of his Majeſty's dominions, whereto ſhe belongs, on forfeiture of double the money ſo paid, to be recovered in the high court of Admiralty by any perſon who ſhall firſt inform for the ſame.

Champion v. Nicholas, 1 Str. 405. at *niſi prius* in Middleſex.

The cargo of a ſhip was loſt by the capture of a *Swediſh* privateer, who carried her into *Gottenburgh*: the maſter ſtaid there three months to refit the ſhip, and take in new lading; and to prevent the ſeamen from going away, he agreed to pay them ſo much *per* month, whilſt they ſtaid there. In an action for this, the maſter would have diſcharged himſelf, on the rule that freight is the mother of wages, and that none are ever paid whilſt the ſhip is lading and unlading; which the Chief Juſtice agreed to be the general doctrine; but he held it not ſufficient to controul a ſpecial agreement, as there was in this caſe, and where too there was ſo long a ſtay at *Gottenburgh*.]

Winch. 8. 4 Inſt. 141. Vent. 146. 343. 3 Mod. 244. Salk. 33. pl. 4. & *vide* 4 & 5 Ann. c. 16.

The mariners may ſue in the Admiralty court for their wages, although the hiring was by the maſter on land; and this is allowed of in favour of navigation, for here they may all join in the ſame libel: alſo, by the law of the Admiralty, they have remedy againſt the ſhip and owners, as well as againſt the maſter; and it would be a great diſcouragement to ſeafaring-men to oblige them to bring ſeparate actions, and thoſe againſt a maſter who may happen to be inſolvent.

Raym. 2. Salk. 33. pl. 5. Ld. Raym. 397. 632. 2 Str. 858.

So, of the other officers under the maſter, as the mate, purſer, boatſwain, *&c.*, for though they contract with the maſter, yet it is on the credit of the ſhip.

Roll. Abr. 533. [So, a carpenter. 2 Str. 707.]

So, a ſhipwright may ſue in the Admiralty for (*a*) making a ſhip.

(*a*) So, for mending a ſhip. Cro. Car. 296.

6 Mod. 238. 2 Ld. Raym. 1044. S. C. [2 Wilſ. 265. S. C. cited, and approved of by the court.]

And if a contract be with ſeamen to go on a voyage, and they, in order thereunto, work in a harbour, and, after, the voyage be intercepted through the owner's fault, as, if the ſhip be arreſted for his debt, *&c.* the ſeamen ſhall ſue for their wages for the work done in the harbour, in purſuance of the contract to go on a voyage, in the Admiralty, as much as if they had gone the voyage: *ſecùs*, if the retainer of them had been only to do the work in the harbour.

Roſs v. Walker, 2 Wilſ. 264.

[But a pilot, though a mariner, who is ſent for from *Graveſend*, and goes from thence on board a ſhip lying in *Sea-Reach*, and pilots her thence to her moorings at *Deptford*, cannot ſue in the Admiralty for the pilotage; for both the contract and the work are within the body of a county.]

Salk. 31. Opy v. Addiſon.

So, if there be any ſpecial agreement, by which the mariners are to receive their wages in any other manner than is uſual, or, if

if the agreement be under ſeal, the mariners cannot ſue in the Admiralty. [2 Str. 968. Day v. Searle,

S.P. 2 Barnard. K. B. 419. S. C. Howe v. Napier, 4 Burr. 1944. S. P. But ſee Benns v. Parre, 2 Ld. Raym. 1206. and Roberts v. Cadd, Bunb. 247. Buggin v. Bennett, 4 Burr. 2035. Menetone v. Gibbons, 3 Term Rep. 267.]

Nor can the maſter ſue in the Admiralty court; for his contract is on the credit of the owners (*a*), and not like that of the mariners, which is on the credit of the ſhip. 4 Inſt. 141. Raym. 3. Salk. 33. pl. 4.

Carth. 51 S. P. although the owner was beyond ſea, and the ſhip lay here; & *vide* 2 Salk. 548. pl. 3. [(*a*) Hence, the maſter has no lien on the ſhip for wages, ſtores, or repairs done in England. Wilkins v. Carmichael, Dougl. 101.]

[Therefore, where a man went out mate, and upon the death of the maſter during the voyage, ſucceeded to the command of the ſhip; and upon his return ſued in the Admiralty for his wages as mate, and for a further allowance after he became maſter; the court granted a prohibition *quoad* the time he was maſter; and refuſed it *quoad* the time he was mate.] Reed v. Chapman, 2 Str. 937

(F) Of Average.

WHenever a ſhip is in ſtreſs of weather, or in danger, or juſt fear of (*b*) enemies, and the maſter, to ſave part of the cargo, throws overboard ſome of the goods in the ſhip, thoſe which are ſaved ſhall contribute in proportion; and this common calamity ſhall be equally borne by all the parties intereſted. This is called general or groſs average, and is allowed by the civil law, the cuſtoms of merchants, and our law. Molloy, 246, &c. 2 Bulſt. 290.

(*b*) So likewiſe, goods coming from infected towns or places may be caſt overboard. Molloy, 246.

[There is another ſpecies of average called ſmall or petty averages. Petty average conſiſts in ſuch charges and diſburſements, as, according to occurrences, and the cuſtom of every place, the maſter neceſſarily furniſhes for the benefit of the ſhip and cargo, either at the place of loading or unloading, or on the voyage. Theſe charges are lodemanage, or the hire of a pilot for conducting the veſſel from one place to another; towage, pilotage, light-money, beaconage, anchorage, bridge-toll, quarantine, river charges, ſignals, inſtructions, paſſage-money by caſtles, expences for digging a ſhip out of ice when frozen up, that it may be brought into a proper harbour; and at *London*, by cuſtom, the fee paid at *Dover* pier.

A third ſpecies of average, is that we are accuſtomed to meet with in bills of lading, "paying ſo much freight for the ſaid "goods, with primage or *average* accuſtomed." In this ſenſe it ſignifies a ſmall duty, which merchants, who ſend goods in the ſhips of other men, pay to the maſter, over and above the freight, for his care and attention to the goods ſo intruſted to him.]

In this contribution in general average, not only the maſter, owners, and freighters of the ſhip ſhall bear a proportionable ſhare of the loſs, but alſo paſſengers for ſuch wares as they have in the ſhip. Molloy, 250.

ſhip. And paſſengers who have no wares or goods in the ſhip; yet, as they are a burden to the ſhip, eſtimate is to be made of their apparel, rings, and jewels, towards a contribution of the loſs: and in general it is ſaid, that every thing ſhall contribute, except the proviſions of the ſhip, and the men who are neceſſary to work the ſhip.

Molloy, 247. The maſter ought to be careful, that only thoſe things of the leaſt value and greateſt weight be flung overboard: alſo, he and the crew (or moſt of them) muſt ſwear that the goods were caſt overboard for no other cauſe but purely for the ſafety of the ſhip and lading.

Molloy, 249. If, to avoid the danger of a ſtorm, the maſter cuts down the maſts and ſails, and they falling into the ſea are loſt, this damage is to be made good by ſhip and lading, *pro rata*: otherwiſe, if the caſe happens by ſtorm, or other caſualties.

Molloy, 248. Alſo, if through the rifling of the ſhip, caſting overboard, and lightning the ſhip, any of the remaining goods are ſpoiled, either with wet or otherwiſe, thoſe which are preſerved muſt contribute towards the loſs of the goods impaired, as well as to thoſe which were entirely loſt.

Da Coſta v. Newnham, 2 Term Rep. 407. [Where a ſhip is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and proviſions of the workmen hired for the repairs become general average.]

Molloy, 250, 251. The goods ſaved and loſt are to be eſtimated according as the goods ſaved were ſold for, freight and other neceſſary charges being firſt deducted, and in ſuch proportion the goods ſaved are to contribute.

Leg. Wiſb. Art. [This rule is agreeable to the marine laws of *Wiſbuy*, which declare, that the goods thrown overboard ſhall be brought into a groſs average, and ſhall be rated at the ſame price for which other merchandize of the ſame ſort, preſerved from the ſea or enemy, was ſold. This cuſtom mentioned by *Molloy* was certainly new in *England* at the time he wrote; for it appears by *Malyne*, that in 1622 the diſtinction was obſerved of eſtimating the goods at prime coſt, if the jettiſon happened before half the voyage was performed: and if after, at the price the reſt of the goods ſold for at the place of diſcharge. However, the authority of *Molloy* is confirmed by *Magens*, who ſays, that the prevailing mode of ſettling averages now adopted in *England* is conformable to that rule, which has aboliſhed the diſtinction.

Maly. Lex Marc. 1ſt part. c. 26.

Molloy, tit. Average, § 4. In *England*, money and jewels fall into the general average at their full price.

1 Mag. 62. Peters v. Miligan, Sittings at Guildhall, 1787. *coram* Buller, J.

Peters v. Miligan and others, at Guildhall, *coram* Buller, J. Dec. 19th, 1787. A ſpecial action on the caſe was brought by the owners of a packet hired by government againſt defendants, who were the ſhippers of bullion from the *Weſt Indies* to this country, for their proportion of general average ariſing from a loſs by cutting away a maſt. A bill of lading was given by the captain at the time he received the bullion. It appeared that merchant ſhips take leſs for the

the conveyance of this article than packets, and these than men of war. Packets are allowed by government to receive bullion on board, but captains of men of war are prohibited. Packets however are considered as king's ships, they are under martial law. It appeared also that bullion on board merchant ships always contributes to general average. But no particular instances were in proof of such an accident having happened to a packet with bullion on board, on which the general question could arise. But several witnesses declared that they never heard of such a demand, and they were likely to have known it, if it ever had been made.—*Bearcroft* for plaintiff in his reply contended, that this being a new question in a court, it was as much in his favour as against him; for perhaps the demand was never before resisted. Wherever a bill of lading is given, it must be for *cargo*, and cargo is always subject to general average. This must be considered as cargo, and though packets are not allowed to carry cargo in general, yet *quoad* bullion they are. *Buller*, J.—There is a point arising in this cause, and it is the only one which I can leave to the jury, which is new in a court of justice; therefore it is necessary to state it precisely: the only question then is, whether any usage in the particular case of packets has made an exception out of the general law with regard to general average? for as to the general law there can be no doubt but that bullion is subject to average like any other cargo paying freight. Before I come to the evidence on this subject, I shall lay two circumstances out of the case: 1st, That though a captain of a man of war takes bullion on board, yet he does not receive any freight for it as such, and if he does receive a reward for doing so, it is against positive orders. 2d, The difference of the premiums of insurance between packets and merchantmen with bullion on board, because the motive of the underwriter in requiring less in the one than in the other case, is, because the former is more secure and better manned than the latter. There can be no doubt but that specie is liable to general average. The law upon this subject has been diligently and ably collected by a gentleman who has lately written on the subject of insurance. Mr. Park. Every thing which pays freight must be liable to general average. A packet does carry bullion for freight; the captain gives bills of lading; government receives one-third of the freight; the owner another third, and the captain the third share. The cargo of every vessel carrying for freight must equally be liable to general average, whether employed by government or a subject: there can be no difference. Then the question arises, whether there is any usage in this case to vary the general law. This is the material consideration. It has been said by the witnesses, that they never heard of any instance similar to the present, in which such a demand has been made. Whether negative usage ought to weigh or not, depends very much upon the subject to which it is applied. In cases of this sort, where accidents must frequently have happened, negative usage of non-claim is very strong. Captain *Bull*, of one of the packets, has said, that very many instances have happened

pened of packets cutting away their masts. Now it must frequently have happened that bullion was on board in such cases. There are now 30 packets employed every year by government, and many have been so at least from the time of Queen *Anne*, but I cannot now say at what time they were set up. Captain *Braithwayte* says, that they have larger freight for carrying bullion in the packets from *Lisbon* than the merchantmen have, because the packets are a safer mode of conveyance; but the reason given by Captain *Bull* for the difference is, because there is no general average allowed in that case. Then Mr. *Etherege*, who is clerk of the bullion office in the Bank, says, that he never knew of a demand of this sort in the case of a packet, and he thinks he must have known it if there had; but he has always known it done in the case of merchantmen.—Verdict for defendant by a special jury.]

Molloy, 250. If a master of a ship lets out his ship to freight, and then receives his compliment, and afterwards takes in goods without leave of the freighters, and a storm arises at sea, and part of the freighters' goods are cast overboard, the remaining goods are not subject to the average, but the master must make good the loss out of his own purse.

Moor, 297. Also, average is not due, unless the goods are lost in such a manner, that thereby the residue in the ship are saved; as, if goods are thrown overboard to lighten the ship, or, by composition, part is given to a pirate to save the rest; but, if a pirate takes part by violence, average shall not be paid for them.

Show. Par. Cases, 18, 19. and affirmed in parliament. So, where *A.* being one of the owners of a ship, loaded on board her 210 tons of oil, and *B.* loaded on board her 80 bales of silk upon a freight, by contract, both to be delivered at *London*; the ship was pursued by enemies and forced into an harbour, &c. and the master ordered the silk on shore, being the most valuable commodity, though they lay under the oils, and took up a great deal of time to get at them; the ship and oils were afterwards taken, and the owner of the oils brought his bill in equity to have contribution from the owner of the silk; in this case, as the loss of the oils did not save the silks, nor the saving the silks lose the oils, the bill was dismissed.

Molloy, 249. Hard. 183. If a ship happens to be taken, and the master, to redeem the ship and lading out of the enemies or pirates hands, promises a certain sum of money, for performance whereof he himself becomes a pledge or captive in the custody of the captor; in this case he is to be redeemed at the costs and charges of the ship and lading and all are to be contributory for his (*a*) ransom according to each man's interest.

(*a*) And as he may ransom the ship and goods, so may he retain the goods for his satisfaction in the same manner as he may detain the goods for freight; but if he once suffers them out of his possession, he cannot afterwards retake them. 6 Mod. 12, 13. [But now by stat. 22 Geo. c. 25. "it shall not be lawful for any of his Majesty's subjects to ransom, or to enter into any contract or agreement for ransoming any ship or vessel belonging to any of his Majesty's subjects, or any merchandize or goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against any of his Majesty's subjects. And all contracts and agreements entered into, and all bills, notes, and other securities given for such purposes are declared void, and the offender is subject to a penalty of five hundred pounds."]

So, where a pirate takes part of the goods to ſpare the reſt, contribution muſt be paid; but if a pirate takes by violence part of the goods, the reſt are not ſubject to average, unleſs the merchant hath made an expreſs agreement to pay it after the ſhip is robbed. Moor, 297. Molloy, 249.

If *A.* and ſeveral others take their paſſage in a ferry-boat, and being upon the water, a tempeſt ariſes, ſo that they are in danger of being drowned; upon which, to preſerve their lives, ſeveral of the goods are caſt overboard, among which a pack of goods of *A.*'s of great value is thrown over; in this caſe, there ſhall be no average, but the ferryman muſt anſwer for the goods; becauſe, for his hire, he runs the venture of the voyage. Allen, 93. 2 Buſſ. 280. 12 Co. 62.

(G) Of Hypothecation.

IF a ſhip be at ſea, and ſpring a leak, or be otherwiſe in danger of being loſt, or the voyage be defeated for want of proviſions or other neceſſaries; in theſe caſes of extremity, the maſter may pledge or hypothecate the ſhip and goods, or (*a*) either of them, for ſuch neceſſaries as are wanting, which power is implicitly given him in (*b*) conſtituting him maſter, and which he may exerciſe, rather than that the ſhip ſhould be loſt, or the voyage defeated. Roll. Abr. 53. Hob. 11. Moor, 918. That it is ſo by the laws of Oleron, of which our law takes notice.

Molloy, 213. (*a*) The maſter may hypothecate either ſhip or goods, for the maſter is intruſted with both, and repreſents the traders as well as owners of the ſhip. Salk. 34. pl. 7. 2 Ld. Raym. 805. (*b*) That he who is deputed maſter may do the ſame. Noy, 95.

The maſter cannot hypothecate the ſhip or goods for any debt of his own, nor in any caſe, but for the preſervation of the ſhip and completing of the voyage. Molloy, 213.

Alſo, the maſter cannot (*c*) ſell the ſhip and broken tackle, though there is no probability of its being ſaved, partly in reſpect of the tempeſt, and partly in reſpect of the barbarity of the inhabitants, who took away every thing that was caſt on the ſhore. Sid 453. *per* Hale. (*c*) But if he cannot hypothecate, he may ſell ſo much of the lading as is neceſſary, &c. Molloy, 214.

If the veſſel happens to be wrecked or caſt away, and the mariners, by their great pains and care, recover ſome of the ruins and lading, the maſter, in that caſe, may pledge the ſame, and diſtribute the money among the mariners, or ſo much as ſhall be neceſſary to the defraying of their expences to their own country: but if the mariners noway contributed to the ſalvage, then their reward is ſunk and loſt with the veſſel; and if there be any conſiderable part of the lading preſerved, he ought not to diſmiſs his mariners till advice from the laders or freighters. Molloy, 214.

But although hypothecation of ſhips be abſolutely neceſſary for navigation, without which maſters could not get credit abroad; yet a maſter cannot make the owner (*d*) perſonally liable by any contract of his; but (*e*) the ſhip and cargo ſhall be liable where he hypothecates for neceſſaries, although ſuch neceſſaries were not actually employed or laid out in the ſervice of the ſhip or voyage, and (*d*) 6 Mod. 79. 2 Sid. 161. Salk. 35. pl. 9. *cont.* [However, what is ſaid by Ld. Hard-

wickein the case of Buxton v. Ince, 1 Vez. 156. and the decision of the Master of the Rolls in Samsun v. Braginton, 1 Vez. 443. support the doctrine in the text.]

and the owners and freighters must take their remedy against the master.

(e) Noy, 25.

Molloy, 214. 6 Mod. 79. [2 P. Wms. 367. 2 Str. 695. 1 Atk. 234.] & *vide* 2 Vern. 643. Salk. 34. pl. 7. 3 Mod 244. 6 Mod. 12. 25. 79. [Menetone v. Gibbons, 3 Term Rep. 267.]

The master can only hypothecate, where the calamity of want of necessaries happened after the ship had put to sea; and therefore the Admiralty court is allowed to have jurisdiction herein, so far as to subject the ship, but cannot proceed against the person otherwise, than as it is necessary to make him party towards the condemnation of the ship.

And therefore where *A.* contracted with *B.* for a cable, which he delivered at *Ratcliff-upon-Thames*, and *B.* sued in the Admiralty, a prohibition was granted; though it was insisted, that the want of the cable was occasioned by the stress of the weather and sea; for here the contract was at land, and a remedy for the breach at common law: bnt had the hypothecation been at *Rotterdam*, or any other foreign port, the remedy had been proper in the Admiralty court. [For that court has cognizance of an hypothecation bond given in the course of a voyage, though it be executed upon land, and under seal.]

(H) Of Charter-Parties.

Molloy, 227., &c. 2 Vent. 196. Style, 133. 2 Show. 384. Palm. 399. 2 Roll. Abr. 248. pl. 10. Poph 161.

A Charter-party is an agreement by indenture, whereby the owners, master, and freighters of a ship covenant with each other, that such a ship shall be fit and ready to sail, take in such and such lading, carry and transport the same to such place or places, in consideration whereof the freighters or merchants are to pay so much, *&c.* and such charter-party, being only a covenant or agreement, shall be construed according to the intention of the parties, and the usual customs of merchants.

2 Inst. 673. 2 Lev. 74. S. C. cited, and admitted to be law.

An indenture of charter-party was made between *Scudamore* and others, owners of the good ship called *B.*, whereof *Robert Pitman* was master, of the one part, and *Vandestene* of the other part; in which indenture the plaintiff covenanted with the said *Vandestene* and *Robert Pitman*; and also *Vandestene* covenanted with the plaintiff and *Robert Pitman*, and bound themselves to the plaintiff and *Robert Pitman* for the performance of covenants in 600 *l.*, and the conclusion of the said indenture was, *In witness whereof the parties aforesaid to these present indentures have put their seals*; and the said *Robert Pitman* to the said indenture put his hand and seal and delivered the same: the defendant, in bar of the said action pleaded the release of *Pitman*, &c. whereupon the plaintiff demurred; and it was adjudged, that the release of *Pitman* did not bar the plaintiff, because he was no (*a*) party to the indenture and the diversity was taken and agreed between an indenture reciprocal between parties on one side, and parties on the other side, as this was; for, there, no bond, covenant, or grant, can be made to, or with, any that is not party to the deed; but where

(*a*) Lev. 235.

the deed indented is not reciprocal, but is without a *between*, &c. as *omnibus Chriſti fidelibus*, &c. there, a bond, covenant, or grant may be made to divers ſeveral perſons.

So, where an action was brought on a charter-party, which was in this manner: *This indented charter-party witneſſeth, that* Binley, *maſter, and part-owner of the ſhip, with conſent of* Cooker, *the other part-owner, hath let the ſhip to* Child *for ſuch a voyage, and* Child *covenants with* Binley, nec non *with Cooker to pay* 300 *l. Cooker* brings the action, and the defendant *Child* pleads, that only he and *Binley* were the parties to and ſealed the indenture; whereupon the plaintiff demurred; & *per totam curiam*, though the deed be indented, yet, not being *inter partes*, there may be a covenant with a ſtranger, as if it were a deed poll, or in the firſt perſon, *Know ye that I*, &c.: otherwiſe, where the deed is between parties, then no one, that is a ſtranger, can take advantage thereof by way of action. 2 Lev. 74. 3 Keb. 94. 115. Cooker v. Child. 3 Lev. 139. S. C. cited.

In an action on a charter-party a breach muſt be aſſigned, which the party may do in the very words of the agreement; and, if there be any thing to be done by the plaintiff, which, in the nature of the thing, is *neceſſary to enable the defendant to perform his part* of the agreement, if the plaintiff hath not done his part, this will excuſe the defendant's omiſſion. *Vide* tit. Covenants, Letter (L) and 2 Jon. 216.

[In covenant on a charter-party, whereby it was agreed to employ a ſhip of which the plaintiff was captor, as ſoon as ſentence of condemnation ſhould have paſſed, the ſentence muſt be taken to mean a *legal* ſentence, and the party who ſues for the freight muſt aver, that the ſhip was condemned by a court having competent juriſdiction.] Unwin v. Wolſeley, 1 Term Rep. 674.

If, in an action of covenant, the plaintiff declares upon a charter-party, by which the plaintiff, being maſter of a ſhip, was to pay two parts of the port-charges, and the factor of the defendant the other part; and the plaintiff ſhews, that he ſailed from *L.* to *C.* and there paid all the port-charges, *viz.* two parts for himſelf, and the other part for the defendant; and that the defendant had not repaid him; this breach is well aſſigned; for when the plaintiff ſays he paid the third part, it ſhall not be intended the defendant did, but that the plaintiff was neceſſitated to pay it, otherwiſe his ſhip would be ſtaid in the port. 2 Jon. 186. Bellamy v. Ruſſel.

[If there be a covenant in a charter-party, that no claim ſhall be admitted or allowance made for ſhort tonnage, unleſs ſuch ſhort tonnage be found and made to appear on the ſhip's arrival, on a ſurvey to be taken by four ſhipwrights to be indifferently choſen by both parties; this is not a condition precedent to the plaintiff's right of recovering for ſhort tonnage, but is a matter of defence to be taken advantage of by the defendant; and, conſequently, the not averring performance can be no ground for arreſting the judgment.] Hotham v. East India Company, 1 Term Rep. 638.

If *A.* covenants to pay 3 *l. per* ton for goods imported, and for performance thereof binds himſelf in a penalty, and in an action thereupon, the plaintiff aſſigns for breach the nonpayment for ſo many tons, and a hogſhead, which came to ſo much; this is naught, 2 Lev. 124. Allen, 9. S. P.

naught (*a*), for the covenant is only to pay by the ton; though it was said *per cur.* to be otherwise, if the covenant had been to pay, *secundum ratam*, 3 *l. per* ton.

(*a*) If goods are sent abroad generally the freight must be according to freight for the like accustomed voyage. Molloy, 232.—And if a ship be freighted for 200 tons or thereabouts, the addition of *thereabouts* is commonly reduced to be within five tons, more or less, as the moiety of the number *ten*, whereof the whole number is compounded. Molloy, 232.

2 Vern. 210. 212.

(*b*) If a charter be so worded, that there can be no remedy thereon at law, yet the party having a just demand may be relieved in equity; as, where by the agreement there was no freight to be paid for the outward-bound cargo, and when the ship arrived beyond sea, the factor had no goods at all to load the ship with; the court decreed payment of the freight.

[(*b*) But Lord Mansfield, speaking of this very instrument, says, "In construing arguments, I know of no difference between a court of equity and a court of law. "A court of equity cannot *make* an agreement for the parties; it can only explain what their true "meaning was, and that is also the duty of a court of law." Dougl. 277.]

2 Vern. 727.

So, where the *East India* Company took bonds from the mariners and officers of a ship not to demand their wages, unless the ship returned to the port in *London*; and the ship arrived at a delivering port, and was afterwards taken by the *French*; it was held by my Lord Chief Justice *Holt*, in an action tried by him, and likewise in Chancery, that the seamen and officers should have their wages, to the time of the arrival of the ship at the delivering port.

2 Vern. 242. Draddy v. Beacon.

The plaintiff, a merchant in *London*, hired the defendant's ship to freight for a voyage to *Bourdeaux*, at 3 *l.* 10 *s.* a ton: it happened, that an embargo was laid on all merchant ships for six weeks: the ship afterwards proceeded on her voyage to *Bourdeaux*; and the defendant not discovering what agreement he had made with the plaintiff in *England*, the plaintiff's factors and correspondents there agreed to allow the defendant 6 *l.* 10 *s. per* ton, upon which latter agreement, the defendant recovered at law. A bill being exhibited for relief against this second and underhand agreement, obtained, as was alleged, by fraud, was dismissed; for the defendant was at liberty to make a new agreement, by reason that the performance of the first was obstructed by the embargo after laid on all merchant ships.

2 Chan. Ca. 238.

A master of a ship, without the owner, treated with the plaintiff, a merchant, for the freight of the ship at 80 tons, and accordingly entered into a charter-party with him to sail from *London* to *Falmouth*, and thence to *Barcelona*, without altering the voyage, and there to unlade at a certain rate *per* ton; and for performance, the master binds the ship, tackle, *&c.* valued at 300*l.* the master deviates, and commits barratry, by which the merchant in effect loseth his voyage and goods. The merchant had a sentence against the master and ship in *Barcelona*, which was confirmed in a higher court in *Spain*; and the owner having brought trover for the ship, the merchant exhibited his bill to be relieved against this action, and likewise another action brought for freight: it was held by my Lord Chancellour, that the charter-party having valued the ship at a certain rate, the owner is not liable further, and the master is liable for deviation and barratry for

for ſhould it be otherwiſe, maſters would be owners of all men's ſhips and eſtates.

If a charter-party be made in *England*, to do certain things in ſeveral places on the ſea, though no act is to be done in *England*, but all upon the ſea; yet no ſuit can be in the Admiralty court for the nonperformance of the agreement, for the contract is the original, without which no cauſe of ſuit can be; and this contract is out of their juriſdiction; for where a part is triable by the common law, and part by the admiral law, the common law ſhall be preferred. Roll. Abr. 532. Roll. Rep. 486. S. C. 4 Inſt. 135. 139. 142. Hob. 212. Moor, 450. like point.

[Freighters of ſhips under charter-parties with the *Eaſt India* Company, are not anſwerable for *damage*, or *loſs*, occaſioned by the act of God. The expreſſion *ſhip-damage*, in thoſe charter-parties, means, damage from negligence, inſufficiency, or bad ſtowage in the ſhip.] Dougl. 272.

(I) Of Policies of Inſurance; [and herein,

1. Of Marine Inſurances.]

[ASSURANCE or inſurance ſignifies a contract or agreement whereby one or more perſons, called inſurers or aſſurers, oblige themſelves to anſwer for the loſs of a ſhip, houſe, goods, &c. ſpecified in an inſtrument ſubſcribed by them, in conſideration of a premium of a ſtipulated ſum *per cent.* paid by the proprietors of the things inſured. 2 Saund. 200.

The inſtrument by which this contract of indemnity is effected, is called a Policy. It is ſigned only by the inſurer, who, on that account, is denominated an underwriter. Notwithſtanding this, there are certain conditions to be performed as well by the perſon not ſubſcribing, as by the underwriter, elſe the policy will be void. Park, 1.

Of policies there ſeem to be two ſorts, *valued* and *open* policies; and the only difference between them is, that in the former, goods or property inſured are valued at prime coſt, at the time of effecting the policy; in the latter, the value is not mentioned: that in the caſe of an open policy, the real value muſt be proved; in a valued policy it is agreed, and is juſt as if the parties had admitted it at the trial. 2 Burr. 1171.

Although policies of inſurance are not to be ranked with ſpecialty contracts, not being under ſeal, yet they have always been holden as ſacred agreements. The courts therefore will very reluctantly admit of any alteration in them. They may indeed be altered by the conſent of the parties (*a*) after they are ſigned; but the courts will never vary or depart from the written words, but upon the ſtrongeſt and moſt ſatisfactory evidence that the meaning of the parties has been miſtaken (*b*). Park, 1. Skin. 54. (*a*) Bates v. Graham, 2 Salk. 444. (*b*) Henkle v. Royal Exchange Aſſurance Company, 1 Vez. 317. Motteux v. Governor and Company of the London Aſſurance, 1 Atk. 545.

By the common law and uſage of merchants, any perſon might be an inſurer. But the ſtatute of 6 *G.* 1. *c.* 18. (by which the crown was authorized to create two diſtinct corporations for the purpoſe of inſuring, which corporations are ſince known by the names The projectors of theſe companies had been very

of the *Royal Exchange Assurance* Office, and the *London Assurance* Office,) has somewhat restrained this common law right: for by § 12. of that statute it is enacted, "that from and after the granting or making the said charters or indentures for making the two corporations above mentioned, and passing the same under the great seal, for and during the continuance of the said corporations respectively, or either of them, all other corporations or bodies politick, before this time erected or established, or hereafter to be erected or established, whether such corporations or bodies politick, or any of them, be sole or aggregate, and all such societies and partnerships as now are, or hereafter shall or may be, entered into by any person or persons, for assuring ships or merchandizes at sea, or for lending money on bottomry, shall, by force and virtue of this act, be restrained from granting, signing, or underwriting any policy of assurance, or making any contracts for assurance of or upon any ship or ships, goods, or merchandizes, at sea, or going to sea, and for lending any monies by way of bottomry as aforesaid: and if any corporation or body politick, or persons acting in such society or partnership, (other than the two corporations intended to be established by this act, or one of them,) shall presume to grant, sign, or underwrite, after the twenty-fourth day of *June* 1720, any such policy or policies, or make any such contract or contracts for assurance of or upon any ship or ships, goods, or merchandizes, at sea or going to sea, or take or agree to take any premium or other reward for such policy or policies, every such policy and policies of assurance of or upon any such ship or ships, goods or merchandizes, shall be *ipso facto* void, and all and every such sum or sums so signed and underwritten in such policy or policies shall be forfeited, and shall and may be recovered, one half to the use of his majesty, the other to that of the informer, by action: and if any corporation or bodies politick, or persons acting in such society or partnership, other than the two corporations intended to be erected by this act, or one of them, shall presume to lend, or agree to lend, or advance, by themselves or any others on their behalf, after the said twenty-fourth day of *June* 1720, any money by way of bottomry contrary to this act, the bond or other security for the same shall be *ipso facto* void, and such agreement shall be adjudged to be an usurious contract, and the offenders therein shall suffer as in cases of usury: nevertheless it is intended and hereby declared, that any private or particular person or persons shall be at liberty to write or underwrite any policies, or engage himself or herself in any assurances or for, or upon any ship or ships, goods or merchandizes, at sea or going to sea, or may lend money by way of bottomry, as fully and beneficially, as if this act had never been made, so as the same be not on the account or risk of a corporation or body politick, or upon the account or risk of persons acting in a society or partnership for that purpose as aforesaid."

industrious to bespeak the countenance of the House of Commons, for which they had caused two letters to be printed and given to the members. But these, and all other solicitations having proved ineffectual, they had recourse to other expedients; and, understanding that the civil list was considerably in arrears, (for which no provision had been, or could be conveniently made by the parliament, because the grand committee of supply had been inadvertently dismissed,) they offered to the ministry 600,000*l.* towards the discharge of that debt, in case they might obtain the king's charter, with the parliamentary sanction for the establishment of these companies. This offer the ministry, who were at a loss for means to pay the civil list debt, readily embraced; and, Mr. Craggs having prepared the leading members of the House of Commons, M

Aſſable, on the 4th of May 1720, preſented a meſſage from the King, recommending the eſtabliſhment of theſe companies; in purſuance of which this act was paſſed.

Upon this clauſe of the ſtatute, a queſtion lately aroſe at *Guildhall*. It was an action brought to recover a ſum of money received by the defendant from one *Briſtow* to the plaintiff's uſe. The plaintiff was an underwriter, and the defendant was a broker, and a loſs having happened upon a policy underwritten by the plaintiff, he had been obliged to pay it: but *Briſtow*, having agreed to take half the plaintiff's riſk, had paid his moiety of the loſs into the hands of the defendant, to recover it from whom this action was brought. Lord *Kenyon*—I am of opinion that the plaintiff cannot recover, for this is clearly a partnerſhip within the act of parliament. If a ſingle name appears upon the policy, as in this caſe, the inſurer ſhall never be allowed, if a loſs happen, to defeat a *bona fide* inſurance by ſaying to an innocent man, there was a ſecret partnerſhip between another and myſelf, and therefore the policy is void. But here, the plaintiff is himſelf the underwriter, who comes to enforce the contract: it is a partnerſhip *pro hac vice*; and this party cannot apply to a court of juſtice to enforce a contract founded on a breach of the law.

Sullivan v. Greaves, Sittings after Eaſter, 1789. Park, 8. No motion was ever made to ſet aſide the nonſuit: but two or three days after, Lord Kenyon mentioned to the bar, that he had ſtated the caſe to the other judges of the court of King's Bench, who were unanimouſly of the ſame opinion with him. And this opinion has been ſince farther confirmed by a deciſion of the court of Common Pleas in the caſe of Mitchel v. Cockburn, 2 H. Bl. 379., and of the court of King's Bench in Booth v. Hodgſon, 6 Term Rep. 405.

With reſpect to the ſubjects of the policy, the moſt frequent are ſhips, goods, merchandizes, the freight or hire of ſhips: alſo, houſes, warehouſes, and the goods laid up in them from danger by fire, and inſurance upon lives. Bottomry and *reſpondentia* may alſo be the ſubject of inſurance. But then it muſt be particularly expreſſed in the policy to be *reſpondentia* intereſt; for under a general inſurance (*a*) on *goods and merchandizes*, the party inſured cannot recover money lent upon bottomry. Not (*b*) but that money expended by the captain for the uſe of the ſhip, and for which *reſpondentia* intereſt is charged, may be recovered under an inſurance upon *goods, ſpecie, and effects*, provided the uſage of the trade, which in matters of inſurance is always of great weight, ſanctions it.

Park, 9.

(*a*) Glover v. Black, 3 Burr. 1394. 1 Bl. Rep. 405. S. C.

(*b*) Gregory v. Chriſtie, B. R. Tr. 24 Geo. 3. Park, 11.

Although inſurances upon the wages of mariners are in general for very wiſe reaſons forbidden; yet this regulation does not mean to prevent them from inſuring thoſe wages, which they are entitled to receive abroad, or goods which they have purchaſed with thoſe wages in order to bring home; for in ſuch a caſe, they are to be conſidered in the ſame light with other men.

1 Mag. 19.

In an action upon a policy of inſurance upon *Fort Marlborough*, otherwiſe *Bencoolen*, in the *Eaſt Indies*, for twelve calendar months, from the firſt of *October* 1759, to the firſt of *October* 1760, againſt any *European* enemy, for the benefit of the governor, it was doubted by Lord *Mansfield*, who tried that cauſe, whether a policy againſt the loſs of *Fort Marlborough* for the benefit of the governor was good, upon the principle which does not allow a ſailor to inſure his wages. But afterwards, when he came to deliver the opinion of the court upon all the points in that cauſe, after mentioning

Carter v. Boehm. 3 Burr. 1905. and 1 Bl. Rep. 593.

this doubt, which had occurred to his mind, he went on thus: "But, considering that this place, though called a fort, was really "but a factory or settlement for trade; and that he, though "called a governor, was really but a merchant; considering "too, that the law allows a captain of a ship to insure goods "which he has on board, or his share in the ship, if he be a part "owner; and the captain of a privateer, if he be a part owner, "to insure his share; considering too, that the objection "could not, upon any ground of justice, be made by the insurer, "who knew him to be the governor, at the time he took the "premium; and as with regard to principles of publick conve-"nience, the case so seldom happens, (I never knew one before,) "any danger from the example is little to be apprehended, I did "not think myself warranted, upon that point, to nonsuit the "plaintiff; especially too, as the objection did not come from the "bar. Though this point was mentioned, it was not insisted "upon at the last trial; nor has it been seriously argued, upon this "motion, as sufficient alone to vacate the policy: and if it had, "we are all of opinion, that we are not warranted to say, that it "is void upon that account."

It is enacted by stat. 28 *G.* 3. *c.* 56. "That it shall not be law-"ful for any person or persons to make or effect, or cause to be "made or effected, any policy of assurance on any ship or vessel, "or upon any goods, merchandizes, effects, or other property "whatsoever, without first inserting or causing to be inserted in "such policy the name or names, or the usual style and firm of "dealing of one or more of the persons interested in such assur-"ance, or without instead thereof first inserting the name or "names, or the usual style and firm of dealing of the consignor "or consignors, consignee or consignees, of the goods or property "so to be inserted, or the name or names, or the usual style and "firm of dealing of the person or persons residing in *Great Bri-"tain* who shall receive the order for and effect such policy, or "of the person or persons who shall give the order or direction, "the agent or agents immediately employed to negotiate or effect "such policy." The statute further declares, that "every policy "made or underwritten contrary to the true intent and mean-"ing of this act, shall be null and void to all intents and pur-"poses."

Kewley v. Ryan, 2 H. Bl. 343. Henchman v. Offley, *Id.* 345. note.

An insurance generally "*upon any ship or ships*" expected from a particular place is valid; and the insured has a right to cover any ship he may think proper, that falls within the terms of it.

Plantamour v. Staples, 1 Term Rep. 611. note.

Nor do the owners of goods insured preclude themselves by shifting the goods from one ship to another from recovering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned.

Ross v. Thwaite. Sittings after Hil. 16 G. 3 at Guildhall. Park, 21.

An action was brought upon a policy of insurance of the cap-tain's goods for six months certain. The loss proved was chiefly for goods lashed on deck, and the captain's clothes, and the ship's provisions. It was proved by an underwriter and a broker, that

none

none of those things are within a general policy on goods; for the risk was greater as to goods lashed on deck, than other goods: and a policy on goods means only such goods as are merchantable, and a part of the cargo. They also swore, that when goods like the present are meant to be insured, they are always insured by name; and the premium is greater.

Lord *Mansfield* said, he thought it consistent with reason; and understood the usage to be so: therefore he advised the plaintiff to withdraw a juror, the premium having been paid into court, to which he consented.

Where the owner of the goods insured brought down *his own lighter*, received the goods out of the ship, and before they reached land, an accident happened, whereby the goods were damaged, a special jury of merchants, under the express direction of Lord Chief Justice *Lee*, found that the insurer was discharged, although the insurance was upon goods to *London*, and *till the same should be safely landed there.* Sparrow v. Carruthers. 2 Str. 1236. The case turned upon the goods not being sent by the ship's boat, which is considered as part of the ship and voyage.

By 35 *Geo.* 3. *c.* 63. which repeals all former duties upon policies of insurance, it is enacted, "That for every skin, or piece of "vellum, or parchment, or sheet of paper, on which any insur- "ance upon any ship or ships, goods or merchandize, or upon "any other property or interest whereon insurances may lawfully "be made, shall be engrossed, written, or stamped, the stamp "duties following upon the sums insured, that is to say, where "the sum to be insured shall amount to 100*l.*, a stamp duty of "2*s.* 6*d.*, and so progressively for every sum of 100*l.* insured; "and where the sum to be insured shall not amount to 100*l.*, a "like stamp duty of 2*s.* 6*d.*; and where the sum to be insured "shall exceed 100*l.*, or any progressive sums of 100*l.* each, by "any fractional part of 100*l.*, a like stamp duty of 2*s.* 6*d.* for "each fractional part of 100*l.*; and that upon all and every in- "surances or insurance, where the premium, or consideration in "the nature of a premium, actually and *bonâ fide* paid, given, or "contracted for, shall not exceed the rate of 10*s.*, there shall be "paid the following duties; that is to say, where the sum so to be "insured shall amount to 100*l.* a stamp duty of 1*s.* 3*d.* and so "progressively for every sum of 100*l.* so insured; and where the "sum so to be insured shall not amount to 100*l.*, a like stamp "duty of 1*s.* 3*d.*; and where the sum so to be insured shall ex- "ceed 100*l.*, or any progressive sums of 100*l.* each, by any "fractional part of 100*l.*, a like stamp duty of 1*s.* 3*d.* for such "fractional part of 100*l.*, which several sums shall be payable "and paid by the assured in such insurances respectively."

By § 2. the duty imposed by this act is not to extend to insurances on lives, or insurances from losses by fire.

"Provided, that upon every such insurance, where the pre- "mium or consideration in the nature of a premium, actually and "*bonâ fide* paid, given, or contracted for, shall not exceed the "rate of 10*s.* *per centum* on the sum insured, it shall be lawful "where the sum insured shall amount to 200*l.* or upwards, to "use stamps of 2*s.* 6*d.* for every 200*l.* of the sum insured, in- "stead of stamps of 1*s.* 3*d.* for every 100*l.* of the like sum "insured." § 4.

"Every

§ 11. "Every contract or agreement which ſhall be made or entered "into for any inſurance, in reſpect whereof any duty is by this "act made payable, ſhall be engroſſed, printed, or written, and "ſhall be deemed and called *a policy of inſurance*; and the pre- "mium, or conſideration in the nature of a premium, paid, given, "or contracted for, upon ſuch inſurance, and the particular riſk "or adventure inſured againſt, together with the names of the "ſubſcribers and underwriters, and ſums inſured, ſhall be re- "ſpectively expreſſed or ſpecified in or upon ſuch policy, and in "default thereof every ſuch inſurance ſhall be null and void to "all intents and purpoſes whatever."

§ 12. "And no policy of inſurance upon any ſhip, or upon any ſhare "or intereſt therein, ſhall be made for any certain term longer "than twelve calendar months; and every policy which ſhall be "made for any longer term ſhall be null and void to all intents "and purpoſes."

The 10th ſection provides for an allowance to be made under certain circumſtances by the commiſſioners, where the ſums inſured on homeward voyages ſhall exceed the intereſt of the aſſured.

The 13th ſection provides, that nothing contained in the act ſhall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of inſurance, duly ſtamped as aforeſaid, after the ſame ſhall have been underwritten, or to require any additional ſtamp duty by reaſon of ſuch alteration, ſo that ſuch alteration be made before notice of the determination of the riſk originally inſured, and the premium or conſideration originally paid or contracted for ſhall exceed the rate of 10 *s. per cent.* on the ſum inſured, and ſo that the thing inſured ſhall remain the property of the ſame perſon or perſons, and ſo that ſuch alteration ſhall not prolong the term inſured beyond the period allowed by § 12. of this act, and ſo that no additional or further ſum ſhall be inſured by reaſon or means of ſuch alteration.

§ 15. A penalty of 500 *l.* is impoſed both upon the perſons procuring, and the brokers effecting inſurances on policies not duly ſtamped;

§ 16. and the latter can neither demand their brokerage, nor the money

§ 17. expended for premiums; and every underwriter ſubſcribing ſuch illegal policy, is liable to a like penalty of 500 *l.*

Anon. Skin. 243. A policy of inſurance ſhall be conſtrued to run until the ſhip ſhall have ended, and be diſcharged of her voyage; for arrival at the port, to which ſhe was bound, is not a diſcharge *till ſhe is unloaded:* and it was ſo adjudged by the whole court, upon a demurrer.

Lockyer v. Offley, 1 Term Rep. 252. But although this conſtruction may be perfectly right, where the policy is general from *A.* to *B.*, yet if it contain the words uſually inſerted "*and till the ſhip ſhall have moored at anchor twenty-* "*four hours in good ſafety,*" the underwriter is not liable for any loſs, ariſing from ſeizure after ſhe has been twenty-four hours in port; though ſuch ſeizure was in conſequence of an act of barratry of the maſter *during the voyage*, for, if it were extended beyond the

time limited in the policy, it would be impoſſible to lay down any fixed rule, and all would be uncertainty and confuſion.

In an action upon a policy of inſurance by the defendant at *London*, inſuring a ſhip from thence to the *Eaſt Indies*, warranted to depart with convoy, the declaration ſhewed, that the ſhip went from *London* to the *Downs*, and from thence with convoy, and was loſt. After a frivolous plea and demurrer, the caſe ſtood upon the declaration, and it was objected, that there was a departure without convoy. But by the court, the clauſe "warranted "to depart with convoy," muſt be conſtrued according to the uſage among merchants, that is, from ſuch place where convoys are to be had, *as the Downs*. Lethulier's caſe, 2 Salk. 443.

Caſe upon a policy of inſurance, which was to inſure the *William* galley in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy. The caſe was, the galley ſet ſail from *Bremen* under convoy of a *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips, whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war and an admiral. After a ſtay of nine weeks, they ſet ſail from the *Texel*; the galley was ſeparated in a ſtorm, taken by a *French* privateer, and retaken by a *Dutch* privateer, and paid eighty pounds ſalvage. It was ruled by *Holt*, Chief Juſtice, that the voyage ought to be according to *uſage*, and that their going to the *Elbe*, though out of the way, was no deviation; for till after the year 1703, (prior to which time this policy was made,) there was no convoy for ſhips directly from *Bremen* to *London*. Verdict for the plaintiff. Bond v. Gonſales, 2 Salk. 445.

The ſhip *Succeſs* was inſured "*at and from* Leghorn *to the port* "*of* London, *and till there moored twenty-four hours in good ſafety*." She arrived the 8th of *July* at *Freſh Wharf* and moored, but was the ſame day ſerved with an order to go back to the *Hope* to perform a fourteen days quarantine. The men upon this deſerted her, and on the 12th of the month the captain applied to be excuſed going back, which petition was adjourned to the twenty-eighth, when the regency ordered her back; and on the thirtieth, ſhe went back, performed the quarantine, and then ſent up for orders to air the goods; but before ſhe returned, the ſhip was burnt on the twenty-third of *Auguſt*. The queſtion was, therefore, whether the inſurer was liable? Lord Chief Juſtice *Lee* ruled, that though the ſhip was ſo long at her moorings, yet ſhe could not be ſaid to be there in *good ſafety*, which muſt mean the opportunity of unloading and diſcharging; whereas here ſhe was arreſted within the twenty-four hours, and the hands having deſerted, and the regency taken time to conſider the petition, there was no default in the maſter or owners: and it was proved that till the fourteen days were expired, no application could be made to air the goods; whereupon the jury found for the plaintiff. Waples v. Eames, 2 Stra. 1243.

In an inſurance upon *freight*, if an accident happens to the ſhip before any goods are put on board, which prevents her from ſailing, the inſured upon the policy cannot recover the freight which

which he would have earned, if ſhe had ſailed. The circumſtances of the caſe were theſe:

Tonge v. Watts, 2 Stra. 1251.

The plaintiff inſured *on ſhip and freight*, at and from *Jamaica* to *Briſtol*. A cargo was ready to put on board; but the ſhip being careening, in order for the voyage, a ſudden tempeſt aroſe, and ſhe and many others were loſt. The rigging and parts of her were recovered and ſold, and the defendant paid into court, as much as, upon an average, he was liable to for the loſs of the ſhip: but the plaintiff inſiſted to be allowed ſix hundred pounds for the freight the ſhip *would have earned* in the voyage, if the accident had not happened. But as the goods were not *actually* on board, ſo as to make the plaintiff's right to freight commence; Lord Chief Juſtice *Lee* held, he could not be allowed it, and he was nonſuited.

Montgomery v. Egginton, 3 Term Rep. 362.

But if the policy be a valued policy, and part of the cargo on board when ſuch accident happens, the reſt *being ready to be ſhipped*, the inſured may recover to the whole amount. This was ſo decided in an action brought by the aſſured on a policy on freight valued at 1500*l.* In fact only 500*l.* worth of freight was on board when the ſhip was driven from her moorings and loſt: but goods to the amount of the reſt of the freight *were ready* to be ſhipped, and were lying on the quay for that purpoſe at the time. Lord *Kenyon*, before whom the cauſe was tried, told the jury, that the queſtion for their conſideration was, whether this was a mere colourable inſurance and a gaming policy, or whether it was a *bonâ fide* tranſaction; if the latter, the inſured was entitled to recover for the whole value in the policy. The jury found the whole ſum. The defendant's counſel obtained a rule for a new trial, which he afterwards abandoned, the court being ſtrongly of opinion againſt him.

Thompſon v. Taylor, 6 Term Rep. 478.

So alſo, in an *open* policy on freight, *at and from* London *and* Teneriffe *to any of the* Weſt India *iſles*, (*Jamaica* excepted,) the underwriters were held liable to pay the inſurance, though the ſhip ſailed from *London* in ballaſt, and was captured before her arrival at *Teneriffe*, where the cargo was to be put on board. But as the ſhip was under a charter-party *to depart out of the river* Thames, *and proceed to* Teneriffe, *and there to load and receive on board from the freighters* 500 *pipes of wine, to deliver in the* Weſt Indies, *for the freight of which* 500 *pipes, the freighters covenanted to pay* 35 *s. per pipe*; the court held, that the inſtant the ſhip departed from the *Thames*, the contract for freight had its inception, and the plaintiff was entitled to recover.

Gordon v. Morley. Campbell v. Bordieu. 2 Stra. 1265.

On an inſurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*, and the ſhip *Ranger*, having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The inſurers reſiſted the demand of indemnity, alleging that as there was a *French* war, the ſhip ſhould not have ventured through the *Channel*, but have waited for occaſional convoy. Lord Chief Juſtice *Lee*, however, was of opinion, that the ſhip was to be conſidered as under the defendant's inſurance to a place of general rendezvous, according to the interpretation of the words warranted

warranted to depart with convoy, *Salk.* 443. 445.; and if the parties meant to vary the insurance from what is *commonly* understood, they should have stated it. Two special juries of merchants found their verdicts agreeably to that direction.

Motteux and others v. the Gov. and Comp. of Lond. Assur. 1 Atk. 545.

A bill was filed in the court of Chancery, which stated, that the ship *Eyles*, late in the *East India* Company's service, was, in the year 1732, at *Bengal*, at which time the owner employed *I. H.* to insure the ship in the *London* Assurance Office for five hundred pounds. The adventure thereon was to commence *from her arrival at Fort Saint George*, and thence to continue till the said ship should arrive at *London*, and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice, and the ship was, and should be rated *at interest or no interest*, without farther account; in consideration whereof, *I. H.* paid fifteen pounds premium. The *Eyles* came to *Fort St. George* in *February* 1733, in her way to *England*; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ships, *&c.*, she sailed to *Bengal* to be refitted, and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the *Engilee* sands and was lost. Evidence was read on the part of the plaintiffs to prove, that *Bengal* was the most proper place to refit, and that she went thither for that reason; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board, but water, provision, and ballast. Lord Chancellour *Hardwicke*.—As to the question, whether there has been a breach, or, in other terms, a loss, within the meaning of this policy, the general principles laid down by the plaintiff's counsel are right, that stress of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition, are to be considered. In such a case, if she went to the nearest place, I should consider it equally the same as if she had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to shew the necessity of the ship's being repaired, but there is not a syllable of proof why she might not have been equally well repaired at *Fort Saint George*. There is one part of this case which distinguishes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ship was lost in *July* 1733, three weeks before the time of making this policy, so that clearly the ship was not at *Fort Saint George* at the time the agreement was made; and therefore it is a material question, whether it comes within the agreement. His Lordship directed an issue to try, whether the loss in *July* 1733 was a loss during the voyage, and according to the adventure agreed upon; which issue was afterwards found for the plaintiffs upon a trial in the Common Pleas.

1 Atk. 548.

In an action upon a policy of insurance, before Lord Chief Justice *Hardwicke*, it has been held, that the words "at and from *Bengal* to *England*," meant *the first arrival* at *Bengal*; and it was agreed,

agreed, that when such words are used in policies, *first arrival* is always implied and understood.

Chitty v. Selwin, 2 Atk. 359.

It has likewise been held, that when a ship is insured *at and from a place*, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable: but if all thoughts of the voyage be laid aside, and the ship lie there five, six, or seven years, with the owner's privity, it shall never be said the insurer is liable; for it would be to subject him to the whim and caprice of the owner.

Camden v. Cowley. 1 Bl. Rep. 417.

This was an action on a policy of insurance on a ship, at and from *Jamaica* to *London*. The ship had also been insured from *London* to *Jamaica* generally, and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports of the island. This was an action on the homeward policy; and in order to shew when the homeward-bound risk commenced, it was necessary to shew at what time the outward-bound risk determined; and the jury, which was special, after an examination of merchants as to the custom, by their verdict, decided, that the outward risk ended, when the ship had moored in any port of the island, and did not continue till she came to the last port of delivery.

In the *Trinity* term following, a motion was made for a new trial, but it was refused; because it had been thoroughly tried, and no new light could be thrown upon it, although Lord *Mansfield* said, the inclination of his opinion at the trial was the contrary way. Mr. Justice *Wilmot* thought, the construction put upon the policy by the jury was the right one.

Barras v. the London Assurance, Sittings after Hilary 1782, at Guildhall.

In a similar case, Lord *Mansfield* laid down the same doctrine to the jury, namely, that the outward risk *upon the ship* ended twenty-four hours after its arrival in the first port of the island, to which it was destined: but that the outward policy *upon goods* continued till they were landed.

Leigh v. Mather, Sittings at Guildhall, after Mich. 1795.

The doctrine stated in the two last cases has been confirmed in a late decision. It was an action on a policy of assurance of the *ship Pallifer*, and *on goods* on board thereof, on a voyage at and *from Georgia to Jamaica*. The ship arrived at *Montego Bay*, and moored at anchor, and there also the plaintiff's agent sold and delivered the greatest part of the cargo to Messrs. *Adams* and *Hatton*, merchants there. The captain then entered into a charter-party with *Adams* and *Hatton* to proceed from thence to *Saint Anne*'s, and there to take in a cargo for *London*. After unloading the greatest part of the cargo at *Montego Bay*, and remaining there a month, it was verbally agreed, that the remainder of the cargo which was lumber, should be carried as ballast to *Saint Anne*'s, and accordingly the vessel, after taking in some fustick, proceeded towards *Saint Anne*'s, but was wrecked in her passage. For the plaintiff it was insisted, that in such an insurance, the ship might go from port to port; and that, in all events, the goods were protected by the policy till they were all discharged and safely landed. Lord *Kenyon* was clearly of opinion, and that opinion was confirmed

firmed by a ſpecial jury, to whom he particularly referred on this occaſion, that the riſk on the ſhip ceaſed, after ſhe had been moored at anchor twenty-four hours in the firſt port of the iſland for the purpoſe of unloading; and the facts diſcloſed in this caſe having manifeſted that *Montego Bay* was alſo the original deſtination of the cargo, and that its not being wholly delivered there, was only prevented by a new agreement, the goods could not be recovered under this policy. A ſhip inſured to *Jamaica* generally cannot be permitted to go round the whole iſland, from port to port, for the purpoſe of unloading her cargo, eſpecially where, as in this caſe, the owner of the ſhip and goods is the ſame perſon. The plaintiff was nonſuited.

In conſtruing policies, the *ſtrictum jus*, or *apex juris* is not to be the rule, but a liberal conſtruction is to be adopted, and the uſage of trade called in to explain any doubts.

Thus, in an aſſurance of goods from *Malaga* to *Gibraltar*, and from thence to *England* or *Holland*, the parties having agreed that the goods might be unloaded at *Gibraltar*, and reſhipped in one or more *Britiſh* ſhip or ſhips, and it appearing in evidence that there was no *Britiſh* ſhip at *Gibraltar*, but the goods had been unloaded and put into a *ſtore ſhip*, (which was always conſidered as a warehouſe) the inſurers were held to be liable for the loſs of theſe goods in the ſtore ſhip. Tierney v. Etherington, before Lee, C. J. 5th March 1743. 1 Burr. 348.

A ſhip was inſured from *London* to any place beyond the *Cape of Good Hope*. The ſhip arrived in the river *Canton* in *China*, where, in order to be heeled and refitted, the ſails, &c. were taken out, and lodged in a *bank ſaul*, on an iſland in the river, (which was proved to be *uſual* and beneficial to all concerned). The underwriter was held liable for the loſs of the ſails by fire, while in this *bank ſaul*. For the inſurer, at the time of underwriting, has under his conſideration the nature of the voyage, and the uſual manner of doing it. What is uſually done by ſuch a ſhip, with ſuch a cargo, in ſuch a voyage, is underſtood to be referred to by every policy. If a ſhip be driven a mile on ſhore by a hurricane, or be burnt in a dry dock, while repairing, the inſurer is liable. Pell v. Governor and Company of the Royal Exchange Aſſurance, 1 Burr. 341. Brough v. Whitmore, 4 Term Rep. 206. S. P.

The goods on board the ſhips, the *Hope* and the *Anne*, were inſured at and from *Dartmouth* to *Waterford*, and from thence to the port or ports of diſcharge, on the coaſt of *Labrador*, with leave to touch at *Newfoundland*, *till the goods ſhould be ſafely diſcharged and landed*. From the time of their arrival, the crew were chiefly employed in fiſhing, and took out their cargo only at leiſure times, which was fully proved to be the uſage,) and the ſhips were taken by a privateer, before they were unloaded. The court held, that the inſurers were liable; for that according to the uſage there was no delay. Noble v. Kennoway, Dougl. 510.

With reſpect to *Eaſt India* voyages, the uſage of trade has been more notorious than in any other, the queſtion having more frequently occurred.

The charter-parties of the *India* Company give leave to prolong the ſhip's ſtay in *India* for a year, and it is common, by a new agreement,

agreement, to detain her a year longer. The words of the policy too are very general, without limitation of time or place.

These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship may be sent, while in *India*, though not expressly mentioned in the policy.

Salvador v. Hopkins, 3 Burr. 1707.

Thus, where the insurance was "at and from *Bengal* to any "ports or places whatsoever, in the *East Indies*, *China*, *Persia*, or "elsewhere beyond the *Cape of Good Hope*, forwards and back-"wards, and during her stay at each place, until her arrival in "*London*, &c." and the captain, when in *Bengal*, entered into a new agreement for prolonging the ship's stay, and went several intermediate or country voyages, in the last of which she was lost; the insurers were held liable.

Gregory v. Christie, B. R. Tr. 24 Geo. 3. Park, 49.

In an assurance "from *London* to *Madras* and *China*, with li-"berty to touch, stay, and trade at any ports or places whatsoever," the facts were; that when the ship arrived at *Madras*, she was too late to go to *China* that year, upon which she was sent by the council to *Bengal* to fetch rice, which voyage she performed once, but in the second attempt she was lost. The insurers are answerable on account of the usage.

Farquharson v. Hunter, B. R. Hil. 25 G. 3. Park, 50.

In an insurance on a ship "at and from *London* to *Bengal*, be-"ginning the risk upon the ship at *London*, and so to continue till "the arrival of the said ship at *Madras* and *Bengal*, *with liberty to* "*touch and stay at any port or place in this voyage*;" the underwriters were held to be answerable for a loss, which happened in an intermediate voyage from *Madras* to *Visagipatnam* for rice, by order of the council.

However, the parties may, by their own agreement, prevent such latitude of construction.

Nor need this be done by express words of exclusion; but if *from the terms used*, it can be collected that the parties meant so, that construction shall prevail.

Lavabre v. Wilson, Dougl. 284.

Thus, where the general words were restrained by the expressions, "*in the outward, or homeward bound voyage*;" and "*in this* "*voyage*;" the court held that the policy only meant places in the usual course of the voyage "to and from the places "named."

Fletcher v. Poole, Sittings after Easter, 1769, before Lord Mansfield at Guildhall, Park, 53.

When a man insures one species of property, he cannot recover damage, occasioned by the loss of a species of property different from that named in the policy. Thus, under a policy *upon the ship*, or *upon the goods*, the insured cannot recover *extraordinary wages* paid to the seamen, or *provisions* expended, during a detention to repair, or a detention by an embargo.

Robertson v. Ewer, 1 Term Rep. 127.

Baillie v. Mondgiliane, B. R. Hil. 25 G. 3.

Nor is the underwriter *on goods* liable for *the freight* paid by the owner of the goods to the proprietors of the ship, where the goods were partially lost.

Eden v. Poole, Sitt. after Hil. 1785.

Neither is an underwriter upon *ship and goods* liable for the charge of demurrage.

Nor in an insurance upon a *Greenland* ship, is the underwriter in a policy *on the ship, tackle, and furniture*, &c. liable for the *lines and tackle* employed in the fishery in those seas. Hoskins v. Pickersgill, B. R. East. 23 Geo. 3.

But provisions sent out in a ship for the use of the crew, are protected by a policy on *the ship and furniture*. Brough v. Whitmore, 4 Term Rep. 206.

In the construction of policies, the loss must be *a direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the insured to recover.

Thus, in an action upon a policy to recover the value of some negroes, who perished by *mutiny*, which was one of the risks insured against; it was held, that the underwriters were liable for all those who were killed in the mutiny, or who died of their wounds: that all those who died of the bruises which they received in the mutiny, though accompanied with other causes, were to be paid for by the underwriters. But they were not liable for those who had swallowed salt water, and died in consequence thereof, or who leaped into the sea, and hung upon the sides of the ship, without being otherwise bruised, or who died of chagrin; all these having been lost by too remote a consequence. Jones v. Schmoll, Guildhall, Tr. Vac. 1785. 1 Term Rep. 130. note. See as to insurance upon negroes, stat. 34 G. 3. c. 80. § 10. continued by 35 G. 3. c. 90.

In the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid. Hence, in an insurance at and from *Liverpool* to *Antigua*, *with liberty to cruise six weeks*; it was held, that this meant a connected portion of time, and not a desultory cruising for six weeks *at any time*. Syers v. Bridge, Dougl. 527.

With respect to perils of the sea, it is to be observed, that every accident, happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, may be considered as a peril of the sea; and for such losses the underwriter is answerable. 1 Show. 323. Roccus, Not.

But a ship driven on an enemy's coast by the wind, and there captured, shall be said to be lost by capture, and not by perils of the sea. Greene v. Elmslie, Peck. 212.

An action was brought to recover the value of certain slaves insured by the policy. The facts were, that the captain missed the island for which he was bound, and the water running short, some of the slaves were thrown overboard, to preserve the rest; and the declaration stated the loss to have happened by perils of the sea. But it was held, that *the mistake* of the captain could not be called *a peril of the sea*. Gregson v. Gilbert, B. R. East. 23 Geo. 3. Park, 62.

A ship, which is never heard of, after her departure, shall be presumed to have perished at sea.

This was held in an action on a policy upon the ship from *North Carolina* to *London*, and the loss was stated to be by sinking at sea; the evidence to support this averment was, that after sailing from port she had never been heard of. Green v. Brown, 2 Str. 1199.

The same was held in a case, where a ship had been captured and ransomed at sea, but was never afterwards heard of, and never arrived at her port of destination. Newby v. Read, Sitts after Mich. 3 Geo. 3. Park, 63.

Park, 64. In *England* no time is fixed, within which payment of a loſs may be demanded from the underwriter, in caſe the ſhip is not heard of. A practice, however, prevails among merchants, that a ſhip ſhall be deemed loſt, if not heard of within ſix months after her departure for any part of *Europe*, or within twelve, if for a place at a greater diſtance.

2 Burr. 694. 1ſt point in Goſs v. Withers. As to loſſes by capture, the rule is, that as between the inſurer and the inſured, the ſhip is to be conſidered as loſt by the capture, though ſhe be never condemned at all, nor carried into any port or fleet of the enemy: and the inſurer muſt pay the value. If, after a condemnation, the owner recover or retake her, the inſurer can be in no other condition, than if ſhe had been retaken or recovered before condemnation. The inſurer runs the riſk of the inſured, and undertakes to indemnify; he muſt, therefore, bear the *loſs* actually ſuſtained, and can be liable to no more. So that if, after condemnation, the owner recovers the ſhip in her complete condition, but has paid ſalvage, or been at any expence in getting her back, the inſurer muſt pay the loſs ſo actually ſuſtained. 2 Burr. 696. No capture by the enemy can be ſo total a loſs, as to leave no poſſibility of a recovery. If the owner himſelf ſhould retake at any time, he will be entitled; and by a late act of parliament, if an *Engliſh* ſhip retake the veſſel captured, either before or after condemnation, the owner is entitled to reſtitution upon ſtated ſalvage. This chance does not, however, ſuſpend the demand for a total loſs upon the inſurer: but juſtice is done, by putting him in the place of the inſured, in caſe of a recapture.

29 G. 2. c. 34. § 24. 34 Geo. 3. c. 66. § 42.

Berens v. Rucker, 1 Bl. Rep. 313. It has likewiſe been held, that where a capture has been made, whether it be legal or not, the inſurers are liable for the charges of a compromiſe made, *bonâ fide*, to prevent the ſhip from being condemned as prize.

Park, 71. By the marine law of *England*, as practiſed in the court of Admiralty, it was formerly held, that the property was not changed ſo as to bar the original owner in favour of a vendee or recaptor, till there had been a ſentence of condemnation.

13 Geo. 2. c. 4. 29 Geo. 2. c. 34. 33 Geo. 3. c. 66. But now by ſtatute this right of the original owner, in caſe of recapture, is preſerved to him for ever, upon payment of ſtated ſalvage to the recaptors.

Before the ſtat. of 19 *G.* 2. *c.* 37. ſeveral caſes were determined upon the queſtion of recapture in the *Engliſh* courts; but the ſame queſtion can never again ariſe between an inſurer and inſured.

Park, 777. If the ſhip be recovered, before a demand for indemnity is made, the inſurer is only liable for the amount of the loſs actually ſuſtained at the time of the demand. Or, if the ſhip be reſtored at any time ſubſequent to the payment by the underwriter he ſhall then ſtand in the place of the inſured, and receive all the benefit reſulting from ſuch reſtitution.

The underwriter, by the expreſs terms of his contract, is anſwerable for all loſs or damage ariſing to the inſured "*by the arreſts, reſtraints, and detainments of all kings, princes, and people, what nation, condition, or quality ſoever.*"

In a late case, the declaration claimed a loss of corn, occasioned *by the unlawful arrest, restraint, and detention of people to the plaintiffs unknown.* The facts upon this part of the case were, that the ship being forced into *Elly* Harbour in *Ireland*, and a great scarcity of corn prevailing there at that time, the people came on board in a tumultuous manner, took the government of the vessel from the captain and crew, weighed her anchor, by which she drove upon a reef of rocks, and would not leave her till they had compelled the captain to sell all the corn considerably below the invoice price. The word *people*, it was contended, at the bar, meant individuals of a nation as opposed to magistrates or rulers. But the court held, that it meant "*the ruling power of the country.*" Nesbitt v. Lushington, 4 Term Rep. 783.

In case of an arrest or embargo by a prince, though not an enemy, the insured is entitled to recover against the insurer. 2 Burr. 696.

If the ship be detained by a foreign power, which, in time of war, may have seized a neutral ship, in order to search her for enemy's property, the charges consequent thereupon must be borne by the underwriter. Saloucci v. Johnson, B. R. Hil. 25 G. 3. Park, 79.

But though an underwriter is liable for all damage arising to the owner of the ship or goods from the restraint or detention of princes, yet that rule shall not be extended to cases where the insured shall navigate against the laws of those countries, in the ports of which he may chance to be detained, or to cases where there shall be a seizure for nonpayment of customs. This was so ruled by Lord Commissioner *Hutchins* in Chancery, in the year 1690: and the reason of it is obvious, because there is a gross fraud on the part of the owner of the property insured; and no man shall take advantage of his own misconduct. If indeed any of those acts were committed by the master of the ship, without the knowledge of the insured, the underwriter would be liable, if not for losses by detention, at least for a loss by the barratry of the master, to which such conduct would most certainly amount. 2 Vern. 176.

It is now settled, that under a policy on a ship and stores, "at "and from a port," in a foreign country, the insurers are liable for the payment of damage occasioned by the detention or seizure of the ship by the government of the country in the loading port. Rotch v. Edie, 6 Term Rep. 413.

Another of the risks insured against is the barratry of the master or mariners.

It appears from the cases upon this subject, that any act of the master, or of the mariners, which is of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, without their consent or privity, is barratry. 1 Stra. 581. 2 Stra. 1173. Cowp. 143. 1 Term Rep. 323.

It is not necessary, in order to entitle the insured to recover for barratry, that the loss should happen *in the act of barratry;* that is, it is immaterial, whether it take place *during* the *fraudulent* voyage, or *after* the ship has returned to the regular course; for the moment the ship is carried from its right track with an evil intent, barratry is committed. Cowp. 155.

But the loss, in consequence of the act of barratry, must happen *during the voyage insured*, and within the time limited by the policy, Lockyer v. Offley. 1 Term Rep. 252.

policy, otherwiſe the underwriters are diſcharged. Thus, if the captain be guilty of barratry by ſmuggling, and the ſhip afterwards arrive at the port of deſtination, and *be there moored at anchor twenty-four hours in good ſafety;* the underwriters are not liable, if, after this, ſhe ſhould be ſeized for that act of ſmuggling.

From the above deſcriptions of barratry, it will appear, that if the act of the captain be done with a view to the benefit of his owners, and not to advance his own private intereſt, no barratry is committed. To conſtitute barratry, it muſt be without the knowledge or conſent of the owners; becauſe nothing can be ſo clear as this, that no man can complain of an act done, to which he himſelf is a party. It is material to conſider, in what ſenſe the word owner is to be underſtood, in this definition. It has been argued, that if *A.* be the owner of a ſhip, and let it out to *B.* as freighter, who inſures it for the voyage; and if the deviation be with the knowledge of *A.*, though unknown to *B.*, the inſurer is diſcharged. But the court over-ruled that argument, and ſaid, that, in order to diſcharge the inſurer from the loſs by barratry, it muſt appear, that the act done was by the conſent, or with the privity of the owner, *pro hac vice*, that is, the freighter, the perſon inſured.

Cowper, 154.

Knight v. Cambridge, 2 Ld. Raym. 1349. 1 Str. 581. S. C.

If a declaration ſtate a ſhip to have been loſt by the *fraud and negligence* of the maſter, that is a ſufficient averment of a loſs by *barratry*.

Stamma v. Brown, 2 Str. 1173.

But where a ſhip ſailed a different courſe from that firſt intended, which alteration was publickly notified before the ſhip ſailed, and where the maſter was to have no benefit by the change, it was held not to be barratry.

Elton v. Brogden, 2 Str. 1264.

So, if a ſhip take a prize, and inſtead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, againſt the orders of his owners, the captain is juſtified by neceſſity; and it is not barratry, becauſe not done to defraud the owners.

Valleio v. Wheeler, Cowp. 143.

A ſhip was inſured from *London* to *Seville;* ſhe was let to freight for the voyage; ſhe ſailed from *London* to the *Downs*, from whence ſhe ſailed to *Guernſey*, *which was out of the courſe of the voyage*. The captain went there to take in brandy *on his own account*, with the knowledge of the original owner of the ſhip, *but not of the freighter for that voyage*. This was held to be barratry.

Roberts v. Ewer, 1 Term Rep. 127.

A breach of an embargo is, it ſeems, an act of barratry in the maſter.

Roſs v. Hunter, 4 Term Rep. 33.

In an action on a policy on goods on board the *Live Oak*, whereof *Joſeph Rati* was maſter, at and from *Jamaica* to *New Orleans*, it appeared, that the ſhip was put up as a general ſhip in *Jamaica* in 1783; that ſhe ſailed on the voyage inſured in *May* 1783, and arrived in *June* following at the mouth of the river *Miſſiſſippi*, which leads up to *New Orleans* in *Spaniſh America;* at the diſtance of about 35 leagues. When the captain had gotten thus far, he dropped anchor, and on his return, without carrying the ſhip to

her port of deſtination, ſtood away for the *Havannah*, after which he was never heard of. It appeared, that he had a private adventure of negroes of his own on board, which there was reaſonable evidence for ſuppoſing he intended to have diſpoſed of at *New Orleans*; but finding it difficult to do ſo, on acconnt of a prohibition to import them into the *Spaniſh* government, he went to the *Havannah*. The jury found for the plaintiff on the count in the declaration, charging the barratry of the maſter; and the whole court of King's Bench, upon a motion for a new trial, were of opinion, that the facts ſtated amounted clearly to the crime of barratry.

So, it has been holden, that if the captain of a ſhip, contrary to the inſtructions of his owner, cruize for, and take a prize, and the veſſel be afterwards loſt, in conſequence of it, he is guilty of barratry, even though he libel his prize in the court of Admiralty in the name of himſelf and his owner; and though the owner had procured a letter of marque, ſolely with a view to encourage ſeamen to enter, and without any intention of uſing it for the purpoſe of cruiſing; for whatever is done by the captain to defeat or delay the performance of the voyage is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that what he did was for the benefit of his owners, yet, if he acted contrary to his duty to them, it is barratry. Moſs v. Byrom, 6 Term Rep. 379.

An act of the captain, *with the knowledge of the owners of the ſhip*, though without the privity of the owner of the goods, who happened to be the perſon inſured, is not barratry. Nutt v. Bourdieu, 1 Term Rep. 323.

If the maſter of the ſhip be alſo the owner, he cannot be guilty of barratry.

It is clear, that if the owner be alſo the maſter of the ſhip, any act, which in another maſter would be conſtrued barratry, cannot be ſo in him; becauſe ſuch doctrine would militate againſt one of the rules above laid down; namely, that no man ſhall be allowed to derive a benefit from his own crime, which he would do, were he to recover againſt the inſurers for a loſs occaſioned by his own act. But where it was proved, that the perſon who was deſcribed in the policy as maſter, and who was treated with as ſuch, carried the ſhip out of courſe for fraudulent purpoſes, it was holden to be *primâ facie* evidence of barratry, and that it lay upon the inſurer, in order to diſcharge himſelf, to ſhew that the perſon ſo acting as maſter, was alſo the owner or freighter of the veſſel. Roſs v. Hunter, 4 Term Rep. 33.

This rule, reſpecting the ſame perſon being both owner and maſter, has been extended in the court of Chancery to a caſe, where ſuch an owner and maſter, after mortgaging his ſhip, had committed barratry; and when the mortgagee brought an action at law againſt the inſurer to recover damages for the loſs which he had ſuſtained by this act of barratry, the court, ſtill conſidering the mortgagor as the owner, granted an injunction. Lewin v. Suaſſo, in Can. 16 Geo. 2. Poſtlethw. Dict. vol. i. p. 147.

Even if the parties inſert in the policy, that the inſurance ſhall be upon the ſhip *in any lawful trade*, if the captain commit barra- Havelock v. Hanail, 3 Term Rep. 277.

try by ſmuggling, the underwriters are anſwerable. For otherwiſe the word *barratry* ſhould be ſtruck out of the policy; and moſt clearly, the ſtipulation in the policy reſpecting the employment of the ſhip in a lawful trade, muſt mean the *trade* on which ſhe is ſent by the owners.

It any captain, or mariner, belonging to any ſhip ſhall wilfully burn or deſtroy her, to the prejudice of any merchant loading goods thereon, *or of any perſon underwriting any policy thereon*, or to the prejudice of the owner of the ſhip, he ſhall ſuffer death as a felon, without benefit of clergy.

If the offence be committed within the body of a county, the offender ſhall be tried in a court of common law; if upon the high ſeas, it ſhall be tried according to the directions of the 28 *H.* 8. *c.* 15.

Partial, or, as it is ſometimes called, average loſs, *ex vi termini*, implies a damage, which the ſhip may have ſuſtained in the courſe of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it alſo means the damage which goods may have received, without any fault of the maſter, by ſtorm, capture, ſtranding, or ſhipwreck, although the whole, or the greater part thereof, may arrive in port. Theſe partial loſſes fall upon the owners of the property ſo damaged, who muſt be indemnified by the underwriter. For if the goods arrive, but leſſened in value through damage received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it can only be effected by putting the merchant in the ſame condition in which he would have been, if the goods had arrived free from damage.

2 Burr. 1172.

2 Burr. 1170.

The proportion of damage the merchant may have ſuffered is aſcertained in this way. Where an entire thing, as one hogſhead of ſugar, happens to be ſpoiled, if you can fix, whether it be a third, a fourth, or a fifth worſe, then the damage is aſcertained to a mathematical certainty. This is found out, not by any price at the port of diſcharge, but by the price at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the ſame thing for in either caſe it equally ſhews, whether the damaged goods are a third, a fourth, or a fifth worſe than if they had come ſound; conſequently, whether the injury ſuſtained be a third, fourth, or fifth of the value of the thing. And as the inſurer pays the whole prime coſt, if the thing be wholly loſt; ſo, if it be only a third, fourth, or fifth worſe, he pays a third, fourth, or fifth, not of the value for which it ſold, but of the value ſtated in the policy. And when no valuation is ſtated in the policy, the invoice of the coſt, with the addition of all charges, and the premium of inſurance, ſhall be the foundation, upon which the loſs ſhall be computed.

Lewis v. Rucker, 2 Burr. 1167 Dick v. Allen, at Guild. after Mich. 1785, *coram* Buller, J.

1 Magens, 37.

This rule of aſcertaining the damage will hold wherever there is a ſpecifick deſcription of caſks or goods: but in *Le Cras v. Hughes*, the property, which conſiſted of various goods taken from an enemy, was valued at the ſum inſured, and part was loſt by perils at ſea; conſequently, the ſame rule could not be adopted

Le Cras v. Hughes, B. R. Eaſt. 22 Geo. 3. Park, 111.

on account of the nature of the thing insured. The only mode was to go into an account of the whole value of the goods, and take a proportion of that sum, as the amount of the goods lost.

Since the 19th of *G.* 2. the constant usage has been to let the valuation fixed in the policy remain, in case of a total loss, unless the defendant can shew that the plaintiff had a colourable interest only, or that he has greatly overvalued the goods: but a partial loss opens the policy. This custom, said Lord *Mansfield*, was introduced by Lord Chief Justice *Lee*, in a case of *Erasmus* v. *Banks*, and in another case of *Smith* v. *Flexney*, which happened about the same period, the same rule of decision was adopted. M. 21 G. 2.

The underwriters of *London* have, by express words inserted in their policy, declared, that they will not be answerable for any partial loss, happening to corn, fish, salt, fruit, flour, and seed, unless it arise by way of a general average, or in consequence of the ship being stranded. This clause was introduced to prevent the vexation of trifling demands, which must have arisen in every voyage, on account of the very perishable nature of the above commodities. This form was formerly used by the two insurance companies, as well as by the private insurers, till the year 1754, when a ship having been stranded, and got off again, the insured recovered a small partial loss against the *London* Assurance Company, since which period, the companies have left out the words, "*or the ship be stranded;*" and are now only liable in cases of a general average: but the old form is still retained by private insurers. Cantillon v. the London Assurance Company, cited in 3 Burr. 1555.

Upon this clause there have been several determinations, in all of which it has been uniformly held, that the underwriters can in no case be answerable for a partial loss to such commodities: and that no loss shall be deemed a total one, but the absolute destruction of the thing insured; for that while it specifically remains, though perhaps wholly unfit for use, no loss has happened within the meaning of this memorandum.

Corn is a general term, and includes many particulars; peas and beans have been holden to come within the meaning of the word. Mason v. Skurray, Sittings after Hil. 1780, at Guildhall. But in a late trial at Guildhall, in the court of Common Pleas, Mr. J. Wilson was of opinion, that the term salt used in the memorandum did not include saltpetre. Jouram v. Bourdieu, Sittings after Easter Term, 27 Geo. 3.

This was held with respect to a cargo of wheat, which was partially damaged in a storm. Wilson v. Smith, 3 Burr. 1550.

The same with respect to a cargo of fish, which was stinking, and of no value when examined. Cockings v. Fraser, B. R. E. 25 G. 3. Park, 114.

A cargo of peas was so much damaged, that the produce was three-fourths less than the freight; but as it in fact arrived at the port of destination, the underwriter was holden not to be liable. Mason v. Skurray, Sitt. after Hil. 1780, at Guildhall.

When the quantity of damage sustained in the course of the voyage is known, and the amount, which each underwriter upon the policy is liable to pay, is settled, it is usual for the underwriter to indorse on the policy, "*adjusted this loss, at so much per cent.*" Park, 117.

"*cent.*" or ſome words to the ſame effect. This is called an adjuſtment.

Hog v. Goulding, Sitt. after Tr. 1745, at Guildh. cor. Lee, C. J.

It has been determined, that after an adjuſtment has been ſigned by the underwriter, if he refuſe to pay, the owner has no occaſion to go into the proof of his loſs, or any of the circumſtances reſpecting it. Beawe's Lex Mercat. 310.

Rodgers v. Mayior, Sitt. after Tr. 1790, Park, 118.

However, this rule has of late been ſomewhat relaxed. An action was brought on a policy of aſſurance on ſhip and goods from *London* to *Shelburne*, in *Nova Scotia*. The policy had been adjuſted by the defendant at 50 *per cent.*, and it was contended, that he was now bound by that adjuſtment. On the other hand, it was argued, that the adjuſtment was not binding; and that if it were, it ought to been declared upon ſpecially. Lord *Kenyon* ſaid, that he did not think it neceſſary to declare on the adjuſtment ſpecially, that it was *primâ facie* evidence againſt the defendant; but if there had been any miſconception of the law or fact, upon which it had been made, the underwriter was not abſolutely concluded by it.—This turned out to be the caſe, and there was a verdict for the defendant.

De Garron v. Galbraiths, Sitt. after Tr. 1795. Park, 118.

Again, the plaintiff produced no other evidence at the trial but the adjuſtment; and the witneſs, who proved it, ſwore, that doubts, ſoon after they had ſigned it, aroſe in the minds of the underwriters, and they refuſed to pay; upon which Lord *Kenyon* ſaid, that under thoſe circumſtances, the plaintiff muſt go into other evidence, which not being prepared to do, he was nonſuited. In the following term a motion was made to ſet aſide the nonſuit, upon the ground that an adjuſtment was *primâ facie* evidence of the whole caſe, and threw the *onus probandi* upon the underwriter; and that it amounted to more than proof of the defendant's ſubſcription to the policy.—Lord *Kenyon:* I admit the adjuſtment to be evidence in the caſe to a certain extent; but I thought at the trial, and ſtill think, that when the ſame witneſs, who proved the ſignature of the defendant to the adjuſtment, ſaid, that doubts, ſoon after the adjuſtment took place, aroſe in the minds of the underwriters, as to the honeſty of the tranſaction, and they called for further proof, the plaintiff ſhould have produced other evidence: and that to ſhut the door againſt inquiry after an adjuſtment, would be to put a ſtop to candour and fair dealing amongſt the underwriters. The rule was refuſed.

Thelluſſon v. Fletcher, Dougl. 301.

An action was brought upon an inſurance upon goods on board a *foreign ſhip*, "the policy to be deemed ſufficient proof of intereſt "in caſe of loſs." The defendant ſuffered judgment to go againſt him by default; and on a motion to ſet aſide the writ of inquiry, the court of King's Bench ſaid, that although ſuch a policy would be void in this country, by virtue of the ſtatute of the 19th G. 2. *c.* 37., yet the ſtatute did not extend to policies on foreign ſhips; and in this caſe the underwriter, having ſuffered judgment to go by default, has confeſſed the plaintiff's title to recover; and the amount of that loſs was fixed, by his own ſtipulation in the policy, which he cannot now controvert.

If an insurer pay money for a total loss, and in fact it be so at the time of adjustment; if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured. But substantial justice is done, by putting him in the place of the insured, and giving him all the advantages that may arise from the salvage.

A box of bullion was wholly lost, the loss adjusted and paid, and an agreement was entered into at the time of adjustment, that the insured would refund to the insurer whatever he should recover in such proportion as the sum insured bore to the whole interest. The bullion was afterwards fished up, and the insured paid into court the insurer's proportion, after deducting salvage. The court held this to be right. Da Costa v. Firth, 4 Burr. 1966.

Salvage is an allowance made for saving a ship, or goods, or both, from the dangers of the seas, fire, pirates, or enemies: and it is also sometimes used to signify the thing itself, which is saved; but it is in the former sense only, in which it is here used. Beawe's Lex Mer. 146.

Underwriters by their policy, expresly undertake to bear all expences of salvage. Park, 140.

The valuation of a ship and cargo in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively; if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, &c.

In order to entitle the insured to recover expences of salvage, it is not necessary to state them in the declaration, as a special breach of the policy.

Thus, in a declaration on a policy on goods, it was stated, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. Lord *Hardwicke* held, that under this declaration, the plaintiffs might give in evidence the expences of salvage. Carey v. King. Ca. temp. Hardw. 304.

But if the insurer pay to the insured such expences, and from particular circumstances the loss be repaired by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss. Randal v. Cockran, 1 Vez. 98.

Before a person insured can demand from the underwriter a recompence for a total loss, he must abandon to him whatever claims he may have to the property insured. Park, 143.

As soon as the insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not: and if they abandon, they must give the underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never afterwards recover for a total loss. Mitchell v. Edie, 1 Term Rep. 608.

But if the insured, hearing that his ship is much disabled, and has put into port to repair, expres his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. For the reason why the notice Da Costa v. Newnham, 2 Term Rep. 407.

notice of abandonment is deemed neceſſary, is to prevent ſurpriſe or fraud upon the underwriter; but in the caſe put, they have by their own act ſuperſeded the neceſſity of notice.

Park, 144. When an abandonment is made, it muſt be total, and not partial.

2 Burr. 697. The inſured may in all caſes chooſe not to abandon: but he cannot at his pleaſure abandon, and thereby turn a partial into a total loſs.

Park, 146. The inſured may abandon to the underwriter, and call upon him for a total loſs, if the damage exceed half the value; if the voyage be abſolutely loſt or not worth purſuing; if further expence be neceſſary; or if the inſurer will not engage at all events to bear that expence, though it ſhould exceed the value, or fail of ſucceſs.

1 Term Rep. 191. But he cannot abandon, unleſs at ſome period or other of the voyage there has been a total loſs: and if neither the thing inſured, nor the voyage is loſt, and the damage does not amount to a moiety of the value, he ſhall not be allowed to abandon.

Pringle v. Hartley, 3 Atk. 195. A ſhip was taken by a *Spaniſh* privateer, retaken by an *Engliſh* privateer and carried into *Boſton* in *New England*, where, as no perſon appeared to give ſecurity for the ſalvage, ſhe was ſold; the recaptors had their moiety, and the overplus remaining in the hands of the officers of the court of Admiralty, the owners were entitled to abandon and to recover for a total loſs.

Goſs v. Withers, 2 Burr. 683. A ſhip was taken by the *French*, remained with them eight days, and was then retaken: the maſter, mates, and ſailors, except a landman and an apprentice, had been taken out and carried to *France*. Before the capture, the ſhip had been ſeparated from her convoy, and was ſo far diſabled by ſtorm, as to be incapable of proceeding in her voyage without going into port to refit. Part of the cargo was thrown overboard in the ſtorm, and the reſt ſpoiled while the ſhip lay at *Milford Haven*. In actions upon two policies, one on the ſhip, and the other on the cargo, it was held, that this was a total loſs, ſo as to entitle the owner to abandon.

Milles v. Fletcher, Dougl. 219. A ſhip, bound from *Mountſerrat* to *London*, was captured, and the captain, crew, rigging, and part of the cargo, which was ſugar, were taken away. She was retaken and carried into *New York*, where the captain alſo arrived. Upon taking poſſeſſion he found that part of the cargo that was left had been waſhed overboard; that 57 hogſheads of what remained were damaged, and that the ſhip was in ſuch a ſtate that ſhe could not be repaired, without unloading her entirely. The owners had no ſtorehouſes at *New York*; nor were any ſailors to be had. The ſalvage came to forty hogſheads of ſugar; and if the ſhip had been repaired, it would have exceeded the freight by 100*l.* There was an embargo laid on all ſhips till *December*, and this ſhip was to have arrived in *London* in *July* preceding. The captain, upon the advice of his friends, ſold the cargo, and was paid for it: he agreed alſo to ſell the ſhip; but the perſon who contracted for her ran away, upon which the captain left her in a creek, and came to *England*. The owners

owners of the ſhip had a right to abandon to the inſurers on the ſhip and freight.

The right to abandon muſt depend upon the nature of the caſe at the time of the action brought, or at the time of the offer to abandon: and therefore if at the time advice is received of the loſs, it appears that the peril is over and the thing in ſafety, the inſured has no right to abandon. Thus, in a caſe where there was a capture and recapture, and it was ſtated that at the time of the offer to abandon, the ſhip was ſafe in port, and had ſuſtained no damage, the court held, that the inſured had no right to abandon. Hamilton v. Mendes, 2 Burr. 1198. 1 Bl. Rep. 276. S. C.

But if the underwriter pay for a total loſs, and it afterwards turn out to be but partial, the inſured ſhall not be obliged to refund: but the inſurer ſhall ſtand in his place for the benefit of ſalvage. Da Coſta v. Firth, 4 Burr. 1966.

A ſhip was inſured from *Wyburg* to *Lynn*, at which place ſhe arrived: the jury found that the ſhip was not worth repairing; but the damage ſuſtained in the voyage inſured did not exceed 48*l. per cent.* By the court—The jury have precluded us from ſaying this is a total loſs; and where neither the thing inſured nor the voyage is loſt, the inſured cannot abandon. Cazalet v. Barbe, 1 Term Rep. 187.

An inſurance was made on ſhip, cargo, and freight, at and from *Tortola* to *London*, warranted free of particular average. On the firſt of *Auguſt* the whole fleet got under way, but not being able to get clear of the iſlands, they anchored that night, and the next day got clear of them. About ten o'clock of the 2d of *Auguſt*, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain, and make water ſo faſt, that the crew were obliged to work both pumps: on the 3d, the captain made a ſignal of diſtreſs, and returned to *Tortola*. A ſurvey was held, by which the ſhip was declared unable to proceed to ſea with her cargo; and that ſhe could not be repaired in any of the *Engliſh Weſt India* iſlands. Many of the ſugars in the bilge and lower tier were waſhed out, and ſeveral of the caſks broke and in bad order. This was holden to be a total loſs, the voyage being entirely defeated. Manning v. Newnham, Tr. 22 G. 3. Park, 168.

Policies are annulled by the leaſt ſhadow of fraud or undue concealment of facts; and both parties are equally bound to diſcloſe circumſtances, within their knowledge: for if the inſurer, at the time he underwrote, knew that the ſhip was ſafe arrived, the contract will be void.

A policy was held to be void, where goods were inſured as the property of an ally, when in fact they were the goods of an enemy. Skin. 327.

A ſhip was known to have ſailed from *Jamaica* on the 24th of *November*; and the agent told the inſurer ſhe ſailed the latter end of *December*; the policy was declared void. Roberts v. Founereau, Sittings at Guildhall, after Tr. 1742.

In an inſurance upon goods, the inſured warranted the ſhip and goods to be neutral; it was expreſsly found by the jury, that they were not neutral. The court, therefore, though the loſs happened by ſtorms, and not by capture, declared that the inſured could not recover. Woolmer v. Muilman, 3 Burr. 1419. 1 Bl. Rep. 427. S. C.

Goods

Fernandes v. Da Coſta, Sittings after Hil. 4 G. 3.

Goods were inſured on board a ſhip, warranted *Portugueſe*. The goods were loſt by a different peril, but in fact the ſhip was not *Portugueſe*. The policy was adjudged void *ab initio*.

Da Coſta v. Scandret, 2 P. Wms. 170.

One having an account that a ſhip, deſcribed like his, was taken, inſured her, without giving any notice to the inſurers of what he had heard. The policy was decreed in equity to be delivered up.

Seaman v. Founereau, 2 Str. 1183.

The agent for the plaintiff, two days before he effected the policy, received a letter from *Cowes*, in which were theſe words: "On the 12th of this month I was in company with the *Davy* "(the ſhip in queſtion), at twelve at night loſt ſight of her all at "once; the captain ſpoke to me the day before that ſhe was "leaky, and the next day we had a hard gale." The ſhip, however, rode out the gale, and was captured by the *Spaniards*. The policy was held to be void, becauſe the letter was not communicated to the inſurer.

Hodgſon v. Richardſon, 1 Bl. Rep. 463.

A ſhip was inſured, "*at and from* Genoa." The ſhip loaded at *Leghorn*, and was originally bound for *Dublin*; but loſing her convoy, ſhe put into *Genoa* in *Auguſt*, and lay there till the *January* following. All theſe facts were known to the inſured, but not communicated to the inſurer. The policy was held to be void.

Ratcliffe v. Shoolbred, Sittings at Guildhall, after Tr. 1780, Park, 181,

A ſhip being bound from the coaſt of *Africa* to the *Britiſh Weſt Indies*, ſailed from *St. Thomas*'s on the coaſt of *Africa* on the 2d of *October*, a circumſtance with which the plaintiff was acquainted by a letter received in *February*. The policy was not made till the 21ſt of *March*. The letter was not ſhewn, nor was any thing ſaid of her ſailing from *St. Thomas*'s, but in the inſtructions "the ſhip "was ſaid to have been on the coaſt the 2d of *October*." The policy was held to be void.

Fillis v. Brutton, Sittings at Guildhall, after Hil. 1782, Park, 182.

The broker's inſtructions ſtated *the ſhip ready to ſail on the 24th of* December; the broker repreſented to the underwriter that the ſhip was in port, when in fact ſhe had ſailed the 23d of *December*. The policy was void.

Carter v. Boehm, 3 Burr. 1905. 1 Bl. Rep. 593. S. C.

But there are many matters as to which the inſured may be innocently ſilent; 1ſt, As to what the inſurer knows, however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what leſſens the riſk. An underwriter is bound to know particular perils, as to the ſtate of war or peace. If a privateer is inſured, the underwriter needs not be told her deſtination.—An inſurance was made on *Fort Marlborough* in the *Eaſt Indies* for twelve months againſt the attacks of an *European* enemy, for the benefit of the governor. The defence ſet up was an undue concealment of circumſtances, particularly the weakneſs of the fort, and the probability of its being attacked by the *French*. The court held that the policy was good.

Planchè v. Fletcher, Dougl. 238.

A ſhip was inſured "from *London* to *Nantz*, with liberty to call "at *Oſtend*." The ſhip's clearances and papers were all made out for *Oſtend*; but ſhe was never intended to go thither. After the policy was made, war was declared againſt *France*. Two defences were ſet up; 1ſt, That there was a fraud in clearing out the

the ſhip for *Oſtend*, when ſhe never was deſigned for place. 2d, That as hoſtilities were declared after the policy was ſigned, and before the ſhip ſailed, the defendant ought to have had notice. The court held that neither of the objections was valid; for as to the firſt it was the common uſage; and of the ſecond the inſurer was bound to take notice.

An underwriter refuſed to pay a loſs by capture, the ſhip being *Portugueſe* and condemned for having an *Engliſh* ſupercargo on board, becauſe the inſured had not diſcloſed that circumſtance. The court held, that the condemnation was unjuſt, and was not ſuch a circumſtance as the inſured was bound to diſcloſe. Mayne v. Walter, B. R. Eaſt. 22 Geo. 3. Park, 125.

A repreſentation is a ſtate of the caſe, not forming a part of the written inſtrument or policy; and it is ſufficient if it be ſubſtantially performed. If there be a miſrepreſentation, it will avoid the policy, as a fraud, but not as a part of the agreement. Even written inſtructions, if they are not inſerted in the policy, are only to be conſidered as repreſentations; and in order to make them valid and binding as a warranty, it is neceſſary that they make a part of the written inſtrument. But if a repreſentation be falſe in any material point, it will avoid the policy; becauſe the underwriter has computed the riſk upon circumſtances which did not exiſt. Park, 196.

The following inſtructions were ſhewn to the firſt underwriter, but not inſerted in the policy, "Three thouſand five hundred "pounds upon the ſhip *Julius Cæſar*, for *Halifax*, to touch at "*Plymouth*, and any port in *America: ſhe mounts twelve guns, and* "*twenty men.*" Theſe inſtructions were not ſhewn to the preſent defendant, but ſhe was repreſented *generally as a ſhip of force*. At the time of her capture, ſhe had on board 6 four-pounders, 4 three-pounders, 3 one-pounders, 6 ſwivels, and 27 men and boys in all, of which 16 only were men. The witneſs ſaid, he conſidered her as being ſtronger with this force, than if ſhe had 12 carriage guns, and 20 men; and that there were neither men nor guns on board at the time of the inſurance. The court held, that theſe inſtructions were only a repreſentation; and that they had been ſubſtantially performed. Pawſon v. Watſon, Cowp. 785.

A ſhip was inſured at and from *Port l'Orient* to the *Iſles of France* and *Bourbon*, and to all or any ports or places where, and whatſoever, in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere, beyond the *Cape of Good Hope*, from place to place, and during the ſhip's ſtay and trade, backwards and forwards, at all ports and places, and until her ſafe arrival back at her laſt port of diſcharge in *France*. A ſlip of paper, at the time the policy was underwritten, was *wafered* to it, and ſhewn to the underwriters, on which was written the following repreſentation: "The ſhip has had a complete repair, and is now a fine and good veſſel, three decks. Intends to ſail in *September* or *October* next. Is to go to *Madeira*, the *Iſles of France*, *Pondicherry*, *China*, the *Iſles of France*, and *l'Orient*." The ſhip, in fact, did not ſail till the 6th of *December*, and did not reach *Pondicherry* till the month of *July* following. Bize v. Fletcher, Dougl. 271.

following. She continued there till *Auguſt*, when inſtead of proceeding to *China*, ſhe ſailed for *Bengal*, where having paſſed the winter and undergone conſiderable repairs, ſhe returned to *Pondicherry*, and after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *l'Orient*, but was taken by the *Mentor* privateer. The uſual time, in which the direct voyage is performed between *Pondicherry* and *Bengal* is ſix or ſeven days; but this ſhip was ſix weeks in going to, and two months in returning from *Bengal*, and lay off *Madras*, *Maſulipatam*, *Viſagapatam*, and *Yanon*, and took in goods at all thoſe places. Lord *Mansfield* told the jury, that if no fraud was intended, and that the variance between the intended voyage, as deſcribed in the ſlip of paper, and the actual voyage as performed did not tend to increaſe the riſk, *this ſlip of paper being only a repreſentation*, the plaintiff was entitled to their verdict.

If the miſrepreſentation be in a *material* point, it will avoid the policy, even though it happen by miſtake.

Macdowell v. Fraſer, Dougl. 247. Thus, in a policy on a ſhip from *New York* to *Philadelphia*, the broker repreſented to the inſurer that the *ſhip was ſeen ſafe in the* Delaware *on the 11th of* December by a ſhip which arrived at *New York*; whereas in fact the ſhip was loſt on the 9th of *December*. The policy was held to be void, although there was no ſuſpicion of fraud.

Shirley v. Wilkinſon, Dougl. 293. The ſame rule holds if the broker conceal any thing *material*, though the only ground for not mentioning it ſhould be that the fact concealed appeared immaterial to him.

But the thing concealed muſt be ſome *fact*, not a *mere ſpeculation or expectation* of the inſured. Thus, where a broker inſuring ſeveral veſſels, ſpeaking of them all, ſaid, "which veſſels are *expected* "to leave the coaſt of *Africa* in *November* or *December*;" the policy was held good, although in fact the ſhip in queſtion had ſailed in the month of *May* preceding.

Barber v. Fletcher, Dougl. 292.

Park, 208. Wherever there has been an allegation of falſehood, a concealment of circumſtances, or a miſrepreſentation, it is immaterial whether it be the act of the perſon himſelf who is intereſted, *or of his agent*; for in either caſe the contract is founded in deception, and the policy is conſequently void.

This rule prevails, even though the act cannot be at all traced to the owner of the property inſured.

Stewart v. Dunlop, Caſ. of Houſe of Lords, Apr. 8, 1785. A man having arrived at *Greenock*, knowing of the loſs of the ſhip inſured, and meeting an intimate friend and acquaintance of the inſured, and a partner with him in ſome other tranſactions, communicated the intelligence of the loſs of the ſhip to him, and *deſired it might be concealed*. The ſame day the perſon receiving the account held a converſation with the plaintiff's clerk, who notwithſtanding that, ſwore, that he had no information from him reſpecting the ſhip, nor did he get *any hint* from him, further than the ſaid perſon aſking the deponent, if he knew whether there were any inſurance made upon her, and if there was any account of her. The ſame day the plaintiff deſired this clerk to write to get an in-

ſurance

ſurance effected, which he did, without telling his maſter of this converſation. The Court of Seſſion in *Scotland* held the policy to be void; and the Houſe of Lords confirmed the decree.

The plaintiff's agent ſhipped goods for the plaintiff, and wrote to the plaintiff's agent in town to get an inſurance done. The letter was dated the 16th of *September*, and it contained this ſentence, "I this day ſhipped on board the *Joſeph*, *which ſailed immediately*, a cargo of oats, *&c.*" This letter was not however ſent till one o'clock on the 17th. The caſe ſtates, that about ſix o'clock in the evening of the 16th, *Thomas* (the agent) heard a report that the ſhip was on ſhore; and at ſix o'clock in the morning of the 17th *he knew* the ſhip was loſt. The policy was held void on account of the fraud in *Thomas*. Fitzherbert v. Mather, 1 Term Rep. 12.

The courts of juſtice in this country have not yet adopted any general rule with reſpect to the return of premium in caſes of fraud. In two or three inſtances in the court of Chancery, where the underwriters have been relieved from the payment of the ſums inſured, on account of fraud, the decree has directed the premium to be returned.

Thus, in a caſe in the year 1690, the defendant and others had come to the inſurance office, and bought a policy for inſuring the life of one *Horwell* (upon whoſe life they had no concern or intereſt depending) for a year; and the policy ran whether intereſted or not intereſted, at a premium of 5 *l. per cent.* They took this way of drawing in ſubſcribers: they agreed with one *Marwood* a known merchant upon the Exchange, and a leading man in ſuch caſes, to ſubſcribe firſt; but in caſe *Horwell* died within the year, *Marwood* was to loſe nothing, but on the contrary was to ſhare what ſhould be gained from the other ſubſcribers. Upon the credit of *Marwood*'s ſubſcribing, ſeveral others (who had inquired of *Marwood* about *Horwell*, who was his neighbour) ſubſcribed likewiſe. *Horwell* lived about four months, and then died; and this bill was brought to be relieved againſt the policy: and this matter being all confeſſed by the anſwer, the court decreed the policy to be delivered up, *and the premium to be repaid.* Wittingham v. Thornborough. Pr. Ch. 20. 2 Vern. 206. S. C.

So alſo, in the caſe of *Da Coſta* v. *Scandrett*, Lord *Macclesfield*, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the inſured. Da Coſta v. Scandrett, 2 P. Wms. 170.

It is true, that during the argument in the caſe next to be quoted, the counſel cited a caſe of *Rucker* v. *Hollingbury*, in which the Maſter of the Rolls had been of a different opinion from that delivered in the two preceding caſes. But Lord *Mansfield* ſaid, that there muſt be ſome miſtake in reciting the caſe before the Maſter of the Rolls; for the practice of the court of Chancery was certainly agreeable to the two former caſes.

The caſe, in which this obſervation was made, was an action on a policy of inſurance on a ſhip, with a count of a general *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe; and damages were laid at 98 *l.* The trial was had, under a decree of the court of Chancery, where the now defendant, the inſurer, being Wilſon v. Duckett, 3 Burr. 1361.

being there complainant, *had offered to pay back the premium, which was* 10*l.* No money was, in the preſent caſe, paid into court; though the uſual courſe in theſe caſes is for the defendant, the inſurer, to bring the premium into court. The jury found a verdict for the plaintiff, for the ten pounds premium, on the count for money had and received to his uſe; although they were of opinion againſt the policy, upon the foot of fraud; and found againſt it, as being fraudulent. In fact, the firſt underwriter was only a decoy-duck, to induce other perſons to underwrite the policy: and it had been previouſly agreed between the inſured and him, that he ſhould not be bound by ſigning the policy; which this court conſidered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord *Mansfield*, (before whom this cauſe was tried,) and of the counſel on both ſides, it was agreed to bring this queſtion before the court, whether, upon a policy of inſurance being found fraudulent, the premium ſhould be returned to the plaintiff (the inſured), or retained by the defendant (the inſurer)? The caſes above mentioned were quoted by the counſel for the plaintiff; but they being all in Chancery, Lord *Mansfield* ſaid, he wanted to know whether there was any common law determination to the ſame effect. As it did not appear that there was, his Lordſhip ſaid, It was plain what muſt be done in this caſe; for he looked upon *the offer made* by the complainant's bill in equity, to be the ſame thing as if the money had *actually been brought into court* in the preſent caſe.

But although the common law has been ſo ſilent upon the ſubject, as not to lay down any general rule; and although, in all the caſes ſtated, the premium was reſtored; yet, if the fraud is notorious, palpable, and groſs in its nature, the court may order, and has ordered, the underwriter to retain the premium.

Tyler v. Horne, Sittings at Guildhall, after Hil. T. 1785.

Thus, where an action was brought by the inſured to recover 150*l.*, being the amount of the defendant's ſubſcription; the ground of refuſal was, that the inſurance was fraudulent; and that the plaintiff knew of the loſs of the ſhip, at the time of effecting the policy. The counſel for the plaintiff were under the neceſſity of admitting that their client had made ſome fraudulent inſurances upon this very ſhip, ſubſequent to the one now in diſpute; but contended, that news of the loſs of the ſhip had not arrived, till after this particular one was effected. The evidence, however, was ſo ſtrong as eaſily to convince the jury, that the plaintiff had received information of the loſs before the order for making the inſurance was given to the broker; and they found a verdict for the defendant.

Lord *Mansfield* ſaid, The fraud was ſo groſs, that the premium ſhould not be recovered from the underwriter.

It is proper, however, to obſerve, that it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies againſt him, at the ſuit of the inſured, to recover the premium.

3 Burr. 1909.

Thus it was ſaid by Lord *Mansfield*, in the caſe of *Carter* v. *Boh*

" The policy would be void againſt the underwriter, if he conceal

" 2

" any thing; as, if he insured a ship on her voyage, which he pri-
" vately knew to be arrived; and *an action would lie to recover the* " *premium.*"

By statute 1 *Ann. st.* 2. *c.* 3. § 4. it is enacted, That if any captain, master, mariner, or other officer, belonging to any ship, shall willingly cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that shall load goods thereon, (or, by a subsequent statute, to the prejudice of any person or persons that shall underwrite any policy or policies of insurance thereon,) shall suffer death as a felon. 4 Geo. 1. c. 12. § 3.

Every ship insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect wholly unknown to the parties, that will vacate the contract, and the insurers are discharged. This arises from a tacit and implied warranty, that the ship shall be in a condition to perform the voyage. Mills v. Roebuck, in the Exch. Park, 221.

But, though the insured ought to know whether she was seaworthy or not at the time she set out upon her voyage; yet, if it can be shewn that the decay to which the loss is attributable did not commence till a period subsequent to the insurance, the underwriter will be liable, if she should be lost a few days after her departure.

It was said by Lord *Mansfield*, that " by an implied warranty " every ship insured must be tight, staunch, and strong; but it is " sufficient if she be so at the time of her sailing. She may cease " to be so in twenty-four hours after her departure, and yet the " underwriter will continue liable." Eden v. Parkinson, Dougl. 708.

However, if a ship sail upon a voyage, and in a day or two become leaky, and founder, or be obliged to return to port, without any storm, or visible or adequate cause to produce such an effect, the presumption is, that she was not seaworthy when she sailed; and the jury, upon the plaintiff's own case, may draw such a conclusion. Murray v. Vandam, Sittings at Guildhall, after Mich. 1794, *coram* Kenyon, C. J.

As it is a condition or implied warranty in every policy of insurance, that the ship is seaworthy, there need be no representation of that; for if she sail without being so, the policy is void. And any insufficiency in her former voyage, will not vacate the policy. Shoolbred v. Nutt, Sittings at Guildhall, after Hil. 1782.

Whenever an insurance is made on a voyage expressly prohibited by the common law, statute, or maritime law of this country, the policy is void. Park, 232.

The goods on board a ship were insured " at and from *London* " to *New York*, warranted to depart with convoy from the chan-" nel for the voyage." She had provisions on board, which she had a licence to carry to *New York* under a proviso in the prohibitory act of 16 *G.* 3. *c.* 5. But *one-half of the cargo, including the goods, which were the subject of this insurance, was not licensed.* The commander in chief had issued a proclamation to allow the entry of unlicensed goods; but he had no authority under the act of Johnson v. Sutton, Dougl. 241.

parliament to iſſue ſuch proclamation, or to permit the exportation of unlicenſed goods. The ſtatute prohibits all intercourſe with *New York*, and confiſcates all ſhips trading to that place, unleſs they have a licence. The court held the policy was void: it is immaterial whether the underwriter did or did not know that the voyage was illegal; for the court cannot ſubſtantiate a contract in direct contradiction to law.

Delmada v. Motteux, B.R. Mich. 25 Geo. 3. Park, 234.

If a ſhip, though neutral, be inſured on a voyage prohibited by an embargo, ſuch an inſurance is void.

Planchè v. Fletcher, Dougl. 238. Lever v. Fletcher, Lond. Sittings, Hil. Vac. 1780. Park, 237.

An inſurance upon a ſmuggling-voyage prohibited by the revenue laws of this country would be void. *Aliter*, if merely againſt the revenue laws of a foreign ſtate; for no country pays attention to the revenue laws of another.

Brandon v. Neſbirt, 6 Term Rep. 23. Briſtow v. Towers, *Id.* 35.

No inſurance can be legally made on an enemy's property.

Park, 244.

All inſurances upon commodities, the importation or exportation of which is prohibited by law, are void. And this rule prevails, whether the inſurer did or did not know, that the ſubject of the inſurance was a prohibited commodity.

By ſtatute 4 & 5 *W.* & *M.* *c.* 15. § 14, 15, 16. a penalty of 500 *l.* is inflicted on the inſurer, who ſhall by way of inſurance procure the importation of prohibited goods; and a like penalty on the inſured.

By 8 & 9 *W.* 3. *c.* 36. § 1. the importation of any foreign alamodes or luſtrings, by way of inſurance or otherwiſe, without paying the duties, is expreſsly prohibited.

By 28 *G.* 3. *c.* 38 § 45. perſons making inſurances on wool, &c. are liable for the firſt offence to a fine of 50 *l.* and ſix months ſolitary impriſonment. The ſame penalty is impoſed on the inſured, and the inſurance is void.

In a policy, "valued free from average," and "intereſt or no "intereſt," it is manifeſt, that the performance of the voyage or adventure, in a reaſonable time and manner, and not the bare exiſtence of the ſhip or cargo, is the object of the inſurance.

Aſſievedo v. Cambridge, 1 Mod. 77.

It was declared from the Bench, in the reign of Queen *Anne*, that ſuch inſurances were *formerly* bad; for it is ſaid in that caſe that in former times, if one had no intereſt, though the policy ran, *intereſt or no intereſt*, the inſurance was void; becauſe inſurances were made for the benefit of trade, and not that perſons unconcerned therein, or unintereſted in the ſubject-matter, ſhould profit by them.

Depaiba v. Ludlow, Comyns's Rep. 360.

The idea thus ſtarted is very much confirmed by what fell from the court in the caſe of *Depaiba* v. *Ludlow*: for the court there obſerved, that inſurances upon intereſt or no intereſt were introduced *ſince* the revolution.

But though this mode of inſuring thus gained a footing in *England*, yet when introduced, the courts of juſtice looked upon the contract

contracts with a jealous eye; and by their determinations ſhewed the ſtrong prejudices which they entertained againſt them. The courts of equity in particular manifeſted that their inclination would lead them as much as poſſible to ſuppreſs ſuch a ſpecies of contract: nay, that they ſtill conſidered them as void.

The defendant had lent money on a bottomry bond, but had no intereſt in the ſhip or cargo; the money lent was 300 *l.*, and he inſured 450 *l.* on the ſhip: the plaintiff's bill was to have the policy delivered up; becauſe the defendant was not concerned in point of intereſt, as to the ſhip or cargo. *Per curiam.*—Take it that the law is ſettled, that if a man has no intereſt, and inſures, the inſurance is void, though it be expreſſed in the policy, *intereſted or not intereſted.* The reaſon the law goes upon is, that inſurances were made for the benefit of trade, and not that perſons unconcerned therein, and who were not intereſted in the ſhip, ſhould profit thereby; and *where one would have the benefit of the inſurance, he muſt renounce all intereſt in the ſhip.* And the reaſon why the law allows that a man, having ſome intereſt in the ſhip or cargo, may inſure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readineſs to lade on board his ſhip. *Per cur.*—Decree the policy to be delivered up to be cancelled. Goddart v. Garrett, 2 Vern. 269.

So, on a policy of inſurance on goods, by agreement valued at 600 *l.*, the inſured not to be obliged to prove any intereſt; the Lord Chancellour ordered the defendant to diſcover what goods he put on board; for although the defendant offered to renounce all intereſt to the inſurers, yet it muſt be referred to the Maſter to examine the value of the goods ſaved, and to deduct it out of the value or ſum of 600 *l.*, at which the goods were valued by the agreement. Le Pypre v. Farr, 2 Vern. 716.

The difference between policies upon intereſt, and ſuch as are not, was, that in policies upon intereſt, the inſured recovered for the loſs actually ſuſtained, whether it were total or partial: but upon a wager policy, he could never recover but for a total loſs. Goſs v. Withers, 2 Burr. 683.

It is enacted by ſtat. 19 *Geo.* 2. *c.* 37. that inſurances made on ſhips or goods, *intereſt or no intereſt*, or, *without further proof of intereſt than the policy*, or *by way of gaming or wagering*, or *without benefit of ſalvage to the inſurer*, ſhall be void. By § 2. there is an exception for inſurances on private ſhips of war, fitted out ſolely to cruiſe againſt his Majeſty's enemies; and alſo by § 3. on any merchandizes or effects, from any ports or places in *Europe* or *America*, belonging to the crowns of *Spain* or *Portugal*.

This ſtatute hath been frequently holden not to extend to inſurances of foreign property, and on foreign ſhips. Thelluſſon v. Fletcher, Dougl. 301.

It hath been alſo frequently holden upon this act, that a valued policy is not a wager policy, for the inſured muſt prove ſome intereſt, although he need not prove the value of this intereſt. If indeed it could be made appear, that a valued policy were uſed merely as a cover to a wager, in order to evade the ſtatute, it would be void. Lewis v. Rucker, 2 Burr. 1167. Grant v. Parkinſon, Mich. 22 Geo. 3. B. R. Park, 267. Da Coſta v. Firth, 4 Burr. 1966.

Le Cras v. Hughes, B. R. East. 22 Geo. 3. Park, 269.

Upon a joint capture by the army and navy, the officers and crew of the ships have, before condemnation, an insurable interest by virtue of the prize act, which usually passes at the commencement of a war.

Kent v. Bird, Cowp. 583.

All insurances, made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagers, and are void. Thus, where the defendant, in consideration of 20*l.* paid by the plaintiff, undertook that the ship should save her passage to *China* that season, or that he would pay 1000*l.* within one month after her arrival in the river *Thames*; the contract was holden to be void, although the plaintiff had some goods on board.

Lowrey v. Bourdieu, Dougl. 451.

Wherever the court can see upon the face of the policy, that it is merely a contract for gaming, where indemnity is not the object in view, they are bound to declare such policy void. As, where by the policy it appeared, that the plaintiffs had lent 26,000*l.* on bond to a captain of an *East Indiaman*, to which amount the ship and cargo were insured, and that in case of loss no other proof of interest was to be required than the exhibition of the bond; the court held, that the contract was void.

As to re-assurances, it is declared by stat. 19 *G.* 2. *c.* 37. § 4. that it shall not be lawful to make re-assurance, unless the insurer be insolvent, become a bankrupt, or die; in any of which cases, such insurer, his executors, administrators, or assigns, may make re-assurance to the amount before by him insured, expressing in the policy, that it is a re-assurance.

Andreè v. Fletcher, 2 Term Rep. 161.

A re-assurance was made by the defendant on a *French* vessel, first insured by a *French* underwriter at *Marseilles*, who was living, and, at the time of subscribing the second policy, was solvent. The court were unanimously of opinion, that this re-assurance was void; and that every re-assurance in this country, either by *British* subjects or foreigners, on *British* or foreign ships, is void by the statute, unless *the first assurer be insolvent, become a bankrupt, or die.*

Newby v. Reed, Sittings in London, East. Vacat. 1763, 1 Blackst. Rep. 416.

In the year 1763, it was ruled by Lord *Mansfield*, Chief Justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions; yet, upon the first action he may recover the whole sum insured, and may leave the defendant therein, to recover a rateable satisfaction from the other insurers.

Rogers v. Davis, Sittings in Mic. Vac. 17 Geo. 3. before Lord Mansfield.

Thus also, it was determined in a subsequent case at *Guildhall*. It was an action on a policy of insurance on a ship from *Newfoundland* to *Dominica*, and from thence to the port of discharge to the *West Indies*. It was a valued policy on the ship and freight; and on the goods as interest should appear. The ship sailed from *Saint John's* the 17th of *December* 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200*l.*, and paid into court 124*l.* This sum was paid on a supposition, that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool* on a voyage from *Newfoundland* to *Barbadoes* and the *Leeward Islands*, with an exception of *American* captures: but the plaintiff afterwards, for the

the purpoſe of ſecuring himſelf againſt captures, and having altered the courſe of his voyage, made the preſent inſurance. The plaintiff now inſiſted he was entitled to receive the full amount of his inſurance againſt the defendant, and not to any part from the *Liverpool* underwriters, becauſe the voyage now inſured was different from that inſured at *Liverpool*. There was, however, a verdict for the plaintiff for his full demand, *with liberty for the defendant to bring an action againſt the* Liverpool *underwriters, if he thought fit.*

Davis v. Gildart, Sittings in Eaſt. Vac. 17 Geo. 3. at Guildhall.

Accordingly in the *Eaſter* term following, an action was brought for money had and received to the uſe of the plaintiff, who was the defendant in the laſt cauſe, in order to recover a contribution for the loſs which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy (which was the ſubject of the former action) 2200*l.* were inſured; that on the two *Liverpool* policies 1700*l.* were inſured: that the merchant was intereſted to the amount of 500*l.* on the ſhip; 300*l.* on the freight; and 1400*l.* on the cargo. That the plaintiff had paid 200*l.* loſs, and 47*l.* for the coſts. The queſtion was, Whether the defendant was liable to contribute any thing, and what? The whole intereſt was 2200*l.* and the whole inſurance was 3900*l.* It was inſiſted by the counſel for the defendant, that the inſurance in *London* was an illegal re-aſſurance; and therefore the plaintiff might have made a good defence in an action brought againſt him: and if ſo, he could not now recover over againſt the defendant.

Lord *Mansfield*.—The queſtion ſeems to be, whether the inſured has not two ſecurities for the loſs that has happened? If ſo, can there be a doubt that he may bring his action againſt either? It is like the caſe of two ſecurities; where, if all the money be recovered againſt one of them, he may recover a proportion from the other. Then this would bring it to the queſtion, whether the ſecond inſurance is void as a *re-aſſurance?* But a re-aſſurance is a contract made by the inſurer to ſecure himſelf; *and this is only a double inſurance.*—There was another ground taken in the cauſe, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict.

Godin v. Lond. Aſſur. Company, 1 Burr. 489. 1 Bl. Rep. 103. S. C.

Although a man, by making a double inſurance, ſhall not be allowed to recover a double ſatisfaction for the ſame loſs; yet various perſons may inſure various intereſts on the ſame thing, and each to the whole value (as the maſter for wages, the owner for freight, one perſon for goods, another for bottomry); and ſuch a contract does not fall within the idea of a double inſurance.

Park, 294.

A deviation is underſtood to mean a voluntary departure, without neceſſity or any reaſonable cauſe, from the regular or uſual courſe of the ſpecifick voyage inſured. Whenever this happens, the voyage is determined; and the inſurers are diſcharged from any reſponſibility.

The reaſon of this is, becauſe the ſhip goes upon a different voyage from that againſt which the inſurer undertook to indemnify.

Nor is it material whether the loſs be or be not an actual conſequence of the deviation; for the inſurers are in no caſe anſwerable for a ſubſequent loſs, in whatever place it happen, or to whatever cauſe it may be attributed. Neither does it make any difference whether the inſured was or was not conſenting to the deviation.

Fox v. Black, Exeter Aſſ. 1767, *coram* Yates, J. Park, 295.

A ſhip was inſured from *Dartmouth* to *Liverpool*; ſhe put into *Loo, a place ſhe muſt of neceſſity paſs by*; and although no accident befel her in going into or coming out of *Loo* (for ſhe was loſt after ſhe got out to ſea), it was held to be a deviation.

Townſon v. Guyon, before Lord Mansfield, *ibid.*

A ſhip being inſured from *Dunkirk* to *Leghorn*, comes to *Dover* for a *Mediterranean* paſs, and it was held to be a deviation.

Ibid. by Lee, C. J.

If the maſter of a veſſel put into a port not uſual, or ſtay an unuſual time, it is a deviation.

Elliot v. Wilſon, 7 Br. P. C. 459.

The inſured ordered their broker to inſure on a particular veſſel from *Carron to Hull, with liberty to call as uſual.* Theſe inſtructions were entered in the broker's books, and the inſurer ſubſcribed a policy on the goods, "at and from the loading thereof, on board the ſaid ſhip at *Carron* wharf, and to continue and endure until the ſaid ſhip (*being allowed a liberty to call at* Leith), ſhall arrive at *Hull*." It being uſual for theſe veſſels to call at *Borrowſtoneſs*, *Leith*, and *Moriſon*'s Haven, this veſſel ſtopt at the latter; and received no damage in going into or coming out of it. The courts in *Scotland* held it was no deviation; but their judgment was reverſed in the Houſe of Lords.

Featſon v. Howard, 6 Term Rep. 531.

If ſeveral places are named in the policy, the ſhip muſt go to thoſe places in the order in which they are named, unleſs ſome uſage, or ſome ſpecial facts be proved, to vary the general rule.

Claſon v. Simmond, Sittings at Guildhall, Hil. 1741.

If the deviation be but for a ſingle night, or for an hour, it is fatal.

Cock v. Townſon, C. B. before Lord Camden.

A ſhip was bound from *Cork* to *Jamaica*, under convoy. Being of force, ſhe, with two other veſſels, took advantage of the night, and cruiſed in hopes of meeting with a prize; it was held a deviation.

Jolly v. Walker, Sittings at Guildhall after Eaſt. 1781.

But, if a merchant ſhip carry letters of marque, ſhe may *chace* an enemy, though ſhe may not *cruiſe*, without being deemed guilty of a deviation.

Moſs v. Byrom, 6 Term Rep. 379.

If the inſured, without the knowledge of the underwriters, take out a letter of marque, (but without a certificate, which by the prize act of the 33 *Geo.* 3. *c.* 66. § 15. is abſolutely neceſſary to its validity,) for the purpoſe of inducing the ſeamen to enter, and without any intention of cruiſing, this does not ſo eſſentially vary the riſk, as to avoid the policy.

Murdock v. Potts, Sittings at Guildhall, after Tr. 1795.

In an action on a policy of inſurance on freight of the ſhip *Bethiah* at and from *Bourdeaux* to *Virginia*, warranted *American* ſhip and property; the declaration alleged, that the ſhip was an *American* ſhip, and the property of *American* ſubjects. The plaintiff proved the ſhip to be *American*, and it was to have been contended,

contended, that the warranty extended to the goods on board as well as to the ſhip; but upon the evidence it appeared, that the goods, whether *American* or not, were to be carried in the ſhip from *Bourdeaux* to *Saint Domingo*, and that ſhe was only to call at *Norfolk* in *Virginia* for orders; ſo that it was unneceſſary to decide or diſcuſs the queſtion upon the conſtruction of the warranty, Lord *Kenyon* being of opinion, that the underwriters upon this policy had a right to expect, that the goods upon which the freight was payable were conſigned to *Virginia*; and that if the freight was payable for the carriage of them from *Bourdeaux* to *Saint Domingo*, the underwriters were not liable for the loſs, though the ſhip was to call at *Norfolk* for orders, the freight payable being in ſuch caſe different from the freight inſured. The plaintiff was accordingly nonſuited, and no application was made to ſet the nonſuit aſide.

Wherever the deviation is occaſioned by abſolute neceſſity; as, where the crew forced the captain to deviate, the underwriter continues liable. Elton v. Brogden, 2 Str. 1264.

If a ſhip is decayed, and goes to the neareſt port to refit, it is no deviation. Motteux v. London Aſſurance Company, 1 Atk. 545.

Wherever a ſhip, in order to eſcape a ſtorm, goes out of the direct courſe; or when, in the due courſe of the voyage, ſhe is driven out of it by ſtreſs of weather; this is no deviation. Harrington v. Halkeld, Sittings at Guildhall, after Mich. 1788.

If a ſtorm drive a ſhip out of the courſe of her voyage, and ſhe do the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return to the point from which ſhe was driven. Delaney v. Stoddart, 1 Term Rep. 22.

A deviation may alſo be juſtified, if done to avoid an enemy, or to ſeek for convoy; becauſe it is in truth no deviation to go out of the courſe of a voyage, in order to avoid danger, or to obtain a protection againſt it.

In an action upon a policy, which was to inſure the *William Galley* in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy, the caſe was this: the *Galley* ſet ſail from *Bremen*, under convoy of a *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips, whence they ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of war and an admiral. After a ſtay of nine weeks, they ſet out from the *Texel*, and the *Galley* was ſeparated in a ſtorm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80 *l.* ſalvage. It was ruled by Lord Chief Juſtice *Holt*, that the voyage ought to be according to uſage, and that their going to the *Elbe*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ſhips directly from *Bremen* to *London*. And the plaintiff had a verdict. Bond v. Gonſales, 2 Salk. 445.

On an inſurance from *London* to *Gibraltar*, warranted to depart with convoy, it appeared, there was a convoy appointed for that trade at *Spithead*, and the ſhip *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her way thither. Gordon v. Morley, Campbell v. Bordieu, 2 Stra. 1265.

thither. The insurers insisted, that this being the time of a *French* war, the ship should not have ventured through the channel, but have waited in the *Downs* for an occasional convoy: and many merchants and office-keepers were examined to that purpose. But Lord Chief Justice *Lee* held, that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words *warranted to depart with convoy*. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the *Downs*. The juries were composed of merchants; and in both cases they found for the plaintiffs upon the strength of this direction.

Cowp. Rep. 601.

In the case of *Bond* against *Nutt*, the point of deviation for the purpose of procuring convoy also came under the consideration of the court. Upon that occasion, Lord *Mansfield* and the whole court held, that if a ship go to the usual place of rendezvous, for the sake of joining convoy there ready, though such place be out of the direct course of the voyage, it is no deviation.

Enderby and Another v. Fletcher, Sittings in London, Trin. Vac. 1780.

And in a more modern case, the only question was, whether there was a deviation or not. Lord *Mansfield* there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bonâ fide* acted according to the best of his judgment: that he had no other view or motive but to come the safest way home, and to meet with convoy; for that it was no deviation to go out of the way to avoid danger.

In our law books it is sometimes said, that a deviation may be justified by the usage and custom of the trade. But that is not quite correct; for if by the usage of any particular trade, it is customary to stop at certain places, lying out of the direct course from *A.* to *B.*, it is not a deviation to stop there; because it is a part of the voyage. There is no deception upon the insurer; because he is bound to take notice of the usages of trade; they are notorious to all the world; and when the usage has declared it lawful in a specifick voyage to go to any place, though out of the immediate track, it is as much a part of the contract of insurance between the parties, as if it had been particularly mentioned. But in order to justify the captain of a ship in quitting the straight and direct line from the port of loading to that of delivery, there must be a precise, clear, and established usage upon the subject, not depending merely upon one or two loose and vague instances.

Salisbury v. Townson, Park, 309.

Where a ship was insured from *Liverpool* to *Jamaica*, and had put into the *Isle of Man*; it appeared that there were *some instances* of the *Liverpool* ships putting in there, but it was not the settled common, established, and direct usage of the voyage and trade; it was therefore held a deviation, and the underwriters were discharged from any loss that happened subsequent to the deviation.

Cowp. 601.

Wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the intention and spirit of the policy, and, consequently, as much protected by it,

if expreſſed in terms. And therefore in all caſes, in order to determine whether a diverſion from the direct courſe of the voyage is ſuch a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and conſequences of the act, as the true criterion of judgment.

If any of the circumſtances above ſtated do really and *bonâ fide* occur, ſo as to render a deviation abſolutely neceſſary, the ſhip muſt purſue ſuch *voyage of neceſſity* in the direct courſe, and in the ſhorteſt time poſſible, otherwiſe the underwriters will be diſcharged. Becauſe a voyage ſuperadded by neceſſity, ought to be ſubject to the ſame qualifications, and entitled only to the ſame ſort of latitude as the original voyage, it having become, by operation of law, a part, as it were, of that original voyage. Lavabre v. Walter, Dougl. 271.

But though an actual deviation from the voyage inſured is thus fatal to the contract of inſurance; yet a deviation merely intended, but never carried into effect, is conſidered as no deviation, and the inſurer continues liable. This has been frequently ſo decided. Thus, in the caſe of an inſurance from *Carolina* to *Liſbon*, and at and from thence to *Briſtol*; it appeared, that the captain had taken in ſalt, which he was to deliver at *Falmouth*, before he went to *Briſtol*; but the ſhip was taken in the direct road to both, and before ſhe came to the point, where ſhe would have turned off to *Falmouth*. It was held, that the inſurer was liable; for it is but *an intention to deviate*, and that was held not ſufficient to diſcharge the underwriter. Foſter v. Wilmer, 2 Stra. 1249. Ld. Ch. Juſt. Lee.

In the caſe of *Carter* v. *the Royal Exchange Aſſurance Company*, where the inſurance was from *Honduras* to *London*, and a conſignment to *Amſterdam*; a loſs happened before ſhe came to the dividing point between the two voyages, for which the inſurers were held liable to pay. 2 Stra. 1249.

The doctrine laid down in theſe caſes has ſince been frequently recognized in ſubſequent deciſions, and particularly by Lord *Mansfield* in the caſe of *Thelluſſon* v. *Ferguſſon*. The inſurance was from *Guadaloupe* to *Havre*, and one of the grounds of defence was, that the ſhip never ſailed from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Breſt*. Lord *Mansfield*, in anſwer, ſaid, "the voyage to *Breſt* was, at moſt, but an *intended deviation*, "not carried into effect." Dougl. 346.

If, however, it can be made appear by evidence, that it never was intended, nor came within the contemplation of the parties, to ſail upon the voyage inſured; if all the ſhip's papers and documents be made out for a different place from that deſcribed in the policy, the inſurer is diſcharged from all degree of reſponſibility, even though the loſs ſhould happen before the dividing point of the two voyages. This diſtinction was very properly taken by the court of King's Bench, in a very modern caſe: and by that diſtinction they admitted the general doctrine, with reſpect to the intention to deviate, in its fulleſt extent.

The ſhip *Molly*, being inſurred "at and from *Maryland* to "*Cadiz*," was taken in *Cheſapeak Bay*, in the way to *Europe*. Upon this the inſured brought this action againſt the defendant, Wooldridge v. Boydell, Dougl. 16.

one

one of the underwriters on the policy. The trial came on at *Guildhall* before Lord *Mansfield*, when a verdict was found for the defendant. A new trial being moved for, the material facts of the case appeared to be as follows:—The ship was cleared from *Maryland* to *Falmouth*, and a bond given that all the *enumerated* goods should be landed in *Britain*, and all the other goods in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were, "To "*Falmouth* and a market:" and there was no evidence whatever that she was destined for *Cadiz*. The place where she was taken, was in the course from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for *Falmouth* nor *Cadiz*, but for the port of *Boston*, to supply the *American* army; but there was not sufficient direct evidence of that fact. At the trial, Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz*, they must find for the plaintiff. If, on the contrary, they should think there was no design of going to *Cadiz*, they must find for the defendant. It also appeared in evidence, that the premium to insure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have greatly exceeded what was paid in this case. Upon the motion for a new trial being argued, the counsel for the plaintiff cited the two cases above stated from *Strange*'s Reports.

Lord *Mansfield*.—The policy on the face of it, is from *Maryland* to *Cadiz*, and therefore purports to be a direct voyage to *Cadiz*. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party, who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus a quo*, and *ad quem*, were certain and the same. Here, was the voyage ever intended for *Cadiz?* There is not sufficient evidence of the design to go to *Boston*, for the court to go upon. But some of the papers say to *Falmouth* and a market: some to *Falmouth* only. None mention *Cadiz*, nor was there any person in the ship, who ever heard of any intention to go to that port. A *market* is not synonymous to *Cadiz*; that expression might have meant *Naples*, *Leghorn*, or *England*. No man upon the instructions would have thought of getting the policy filled up to *Cadiz*. In short, that was never the voyage intended, and, consequently, is not what the underwriters meant to insure.

Way v. Modigliani, 2 Term Rep. 30.

In a later case the same doctrine was holden, *viz.* that if a ship be insured from a day certain from *A.* to *B.*, and, before the day, sail on a different voyage from that insured, the assured cannot recover

recover; even though the ship afterwards fall into the course of the voyage insured, and be lost after the day on which the policy was to have attached.

An insurance was at and from *Grenada* to *Liverpool*, the ship sailed from *Grenada* bound for *Liverpool*, but with a design formed before the commencement of the voyage, as appeared by the clearances, and was admitted on all sides, to touch at *Corke*, in her way to *Liverpool*, but was totally lost, before she arrived at the dividing point. The court of *C. P.* held, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge* v. *Boydell*, it appeared, there was no intention in the ship to go to *Cadiz*, which was mentioned as her port of delivery, at all; and in *Way* v. *Modigliani*, there was an actual deviation, by the ship going to fish on the banks of *Newfoundland*: these cases therefore were wholly different from the present, for here, the ship was really bound to *Liverpool*, though there were also clearances for *Corke*. Kewley v. Ryan, 2 H. Bl. Rep. 343.

From the proposition just established, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate consequence, that whatever damage is sustained before actual deviation, will fall upon the underwriters.

Thus it was held by Lord Chief Justice *Holt*, who said, that if a policy of insurance be made to begin from the departure of the ship from *England* until, *&c.*, and after the departure a damage happen, *&c.*, and then the ship *deviate*; though the policy is discharged from the time of the deviation, yet, for the damages sustained before the deviation, the insurers shall make satisfaction to the insured. Green v. Young, 2 Ld. Raym. 840. 2 Salk. 444. S. C.

Subject to the rules already advanced, deviation or not is a question of fact, to be decided according to the circumstances of the case. Dougl. 758.

In cases of deviation, the premium is not to be returned; because the risk being commenced, the underwriter is entitled to retain it.

A warranty, in a policy of insurance, is a condition or a contingency, that a certain thing shall be done, or happen; and unless that is performed, there is no valid contract. It is immaterial for what end the warranty is inserted in the contract; but being inserted, it becomes a binding condition upon the insured, and he must shew a *literal* compliance with it. 1 Term Rep. 345.

Neither is it any matter whether the loss happen in consequence of the breach of warranty or not; for the very meaning of inserting a warranty is to preclude all inquiry about its materiality. *Ibid.*

It is also immaterial to what cause the non-compliance is to be attributed; for although it might be owing to wise and prudential reasons, the policy is avoided. Cowp. 607.

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and representation. *Id.* 708.

In

Cowp. 708. In order to make *written* inſtructions binding as a warranty, they muſt appear on the face of, and make a part of, the policy.

Dougl. 12. notes. Even though a written paper be *wrapt up in the policy*, and ſhewn to the underwriters at the time of ſubſcribing; or even *though it be wafered to the policy*, it is not a warranty but a repreſentation.

Thus, when evidence was offered to prove that a paper incloſed was always deemed a part of the policy, Lord *Mansfield* refuſed to hear it.

Bean v. Stupart, Dougl. 10. A warranty written *in the margin* of the policy is conſidered to be equally binding, and liable to the ſame ſtrict conſtruction, as if written in the body of the policy.

Kenyon v. Berthon, Dougl. 12. Words written tranſverſely on the policy were held to be a warranty.

De Hahn v. Hartley, 1 Term Rep. 343. Where it was ſaid *in the margin* that the ſhip ſailed from *Liverpool* with 50 *hands and upwards*, the court held this was a warranty; and as ſhe in fact ſailed from *Liverpool* with only 46, though ſhe had upwards of 50 hands from *Beaumaris*, which is within ſix hours ſail from *Liverpool*, the underwriters were diſcharged.

Hore v. Whitmore, Cowp. 784. If a man warrant to ſail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer anſwerable: and this rule holds, though the ſhip be delayed for the beſt and wiſeſt reaſons, or even though ſhe be detained by force. Thus, where a ſhip was inſured at and from *Jamaica*, warranted to ſail on or before the 26th of *July*; and it appeared that the ſhip was ready, and would have ſailed on the 25th, *if ſhe had not been reſtrained by the order and command of Sir* Baſil Keith, *governor of* Jamaica, *and detained beyond the day*; the inſurer was diſcharged.

Vezian v. Grant, *coram* Buller, J. after Eaſt. 1779. If the warranty be to ſail *after* a ſpecifick day, and the ſhip ſail before, the policy is equally avoided as in the former caſe.

Upon a warranty to ſail on or before a particular day, if the ſhip ſailed before the day from her port of loading, *with all her cargo and clearances on board*, to the uſual place of rendezvous at another part of the iſland, merely for the ſake of joining convoy, it is a compliance with the warranty, though ſhe be afterwards detained there by an embargo, beyond the day. But if her cargo was not complete, it would not be a commencement of the voyage.

Bond v. Nutt, Cowp. 601. A ſhip being inſured at and from *Jamaica* to *London*, warranted to ſail on or before the 1ſt of *Auguſt*, was *completely laden* for her voyage to *England*, at *St. Ann*'s in *Jamaica*, and ſailed from thence on the 26th of *July*, for *Bluefields*, in order to join the convoy there; but was detained by an embargo till the 6th of *Auguſt*. The court held that the ſailing from *St. Ann*'s was the commencement of the voyage. For when a ſhip leaves her port of loading having a full and complete cargo on board, and having no other view but the ſafeſt mode of ſailing to her port of delivery, her voyage muſt be ſaid to commence from her departure from that port.

The ſame doctrine was advanced, even though it was a condition inſerted in one of the ſhip's clearances, that *ſhe ſhould paſs by the place* (at which ſhe was detained by the governor beyond the day named in the warranty) to take the orders of government. Thelluſſon v. Ferguſon, Dougl. 346.

Thus alſo, where an embargo was actually publiſhed, before the ſhip ſailed, and the captain, immediately after croſſing the bar, returned to make a proteſt, and knowingly ſent his ſhip into the embargo; yet as he ſwore, that he believed the embargo would be immediately taken off, the underwriter was held liable. Earle v. Harris, at Guildhall, Hil. Vac. 1780.

If the inſured warrant that the veſſel ſhall depart with convoy, and it do not; the policy is defeated, and the underwriter is not reſponſible.

A convoy means a naval force, under the command of that perſon whom government may happen to appoint.

Therefore, where a ſhip put herſelf under the direction of a man of war till ſhe ſhould join the convoy, which had left the uſual place of rendezvous before ſhe arrived there; it was held not to be a departure with convoy, although ſhe, in fact, joined, and was loſt in a ſtorm. Hibbert v. Pigou, B. R. Eaſt. 23 Geo. 3. Park, 339. *Qu.* Whether ſailing orders from the commander in chief to the particular ſhips are neceſſary to conſtitute a convoy?

But a convoy appointed by the admiral, commanding in chief upon a ſtation abroad, is a convoy appointed by government.

A ſailing with convoy from the uſual place of rendezvous, as *Spithead* for the port of *London*, is a *departure* with convoy, within the meaning of ſuch a warranty. Lethulier's caſe, 2 Salk. 443. Gordon v. Morley, 2 Str. 1265. S. P.

Although the words uſed generally are "to depart with convoy," or "to ſail with convoy," yet they extend to ſail with convoy throughout the voyage. 2 Salk. 443. Jeffreys v. Legendra, 3 Lev. 320. Lilly v. Ewer, Dougl. 71.

But an unforeſeen ſeparation from convoy is an accident to which the underwriter is liable.

It hath been ſo determined where a ſhip was ſeparated from her convoy by ſtorm, and by ſtorm prevented from rejoining it, and was loſt. And even where the ſhip has by tempeſtuous weather been prevented from joining the convoy, at leaſt, ſo as to receive the orders of the commander of the ſhips of war, if ſhe do every thing in her power to effect it, it ſhall be deemed a ſailing with convoy. Victoria v. Cleeve, 2 Str. 1250.

But it is otherwiſe, if the not joining be owing to the negligence and delay of the captain. As, where repeated ſignals for ſailing had been made the night before, and continued next day from 7 till 11; notwithſtanding which the ſhip inſured did not ſail till two hours after. Taylor v. Woodmeſs, Sittings at Guildhall, Hil. Vac. 4 Geo. 3. Park, 349.

But if the courſe upon a particular voyage has been to have a ſtay of convoy, protecting the trade from one port to another; or, government appoint a convoy to eſcort the trade of a place to a given latitude, and no farther; and there be no convoy on that ſtation; a veſſel, taking advantage of ſuch a convoy, has complied with the warranty to ſail with convoy for the voyage. De Gray v. Claggett, Lond. Sittings, after Mich. 1795. D'Eguino v. Bewicke, 2 H. Bl. 551.

If

If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*.

Woolmer v. Muilman, 4 Burr. 1419. 1 Bl. Rep. 427.

In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury that they were not neutral. The court therefore, though the loss happened by storms, and not by capture, declared that the contract was void.

Eden v. Parkinson, Dougl. 705. Tyson v. Gurney, 3 Term Rep. 477.

If the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutrality. The insurer takes upon himself the risk of war and peace; for if the property be neutral at the time of sailing, and a war break out the next day, the insurer is liable.

Bernardi v. Motteux, Dougl. 574.

The sentence of a foreign court of Admiralty is not conclusive, to shew that a ship was not neutral, unless it appear that the condemnation went on that ground.

Barzillay v. Lewis, B. R. Tr. 22 Geo. 3. Park, 359.

But if it appear evident that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty, and the underwriter is discharged.

Saloucci v. Woodmess, B. R. Hil. 24 Geo. 3. Park, 361.

And even where no special ground of condemnation is stated, but the ship is condemned as good and lawful prize, the court here must consider it as conclusive evidence that the property was not neutral.

Mayne v. Walter, B. R. East. 22 Geo. 3. Park, 363.

But if the ground of decision appear to be a foreign ordinance, manifestly unjust, and contrary to the laws of nations, and the insured has only infringed such a partial law, that shall not be deemed a breach of his warranty, so as to discharge the insurer.

Saloucci v. Johnson, B. R. Hil. 23 Geo. 3. Park, 364.

If the ship be condemned as prize, and the grounds of the sentence appear manifestly to contradict such a conclusion, the court here will not discharge the insurers, by declaring that the insured has forfeited his neutrality.

Simond v. Boydell, Dougl. 255.

A clause was inserted that 8 *l. per cent.* of the premium should be returned, if the ship sailed from any of the *West India* islands with convoy for the voyage, *and arrives*. The court held, that the arrival of the ship, whether with or without convoy, entitled the party to a return of the premium stipulated.

Cowp. 668. 3 Burr. 1237.

If the risk is not run, whether the cause of its not being run is attributable to the *fault*, *will*, or *pleasure* of the insured, the premium is to be returned.

Lowry v. Bourdieu, Dougl. 251. Andreè v. Fletcher, 3 Term Rep. 266.

When a policy is void as a wager policy, *and the ship has arrived safe*, the court will not allow the insured to recover back the premium; though it might perhaps be otherwise where the ship *has not arrived*.

Where the risk has *once* commenced, there shall be no apportionment or return of premium afterwards.

But if there are two distinct points of time, or, in effect, two voyages either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one policy.

The

Thus, in an insurance "at and from *London* to *Halifax*, warranted to depart with convoy from *Portsmouth*," when the ship arrived at *Portsmouth*, the convoy was gone; the premium for the voyage from *Portsmouth* to *Halifax* was returned. 1 Bl. Rep. 318. S. C. — Stevenson v. Snow, 3 Burr. 1237.

A ship was insured for twelve months, at 9 *l. per cent.*, warranted free from *American* captures. The ship was taken within two months by the *Americans*. There shall be no return of premium, because the contract was entire; the premium was a gross sum stipulated and paid for twelve months. — Tyrie v. Fletcher, Cowp. 666.

So also, it was held, where a ship, insured for twelve months, was lost at the end of two; though the whole premium of 18 *l.* was acknowledged to be received *at the rate of* 15 *s. per month*; for that is only a mode of computing the gross sum. — Loraine v. Thomlinson, Dougl. 564.

Where the premium is entire in a policy on the voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which, the risk is to end, nor any usage established upon such voyage; though there be several distinct ports, at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable. It was so held in a case, where a ship was insured "at and from *Honfleur* to the "coast of *Angola*, during her stay, and trade there, at and from "thence to her port or ports of discharge in *St. Domingo*, and "at and from *St. Domingo* back to *Honfleur*;" and the policy was at an end by her deviation, before she arrived at *St. Domingo*; and, consequently, for the latter part of the voyage insured, the insurer ran no risk. — Bermon v. Woodbridge, Dougl. 751.

It was also held where a ship was insured "*at* and *from Jamaica*, warranted to sail on or before the first of *August*, to return eight *per cent.* if she sailed with convoy;" and she did not sail till *September*; that there should be no return upon the warranty of the time of sailing; for the court cannot make a distinction between the risk *at* and the risk *from*: though it will be otherwise, if the jury find an express usage upon the subject of return of premium. Indeed, it seems that there never has been an apportionment unless there be something like an usage found to direct the judgment of the court. — Long v. Allen, B. R. East. 25 Geo. 3. Park, 390. Park, 391.

In an action upon a policy of insurance it appeared, that a clause was inserted, that in case of any loss or dispute about the policy, it should be referred to arbitration: and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reserved for the consideration of the court, whether this action would lie before a reference had been made; and it was held by the whole court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust this court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment. — Kill v. Hollister, 1 Wilf. 129.

If the plaintiff in his declaration allege, that a total loss has happened, and lay the damages as for a total loss, it shall be no bar to his recovery, though he can only prove a partial loss; for in — Gardiner v. Croasdale, 2 Burr. 904. 1 Bl. Rep. 198.

in an action for damages merely, a man may always recover *leſs*, but never *more* than the ſum he has laid in his declaration. A contrary doctrine was once attempted to be maintained; but was unanimouſly over-ruled.

Page v. Rogers, Sittings at Guildhall, Hil. Vac. 1785.

An action was brought on a policy of inſurance, in which the declaration ſtated, that the plaintiff was poſſeſſed of one-third of the ſhip on which the inſurance was made. It was proved that the plaintiff had purchaſed the whole ſhip at one period; and as there was no evidence to ſhew that he had ſince parted with any ſhare of it, the counſel for the defendant inſiſted, that the plaintiff had not proved his declaration, which alleged him to have but one-third. Lord *Mansfield* over-ruled the objection, ſaying, that this was *primâ facie* ſufficient evidence; for *omne majus continet in ſe minus*.

By 19 *G.* 2. *c.* 37. § 6. it is declared, "That in all actions or "ſuits brought or commenced by the aſſured, upon any policy of "aſſurance, the plaintiff in ſuch action or ſuit, or his attorney or "agent, ſhall, within fifteen days after he or they ſhould be "required ſo to do in writing by the defendant, or his attorney "or agent, declare what ſum or ſums he had aſſured, or cauſed "to be aſſured in the whole, and what ſums he had borrowed at "*reſpondentia* or bottomry, for the voyage in queſtion in ſuch ſuit "or action."

And by § 7. it is enacted, "That it ſhall and may be lawful for "any perſon or perſons, body or bodies corporate, ſued in any "action or actions of debt, covenant, or any other action or "actions, on any policy or policies of inſurance, *to bring into court* "*any ſum or ſums of money;* and that if any ſuch plaintiff or plain-"tiffs refuſe to accept ſuch ſum or ſums of money ſo brought into "court as aforeſaid, with coſts to be taxed, in full diſcharge of "ſuch action or actions, and afterwards proceed to trial in ſuch "action or actions; and the jury do not aſſeſs damages to ſuch "plaintiff or plaintiffs, exceeding the ſum or ſums of money ſo "brought into court, ſuch plaintiff or plaintiffs, in every ſuch "caſe and caſes, ſhall pay to ſuch defendant or defendants, in "every ſuch action or actions, coſts to be taxed; any law, cuſ-"tom, or uſage to the contrary notwithſtanding."

Ruſſell v. Boheme, 2 Strange, 1227.

A man having purchaſed goods beyond ſea, in order to prove his property in the cargo, in an action upon a policy of inſurance, produced a *bill of parcels* of one *Gardiner* at *Peterſburgh*, with his receipt to it, and proved his hand. The defendant objected, that this was no evidence againſt the inſurers; but the Chief Juſtice allowed it.

Smith v. Laſcelles, 2 Term Rep. 187.

If a merchant abroad, who is intereſted in goods and the freight of a cargo, mortgage them to his creditor here for the payment of money at a certain day, and by a letter incloſing the bills of lading, direct an inſurance, he has an inſurable intereſt although the mortgage was become abſolute before the letter directing the inſurance was received, and an action lies againſt the agent for not inſuring agreeably to the inſtructions contained in ſuch letter.

In an action on a policy of insuring goods on board the ship *A.*, the plaintiff declares, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. The evidence was, that many of the goods were spoiled, but some were saved; and the question was, Whether the plaintiff might give in evidence the expence of salvage, that not being particularly laid as a breach of the policy in the declaration? Carey v. King, Ca. temp. Hardwicke, B. R. 304.

Lord *Hardwicke*, C. J.—I think he may give it in evidence; for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river; it goes on and says, that by reason thereof the goods were spoiled, that is the only special damage laid: yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid. And though it was objected, that such a breach of the policy should be laid, as the insurer may have notice to defend it; it is so in this case, for the plaintiff hath laid the accident, which is sufficient notice, because it must necessarily follow, that some damage did happen.

2. Of Insurances upon Lives.

It is enacted by 14 *G.* 3. *c.* 48. § 1. "That no insurance shall "be made by any person or persons, bodies politick or corporate, "*on the life or lives* of any person or persons, or on any other "event or events whatsoever, wherein the person or persons, for "whose use, benefit, or on whose account, such policies shall be "made, *shall have no interest, or by way of gaming or wagering*; "and every insurance made, contrary to the true intent and "meaning thereof, shall be null and void to all intents and "purposes." And in order more effectually to guard against any § 2. imposition or fraud, and to be the better able to ascertain, what the interest of the person, entitled to the benefit of the insurance, really was, it was further enacted, by the same statute, "that it "shall not be lawful to make any policy or policies on the life or "lives of any person or persons, or other event or events, with-"out inserting in such policy or policies, the person's name in-"terested therein, or for whose use, benefit, or on whose account, "such policy was so made or underwritten. And that in all cases § 3. "where the insured has an interest in such life or lives, event or "events, no greater sum shall be recovered, or received from the "insurer or insurers, than the amount or value of the interest of "the insured in such life or lives, or other event or events."

It has been holden, that a person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note. An action was brought on a policy on the life of *James Russell* from the 1st of *June* 1784 to the 1st of *June* 1785. *Russell* was warranted in good health, and by a memorandum at the foot of the policy it was declared, that it was intended to cover the sum of 5000*l.* due from *Russell* to the plaintiff, for Dwyer v. Edie, London, Sittings after Hil. 1788.

which he had given his note payable in one year from the 14th of *May* 1784. Two objections were made on the part of the defendant: 1ſt, That part of the conſideration for the note was money won at play; 2d, That *Ruſſell*, at the time he gave the note, was an infant.—*Buller*, J. nonſuited the plaintiff upon the ground of part of the conſideration being for a gaming tranſaction, and that therefore there was a want of intereſt in the plaintiff. But as to the other objection on account of infancy, he ſaid, the intereſt muſt be contingent, for *Ruſſell* might or might not avoid his note; and he doubted much whether till ſo avoided, the note muſt not be taken againſt a third perſon to be the note of an adult, for the maker of the note only could take the objection.

Anderſon v. Edge, Sittings at Guildhall, in Tr. 1795.

In an action on a policy of inſurance on the life of Lord *Newhaven* from 1ſt *December* 1792 to 1ſt *December* 1793, the only queſtion made by the defendant was as to the plaintiff's intereſt, which it was contended was not ſufficient to take the caſe out of the above ſtatute. It appeared in evidence, that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell* in a large ſum of money, part of which debt had been aſſigned by them to another perſon: the remainder, being more than the ſum inſured, was, upon a ſettlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.—Lord *Kenyon* was of opinion, that this debt was a ſufficient intereſt: that a creditor had certainly an intereſt in the life of his debtor; the means by which he is to be ſatisfied may materially depend upon it; and at all events the death muſt in every caſe leſſen the ſecurity. Verdict for the plaintiff.

Roebuck v. Hammerton, Cowp. 737.

A policy made, in order to decide upon the ſex of a particular perſon, was held to fall within the prohibition of the ſtatute.

Molliſon v. Staples, Sittings at Guildhall, Mich. Vac. 1788.

Again, a policy having been made, on the event of there being an open trade between *Great Britain* and the province of *Maryland*, on or before the 6th *July* 1778, Lord *Mansfield* ſaid, that it was clear the plaintiff could not recover. 1ſt, Is this an intereſt within the act? It was made to prevent gambling policies. Every man in the kingdom has an intereſt in the events of war and peace; but, I doubt, whether that be an intereſt within the act. But 2dly, The policy is void, by not having the name inſerted according to the ſecond ſection of the ſtatute.

Park, 433.

In a life inſurance, the inſurer undertakes to anſwer for all thoſe accidents, to which the life of man is expoſed, except ſuicide, or the hands of juſtice.

The death muſt happen within the time limited in the policy, otherwiſe the inſurers are diſcharged. And therefore, if a man receive a mortal wound during the exiſtence of the policy, but does not in fact die till after, the inſurers are not liable.

Patterſon v. Black, Sittings at Guildhall, after Hil. 1780.

But, if a man, whoſe life is inſured, goes to ſea, and the ſhip in which he ſailed is never heard of afterwards, the queſtion whether he did or did not die within the term inſured, is a fact for the jury to aſcertain from the circumſtances.

A poli

A policy was made for one year from the day of the date thereof: the policy was dated 3d *September* 1697. The perſon died on the 3d *September* 1698, about one o'clock in the morning; and the inſurer was held liable. Sir Robert Howard's caſe, 2 Salk. 625. 1 Ld. Raym. 480. S. C.

Where there is a warranty that the perſon is in good health, it is ſufficient that he be in a reaſonable good ſtate of health; for it never can mean, that he is free from the ſeeds of diſorder.

If the perſon, whoſe life was inſured, laboured under a particular infirmity, if it be proved by medical men, that, in their judgment, it did not at all contribute to his death, the warranty of health has been fully complied with, and the inſurer is liable. Willis v. Poole, Sittings at Guildhall, after Eaſt. 1780.

If the perſon, whoſe life was inſured, ſhould commit ſuicide, or be put to death by the hands of juſtice, the next day after the riſk commenced, there would be no return of premium. Cowp. 669. Dougl. 758.

3. Of Inſurance againſt Fire.

The *London* Aſſurance Company inſert a clauſe in their propoſals, by which they declare, that they do not hold themſelves reſponſible for any damage by fire, occaſioned by an invaſion, foreign enemy, or any military or uſurped power whatſoever. Under this proviſo, it was holden, that they were not exempted from loſs by fire, occaſioned by a mob at *Norwich*, which aroſe on account of the high price of proviſions. Drinkwater v. London Aſſurance, 2 Wilſ. 363.

But the Sun-fire Office, in addition to theſe words, inſert, "*civil commotions*," which words, it was determined, protected them from any reſponſibility for the loſſes occaſioned by the rioters, who roſe in *London* in 1780, to compel the repeal of a ſtatute, which had paſſed in favour of the Roman Catholicks. Langdale v. Maſon, Sittings at Guildhall, after Mich. 1780, *coram* Mansfield, C. J.

In a policy of aſſurance againſt loſs by fire from half a year to half a year, the aſſured agreed to pay the premium half-yearly "as long as the aſſurers ſhould agree to accept the ſame, *within fifteen days after the expiration of the former half-year;*" and it was alſo ſtipulated, that no inſurance ſhould take place till the premium was actually paid. A loſs happened within fifteen days after the end of one half-year, but before the premium for the next was paid. It was holden, that the inſurers were not liable, though the inſured tendered the premium before the end of the fifteen days, but after the loſs. Tarleton v. Staniforth, 5 Term Rep. 695.

Theſe policies of inſurance are not, in their nature, aſſignable, for they are only contracts to make good the loſs, which the contracting party himſelf ſhall ſuſtain; nor can the intereſt in them be transferred from one perſon to another without the conſent of the office (*a*). There is a caſe in which, by the propoſals, theſe policies are allowed to be transferred, and that is, when any perſon dies, the policy and intereſt therein ſhall continue to the heir, executor, or adminiſtrator, reſpectively, to whom the property inſured ſhall belong; provided, before any new payment be made, ſuch

(*a*) *Secus*, of marine inſurances. Delaney v. Stoddart, 1 Term Rep. 26.

Lynch v. Dalzell, 3 Br. P. C. 497. Sadler's Company v. Badcock, 2 Atk. 554.

such heir, executor, or adminiſtrator, do procure his or her right to be indorſed on the policy at the ſaid office, or the premium be paid in the name of the ſaid heir, executor, or adminiſtrator. But in all other caſes there can be no aſſignment; and the party claiming an indemnity muſt have an intereſt in the thing inſured at the time of the loſs.]

(K) Of Bottomry [and Reſpondentia].

2 Blackſt. Com. 457.

[THE contract of bottomry is in the nature of a mortgage of a ſhip, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ſhip, as a

Latch 252.

ſecurity for the repayment: and it is underſtood, that if the ſhip be loſt, the lender alſo loſes his whole money; but if it return in ſafety, then he ſhall receive back his principal, and alſo the premium or intereſt ſtipulated to be paid, however it may exceed the uſual or legal rate or intereſt. When the ſhip and tackle are brought home, they are liable, as well as the perſon of the bor-

2 Blackſt. Com. 458.

rower, for the money lent. But when the loan is not made upon the veſſel, but upon the goods and merchandizes laden thereon, which, from their nature, muſt be ſold or exchanged in the courſe of the voyage, then the borrower only is *perſonally* bound to anſwer the contract; who therefore in this caſe is ſaid to take up money at *reſpondentia*. In this conſiſts the difference between *bottomry* and *reſpondentia*: that the one is a loan upon the ſhip, the other upon the goods: In the former, the ſhip and tackle are liable, as well as the perſon of the borrower; in the latter, for the moſt part, recourſe muſt be had to the *perſon* only of the borrower.

2 Valin. Com. p. 4.

Another obſervation is, that in a loan upon bottomry, the lender runs no riſk though the goods ſhould be loſt; and upon *reſpondentia*, the lender muſt be paid his principal and intereſt, though the ſhip periſh, provided the goods are ſafe. But in all other reſpects the contract of bottomry and that of *reſpondentia* are upon the ſame footing; the rules and deciſions applicable to one, are applicable to both; and therefore, in the courſe of our inquiries, they ſhall be treated as one and the ſame thing, it being ſufficient to have once marked the diſtinction between them.

2 Blackſt. Com. 458.

Theſe terms are alſo applied to another ſpecies of contract which does not exactly fall within the deſcription of either, namely, to a contract for the repayment of money, not upon the

1 Sidirfin, 27.

ſhip and goods only, but upon the mere hazard of the voyage itſelf: as, if a man lend 1000*l.* to a merchant to be employed in beneficial trade, with a condition to be repaid with extraordinary intereſt, in caſe a ſpecifick voyage named in the condition ſhall be ſafely performed: which agreement is ſometimes called *fœnus nauticum* or *uſura maritima*. But as this ſpecies of bottomry opened a door to gaming and uſurious contracts, eſpecially in long voyages, the legiſlature, at the time it ſuppreſſed inſurances upon wagering policies, introduced a clauſe, by which it was

Molloy, lib. 2. c. 11. § 8.

act

acted, "That all ſums of money lent on bottomry, or at *reſpon-* 19 Geo. 2.
"*dentia* upon any ſhip or ſhips belonging to his Majeſty's ſub- c. 37. § 5.
"jects, *bound to or from the* Eaſt Indies, ſhould be lent only on
"the ſhip, or on the merchandize or effects, laden or to be laden
"on board of ſuch ſhip, and ſhould be ſo expreſſed in the con-
"dition of the ſaid bond; and the benefit of ſalvage ſhould be
"allowed to the lender, his agents or aſſigns, who alone ſhould
"have a right to make aſſurance on the money ſo lent; and in
"caſe it ſhould appear that the value of his ſhare in the ſhip, or
"in the merchandizes or effects laden on board of ſuch ſhip,
"did not amount to the full ſum or ſums he had borrowed as
"aforeſaid, ſuch borrower ſhould be reſponſible to the lender for
"ſo much of the money borrowed, as he had not laid out on
"the ſhip or merchandizes laden thereon, with lawful intereſt
"for the ſame, in the proportion the money not laid out ſhould
"bear to the whole money lent, notwithſtanding the ſhip and
"merchandizes ſhould be totally loſt."

This ſtatute has entirely put an end to that ſpecies of contract which was laſt mentioned, namely, a loan upon the mere voyage itſelf, as far, at leaſt, as relates to *India* voyages; but as none other are mentioned, and as *expreſſio unius eſt excluſio alterius*, theſe loans may be made in all other caſes, as at the common law, except in the following inſtance, which is another ſtatute pro- 7 Geo. 1.
hibition. It is declared, that all contracts made or entered c. 21. § 2.
into by any of his Majeſty's ſubjects, or any perſons in truſt for them, for or upon the loan of any monies by way of bottomry on any ſhip or ſhips in the ſervice of foreigners, and bound or deſigned to trade in the *Eaſt Indies* or parts aforeſaid ſhall be null and void.

This act it ſhould ſeem does not mean to prevent the King's Sumner
ſubjects from lending money on bottomry on foreign ſhips trading v. Gree,
from their own country to their ſettlements in the *Eaſt Indies*. Mich.
The purpoſe of the ſtatute was only to prevent the people of this 30 Geo. 3.
country from trading to the *Britiſh* ſettlements in *India* under fo- C. B.
reign commiſſions, and to encourage the lawful trade thereto. It lately became a queſtion in the Common Pleas, Whether an *American* ſhip ſince the declaration of *American* independency was a foreign ſhip within the ſtatute 7 *G.* 1. *c.* 21. § 2.? It came before the court on a motion to diſcharge the defendant out of cuſtody upon entering a common appearance. The defendant was holden to bail upon a *reſpondentia* bond, which was executed by the defendant, who was an *American*, to ſecure the payment of a cargo ſhipped by the plaintiff on board an *American* ſhip in the *Eaſt Indies*, homeward-bound from *Calcutta* to *Rhode Iſland* in *America*. The ſhip had ſailed from *England*, and landed a cargo of *European* goods in *Bengal*, previouſly to her taking in the cargo on which the bond was given. The court were much inclined to think that the bond was void, the caſe being within the miſchief intended to be remedied by the act: but as the queſtion was of conſiderable conſequence, they thought it not proper to be diſcuſſed on this

ſummary application; but they ordered the defendant to be diſcharged on the ground that where it appeared from the affidavit to hold to bail, that there was a probability of the contract being void, on which the action was founded, it would be wrong to detain the defendant in priſon; more particularly as the plaintiff would by that means have an opportunity of tampering with the defendant in priſon, and of eſcaping from the penalties of the act, and of preventing the caſe from being brought before the court.]

2 Roll. Rep. 48. 5 Co. 70., &c. Cro. Jac. 208. 508. 1 Keb. 539. 711.

Where *A.* lends *B.* 100*l.* to freight a ſhip abroad, and it is agreed, that, if the ſhip comes home ſafe, *A.* ſhall have 150*l.* and that if ſhe do not, that he ſhall loſe the 100*l.*, this is not uſury, but good by the cuſtom of merchants, becauſe of the great perils at ſea, and both principal and intereſt run the ſame hazard of being loſt. But if the principal be ſecured, and the intereſt only depend on an hazard, if it be more than is lawful, it is uſury.

Joy v. Kent, Hard. Rep. 418.

[Again, in debt upon an obligation, conditioned to pay ſo much money, if ſuch a ſhip returned within ſix months from *Oſtend* in *Flanders* to *London*, which was more by the third part than the legal intereſt of money; and if ſhe did not return, then the obligation to be void: the defendant pleaded, that there was a corrupt agreement betwixt himſelf and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he ſhould have no more for intereſt than the law permits, in caſe the ſhip ſhould ever return; and averred that the obligation was entered into by covin, to evade the ſtatute of uſury, and the penalty thereof upon this averment the plaintiff took iſſue, and the defendant demurred.——Lord Chief Baron *Hale*.--Clearly this bond is not within the ſtatute, for this is the common way of inſurance; and if this were void by the ſtatute of uſury, trade would be deſtroyed. It is not like to the caſe, where the condition of the bond is to give ſo much money, if ſuch or ſuch a perſon be then alive; for there is a certainty of that at the time. But it is uncertain and a caſualty whether ſuch a ſhip will ever return or not.]

Lev. 54. Sid. 27.

So, where the condition of a bottomry-bond was, that if the obligor, or the ſhip, or the goods, return ſafe, then to pay more than the legal intereſt; this was adjudged good by the cuſtom of merchants, though it depends on many contingencies; and though the obligee may be ſaid to run little hazard; and though any of the contingencies become impoſſible; as, if the obligor die before his return, *&c.*, yet the bond remains payable, contrary to the general rule of law in ſuch caſes; for the law ſupplies the words, *which ſhall firſt happen*, and foreclоſes the election of the obligor, and gives it to the obligee to take his, on which the contingencies ſhall firſt happen.

2 Chan. Ca. 130.

The plaintiff entered into a penal bond of bottomry to pay 4*l.* *per* month for 50*l.*, the ſhip was to go from *Holland* to the *Spaniſh* iſlands, and ſo to return for *England*; but if ſhe periſhed, the defendant was to loſe his 50*l.* She went accordingly to the *Spaniſh* iſlands, took in *Moors* at *Africk*, and upon that occaſion went

Barbad-

Barbadoes, and then perished at sea; the plaintiff, being sued on the bond and penalty, sought relief in equity, pretending that the deviation was of necessity; but his bill was dismissed, saving as to the penalty.

J. S. entered into a bottomry-bond, whereby he bound himself in consideration of 400*l.* as well to perform the voyage within six months, as at the six months end to pay the 400*l.* and 40*l.* *præmium*, in case the vessel arrived safe, and was not lost in the voyage: it fell out that *J. S.* never went the voyage, whereby his bond became forfeited; and he preferred a bill to be relieved: and in regard the ship lay all along in the port of *London*, so that the defendant run no hazard of losing his principal; the Lord Keeper decreed, that he should lose the *præmium* of 40*l.*, and be contented with his ordinary interest. Vern. 263. Deguilder v. Depeister.

A part-owner of a ship borrowed money of the plaintiff upon a bottomry-bond, payable on the return of the ship from the voyage; she was then going in the service of the *East India* Company, and the *East India* Company broke up the ship in the *Indies;* the owners brought their action against the Company, and recovered damages, but they did not amount to a full satisfaction; and the obligee brought his bill to have his proportionable satisfaction out of the money recovered; but his bill was dismissed, and he left to recover as well as he could at law; the court declaring that they would never assist a bottomry-bond, which carried an unreasonable interest. Abr. Eq. 372. Dandy v. Turner.

[It seems to have been a doubt, late in the last century, whether a loss by the attacks of pirates was a risk which the lender on bottomry had by his contract undertaken to bear; for it was argued in the King's Bench, in the reign of *James* the Second. But the court were of opinion, that piracy was one of the dangers of the seas; and the defendant had judgment. Barton v. Wolliford, Comb. 56.

The lender is answerable likewise for losses by capture; or, to speak more accurately, if a loss by capture happen, he cannot recover against the borrower: but in bottomry and respondentia bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited, (if time be mentioned in the condition,) the bond is not forfeited, and the obligee may recover.

This doctrine was laid down by the whole court of King's Bench, in a case upon a bond of this nature; the proceedings on which were fully stated, when the unanimous opinion of the court was delivered by Lord *Mansfield*. This comes before the court upon a motion on the part of the defendant, for a new trial. It was an action of debt upon a bottomry bond; the condition of which was, that upon the ship's safe arrival at *New York*, a certain sum of money should be paid to the plaintiff; but that in case the ship should miscarry, be lost, cast away, or taken by the enemy, the plaintiff should have nothing. The defendant pleaded Joice v. Williamson, B. R. Mich. Term 23 Geo. 3. Park, 421.

three pleas: 1ſt, *Non eſt factum*; 2dly, That the ſhip did not arrive at *New York*, the port of deſtination; 3dly, That the ſhip was captured. Upon the two firſt pleas iſſue was joined; and to the laſt, there was a replication of recapture. The facts, which appeared in evidence on the trial, are theſe: *the ſhip was taken before her arrival at New York*, by two *American* privateers, which detained her for one month, and plundered her of her ſtores; at which time *ſhe was retaken* by an *Engliſh* privateer, and carried into *Halifax*. The Admiralty court adjudged her to be a good prize to the *Engliſh* privateer, and decreed that ſhe ſhould be reſtored to the original owners, on paying one-eighth for ſalvage: that ſhe proceeded with the remainder of her cargo to *New York*, and earned her freight: that the value of the ſhip was not ſufficient to ſatisfy the bond. Theſe are the facts. Now it is clear, that, by the law of *England*, *there is neither average nor ſalvage upon a bottomry-bond*. It was indeed contended at the bar, on the part of the defendant, that this caſe was within the ſaving of the bond; for it is provided, that in caſe of loſs by *capture*, &c. the bond ſhould be void: and that here there was a capture, and a detention for one month. But upon conſideration, we think that a capture, within this condition, does not mean a *temporary capture*, but it *muſt be a total loſs*: now here it was not ſuch a capture as to occaſion a total loſs. The voyage was not loſt, for the defendant purſued it and earned his freight. Freight depends upon the ſafety of the ſhip; and as the freight was earned, the ſhip muſt have arrived ſafe at the port of deſtination. In whatever way we determine this caſe, there muſt be a hardſhip: but we are all of opinion, that the verdict is right, and that the rule for a new trial muſt be diſcharged.

Walpole v. Ewer, Sittings after Tr. 1789.

An action was brought on a policy of inſurance, on a *reſpondentia* bond, on ſhip and goods at and from *B.* to *C.* The ſhip was *Daniſh*, and an average loſs was ſuſtained upon the goods to the amount of 61. 15*s. per cent.*, and the plaintiff as holder of a *reſpondentia* bond had been called upon to contribute; and now brought his action againſt the *Engliſh* underwriters for the amount of that contribution. Lord *Kenyon*.—By the law of *England*, a lender upon *reſpondentia* is not liable to average loſſes, but is entitled to receive the whole ſum advanced, provided that the ſhip and cargo arrive at the port of deſtination. The plaintiff contends that, as by the law of *Denmark*, ſuch lenders upon *reſpondentia* are liable to average, and bound to contribute according to the amount of their intereſt, the inſurer muſt anſwer to them. The *Danish* conſul has proved that he received a judgment of the court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has ſtated it. The opinions of ſeveral men of eminence in that country have been offered on each ſide, but we reject them, becauſe the ſolemn deciſion of a court of competent juriſdiction is of much greater weight than the opinions of advocates however eminent, or even than the extrajudicial opinions of the moſt able judges. It ſeems, as if in this caſe the under-writers

writers were bound by the law of the country to which the contract relates. Verdict for the plaintiff.

This is not the only case in which the insurers have been holden liable to indemnify, the insured having been obliged by the law of a foreign country to pay a larger sum than by the laws of *England* could have been demanded: though to be sure, in the case about to be quoted, there seems to have been an usage proved, and upon that the learned Judge much relied. It was an action on a policy of insurance on a cargo of fish from *Newfoundland* to any part of *Spain*, *Portugal*, or *Italy*. The ship met with bad weather, and put into *Alicant* and *Leghorn* to repair. The captain being owner, presented a petition to the commercial court of *Pisa*, to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course (which seems a very extraordinary one), adjusted the loss by charging the cargo at its full value, but the ship at one-half, and the freight at one-third, and they also charged as a part of the general average, the seamen's wages and provisions whilst in port. The defendant, as underwriter, had paid into court as much as would cover the average according to the memorandum in the policy, and the law and usage of *England*. The question was, Whether, the plaintiff having been compelled to pay beyond that sum according to the calculation of the sentence of the court of *Pisa*, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard? The plaintiff called several brokers, who said, that, in repeated instances, they had adjusted averages under similar sentences of the court of *Pisa*, and the underwriters, though with reluctance, had always paid them. *Buller*, J.—On the general law, the plaintiff would fail; but, in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average, which make underwriters liable for more than the standard of *English* money. But if you are satisfied it has been the usage upon the evidence given, it ought not to be shaken. The plaintiff had a verdict.

Newman v. Cazalet, Sitt. at Guildh. after Hil.

It has been said, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ship be lost by a wilful deviation from the tract of the voyage, the event has not happened, upon which the borrower was to be discharged from his obligation. This has been decided in several cases.

An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that such a ship was in the service of the *East India* Company, and that it was to obey such orders as they or their factors should give; and that she was designed for a voyage from *London* to *Bantam*, and from thence to *China* or *Formosa*. The plaintiff lent 500*l.* upon the hull of the ship, and the defendant covenanted to pay, if the ship went from *London* to *Bantam*, and returned from thence directly to *London*, 550*l.*: if from *London* to *Bantam*, and from thence to *China*

Western v. Wildy, Skin. 152.

China or *Formoſa*, and returned to *London* within 24 months, 650*l.* If ſhe returned not within 24 months, then to pay 5*l.* per month above 650*l.*, till 36 months; and if ſhe returned not within 36 months, then to pay 710*l.*, unleſs it could be proved by *Wildy*, that the ſhip returned not, but was loſt within 36 months. The ſhip, in fact, went from *London* to *Bantam*, and from *thence to Surat*, and other parts, and ſo returned to *Bantam*; and in her voyage from *Bantam* to *London* was loſt within 36 months: upon which the preſent action was brought.

The court inclined to be of opinion, that this ſhip having deviated from the voyage deſcribed, in going to *Surat*, the plaintiff was not to bear the loſs, and was conſequently entitled to recover. They, however, took time to deliberate; and after conſideration, gave judgment for the plaintiff.

Williams v. Steadman, Holt's Reports, 126. Skin. 345. S. C.

In another caſe of debt upon a bottomry-bond, the defendant pleaded, that the ſhip went from *London* to *Barbadoes ſine deviatione*, and afterwards ſhe returned from *Barbadoes* towards *London*, and in her return was loſt *in voyagio prædicto*; the plaintiff replied, that the ſhip in her return went from *Barbadoes* to *Jamaica*; and that after a ſtay there, ſhe returned from *Jamaica* towards *London*, and was loſt, and ſo ſhews a deviation. The defendant rejoined, that ſhe was preſſed into the King's ſervice, and ſo was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; without this, that ſhe deviated after ſhe was preſſed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ſhip went from *London* to *Barbadoes* without deviation, and that in the return ſhe was loſt in the voyage aforeſaid; but does not ſhew *without deviation*. Now the condition is ſo in expreſs words, and he ought to ſhew expreſsly that he has performed the words of the condition.

The ſame rule of deciſion has been adopted in the courts of equity.

1 Equity Caſes Abr. 372. 2 Chan. Caſes, 130.

The plaintiff entered into a penal bond to pay 40*s.* per month for 50*l.*, the ſhip was to go *from* Holland *to the* Spaniſh *iſlands, and to return to* England: but if ſhe periſhed, the defendant was to loſe his 50*l.* The ſhip went accordingly to the *Spaniſh* iſlands, took in *Moors* at *Africa*, then went to *Barbadoes*, and periſhed at ſea. The plaintiff, being ſued at law upon the bond, came into equity, ſuggeſting that *the deviation was through neceſſity*. But his bill was diſmiſſed, except as to the penalty.

It frequently happened that the borrowers on bottomry, or at *reſpondentia*, became bankrupts after the loan of the money, and before the event happened, which entitled the lender to repayment: by which means the debt could not be proved under the commiſſion, and the lenders were left to ſuch redreſs as they could obtain from the bankrupt, who had previouſly given up every thing to his other creditors. This being likely to prove a diſcouragement to trade, parliament was obliged to

19 Geo. 2. c. 32. § 2.

interpoſe; and it accordingly enacted, "That the obligee in

"any

" any bottomry or *respondentia* bond, made, and entered into " upon a good and valuable consideration, *bona fide*, should be " admitted to claim, and *after the contingency should have happened*, " *to prove his or her debt or demands in respect of such bond, in like* " *manner as if the contingency had happened before the time of the* " *issuing of the commission of bankruptcy against any such obligor*, and " should be entitled unto, and should have and receive, a propor- " tionable part, share, and dividend of such bankrupt's estate, in " proportion to the other creditors of such bankrupt, in like " manner as if such contingency had happened before such com- " mission issued: and that all and every person or persons, against " whom any commission of bankruptcy should be awarded, should " be discharged of and from the debt or debts owing by him, her, " or them, on every such bond as aforesaid, and should have the " benefit of the several statutes now in force against bankrupts, " in like manner, to all intents and purposes, as if such contin- " gency had happened, and the money due in respect thereof had " become payable, before the time of the issuing of such com- " mission."

By the statute-book it appears, that the masters and mariners of ships, having taken upon bottomry greater sums of money than the value of their adventure, had been accustomed wilfully to cast away, burn, or otherwise destroy the ships under their charge, to the great loss of the merchants and owners: it was therefore enacted, " That if any captain, master, mariner, or other officer " belonging to any ship, should wilfully cast away, burn, or " otherwise destroy the ship unto which he belonged, or procure " the same to be done, he should suffer death as a felon." The duration of this act having been limited to three years, it became extinct: but the necessity of such a provision was so great, that a similar law was made a few years afterwards, and is still in force.] 16 Cha. 2. c. 6. § 12. 22 & 23 Cha. 2. c. 11. § 12.

[(L) Of Bills of Lading.

A Bill of Lading is a memorandum or acknowledgment, signed by the master of a ship, that he has received certain goods, which he undertakes to deliver at the intended place to the person named in the bill of lading. It is, regularly, made treble; one for the merchant who loads the goods; another for the consignee of the goods; and the third for the master of the ship.

The bill of lading is assignable, the undertaking being, generally, to deliver to the order or assigns of the shipper. But whether the first indorsement or assignment passes the right of property, whether the instrument be negotiable or not, is a point upon which our courts have differed, and which hath not yet been settled. See Evans v. Martlett, 1 Ld. Raym. 271. Wright v. Campbell, 4 Burr. 2046.

1 Bl. Rep. 628. S. C. Snee v. Prescot, 1 Atk. 245. Caldwell v. Ball, 1 Term Rep. 205. Hibbert v. Carter, *id.* 745. Lickbarrow v. Mason, 2 Term Rep. 63. 1 H. Bl. 357. S. C. 5 Term Rep. 367. S. C. Fearon v. Bowers, 1 H. Bl. 364. note. Salomons v. Nissen, 2 Term Rep. 674.

But,

Wright v. Campbell, 4 Burr. 2046. 1 Bl. Rep. 628. S. C. Salomons v. Niſſen, 2 Term Rep. 674.

But, admitting that the aſſignment of the bill of lading will in general transfer the property, yet, if there be any fraudulent circumſtances between the aſſignor and the aſſignee, if the aſſignee has full notice that the vendor has not been paid for the goods, the aſſignment will not in that caſe diveſt the vendor of his legal right to ſtop them *in tranſitu* in the event of the conſignee's inſolvency.]

(M) Of Bills of Exchange.

1. Of the Nature and different Kinds of Bills of Exchange and Negotiable Notes: And herein,
   1. *Of Foreign Bills.*
   2. *Of Inland Bills.*
   3. *Of Promiſſory and Negotiable Notes.*
2. What ſhall be ſaid a Bill of Exchange, or Negotiable Note, within the Cuſtom of Merchants.
3. Who ſhall be ſaid liable to the Payment thereof; and therein of ſuing the Drawer, Indorſor, or Acceptor.
4. Who ſhall be ſaid entitled to the Money.
5. Of the Indorſement.
6. Of the Acceptance: And herein,
   1. *What ſhall be ſaid a good Acceptance.*
   2. *Whoſe Acceptance ſhall bind.*
   3. *Whether an Acceptance may be qualified.*
7. Of the Proteſt: And herein,
   1. *Of the Neceſſity and Validity of the Proteſt.*
   2. *At what Time to be made, and therein of giving Notice to the Drawer; of the Drawer's Refuſal, ſo as to entitle the Party to Principal, Intereſt, and Coſts.*
8. Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.

1. Of

1. Of the Nature and different Kinds of Bills of Exchange and Negotiable Notes.

1. *Of Foreign Bills.*

THE cuſtom of merchants, in relation to foreign bills of exchange, ſeems to have prevailed time out of mind; and was at firſt introduced for the expedition of trade and its ſafety, and to prevent the exportation of money out of the realm; and hath therefore been always countenanced and encouraged, as a matter of great eaſe and advantage to trade, and is now become part of the law of the land; and as bills of exchange are eſtabliſhed merely by the cuſtom of merchants, and for their benefit; ſo their rules and cuſtoms are allowed to preſcribe their form and ſeveral properties, as to their creating engagements on the parties that are concerned in them.

For the antiquity of exchange, *vide* Molloy, 277. Malyne, 269. —That the true meaſure of exchange is *par pro pari*, or value for value. Molloy, 274. —Where the King of Portugal lowered his coin, this not to prejudice the drawer here.——That originally there could be no exchange, without the king's licence. Molloy, 274.

By this cuſtom, if a merchant abroad draw a bill on a merchant here, or *vice verſa*, requeſting him to pay a certain ſum of money, and the drawer ſet his name to it; this amounts to a promiſe to pay, and ſubjects him, though but a collateral engagement, to an action on the non-payment. Roll. Abr. 6. Cro. Jac. 306. Cro. Car. 301.

And if the drawee, or he on whom the bill is drawn, refuſe to accept it, or, having accepted it, refuſe to pay it, the payee, or he in whoſe favour it is drawn, may proteſt it, and ſhall recover againſt the drawer, not only the principal ſum, but likewiſe all intereſts, coſts, and damages, by reaſon of the proteſt or refuſal of acceptance, or payment of the money. Cro. Car. 301.

But though the cuſtom of merchants, in relation to bills of exchange, be eſtabliſhed by the common law, and ſuch bills, being ſecurities for money, are of great credit among them; yet are they not allowed to be ſecurities of as high a nature as bonds or ſpecialties; and therefore it hath been adjudged, that a bill of exchange is within the ſtatute of (*a*) limitations, and muſt be ſued for within ſix years after it becomes payable. Carth. 3. Renew v. Axton, Show. 341. Comb. 190. S. P. 4 Mod. 105. Holt, 427. pl. 2.

(*a*) Nor are bills of exchange, for value received, ſuch matters of account, as are intended by the exception in the ſtatute concerning merchants accounts. Carth. 226. But for this, *vide* tit. Limitation of Actions.

Alſo, a bill of exchange is to be conſidered as a ſimple contract debt in a courſe of adminiſtration, which an executor or adminiſtrator cannot diſcharge before debts by bond, without being guilty of a *devaſtavit*. *Vide* head of Executors and Adminiſtrators.

So, if a merchant in *London* draw a bill of exchange on his correſpondent in *Newcaſtle*, in favour of *J. S.*, and the bill is refuſed, and *J. S.* dies inteſtate, his adminiſtrator, on letters of adminiſtration taken out in *Durham*, cannot bring an action, on the cuſtom of merchants, againſt the drawer, and lay the ſame in *London*; for that a bill of exchange is not equal to a bond or ſpecialty, which are the deceaſed's goods, where they happen to be at his death, but Carth. 373. Yeomans v. Bradſhaw, Comb. 392. S. C.

is

is a ſimple contract, which follows the perſon of the debtor, and makes *bona notabilia* where the debtor reſides; and therefore adminiſtration ought to have been taken out in *London*.

[But bills of exchange and promiſſory notes, though, according to the general principles of the law, they are to be conſidered only as evidence of a ſimple contract, are yet ſo far regarded as ſpecialties, that unleſs the contrary be ſhewn by the defendant, they are always preſumed to have been made on a good conſideration; nor is it incumbent on the plaintiff, either to ſhew a conſideration in his declaration, or to prove it at the trial. Foreign bills were always entitled to this privilege; but it was not without a conſiderable ſtruggle that it was extended to inland bills: and notes are indebted for it to the ſtatute of Queen *Anne*.]

1 Bl. Rep. 445. Peckham v. Wood, B. R. E. 18 Geo. 3. *Vide* 2 Ld. Raym. 758. 1 Bl. Rep. 487.

Alſo, this cuſtom ſhall not prevail againſt the privilege of infants, ſo as to bind them; and accordingly it hath been adjudged, that if an infant draw a bill of exchange, infancy is a good plea in bar to an action brought againſt him *.

Carth. 160. Williams v. Harriſon, * Or it may be given in evidence on the general iſſue.

Bills of exchange are uſually drawn payable on ſight, ſo many days after ſight, or after date, or on ſingle, double, or treble (*a*) uſances; and it is frequent to draw two or three for the ſame ſum, and of the ſame date, for fear of loſs or miſcarriage, which carry a (*b*) condition with them that only one ſhall be paid.

Molloy, 276. (*a*) An uſance is ſaid to be regularly a month. Molloy, 277. Show. 317. Holt, 113. pl. 4. 12 Mod. 15.——But yet varies according to the cuſtom of particular countries; and therefore, where the plaintiff declared on a bill of exchange drawn at Amſterdam, payable at London, at two uſances, and did not ſhew what the two uſances were, judgment was given for the defendant; for the court could not take notice of foreign uſances which varied, being longer in one place than in another. Salk. 131. pl. 18. Buckley v. Campbell.——[Here it may be proper to mention, that uſance between London and any part of France, is thirty days after date.—Between London and the following places; Hamburgh, Amſterdam, Rotterdam, Middleburg, Antwerp, Brabant, Zealand, and Flanders, is one calendar month after the date of the bill.—Between London and Spain and Portugal, two calendar months.—Between London and Genoa, Leghorn, Milan, Venice, and Rome, three calendar months.—The uſance of Amſterdam, on Italy, Spain, and Portugal, is two months.—On France, Flanders, Brabant, and on any place in Holland or Zealand, is one month.—On Frankfort, Nuremberg, Vienna, and other places in Germany, on Hamburg and Breſlau, fourteen days after ſight, two uſances twenty-eight days, and half uſance ſeven.—Half uſance when the uſance is one month, ſhall contain fifteen days, notwithſtanding the inequality in the length of the months.]—— (*b*) Therefore, if there are three bills for the ſame ſum, and an action is brought on one of them, and the plaintiff declares, that the money *in billa prædicta mentionat.* is not paid; this is ſufficient without averring, that it was not paid on the other bills, becauſe the ſum is the ſame in all the bills.

Starke v. Cheeſman, Carth. 510. 1 Salk. 128. Eaſt v. Eſſington, 1 Salk. 130. 2 Ld. Raym. 810. Wegerſloff v. Keen, 1 Str. 224.

[Where the time, after the expiration of which a bill is made payable, is limited by months, it muſt be computed by calendar, not lunar months: thus, on a bill dated the firſt of *January*, and payable at one month after date, the month expires on the firſt of *February*.

Bellaſis v. Heſter, Ld. Raym. 281. Coleman v. Sayer, Str. 829.

Where a bill is payable at ſo many days after ſight, or from the date, the day of preſentment or of the date is excluded. Thus, where a bill, payable ten days after ſight, is preſented on the firſt day of a month, the ten days expire on the eleventh; where it is dated the firſt, and payable twenty days after date, theſe expire on the twenty-firſt. Where there is no date, and the payment is directed to be made ſo many days *after* date, the date is taken to be the day on which it iſſued.

A cuſtom has obtained among merchants, that a perſon to whom a bill is addreſſed, ſhall be allowed a little time for payment, beyond the term mentioned in the bill, called days of grace. But the number of theſe days varies, according to the cuſtom of different places.

Great Britain, *Ireland*, *Bergamo*, and *Vienna*, three days.

Frankfort, out of the time of the fair, four days.

Leipſick, *Naumburg*, and *Augſburg*, five days.

Venice, *Amſterdam*, *Rotterdam*, *Middleburg*, *Antwerp*, *Cologn*, *Breſlau*, *Nuremberg*, and *Portugal*, ſix days.

Dantzick, *Koningſberg*, and *France*, ten days.

Hamburg and *Stockholm*, twelve days.

Naples eight, *Spain* fourteen, *Rome* fifteen, and *Genoa* thirty days.

Leghorn, *Milan*, and ſome other places in *Italy*, no fixed number.

Sundays and holidays are included in the reſpite days at *London*, *Naples*, *Amſterdam*, *Rotterdam*, *Antwerp*, *Middleburg*, *Dantzick*, *Koningſberg*, and *France*; but not at *Venice*, *Cologn*, *Breſlau*, and *Nuremberg*. At *Hamburg*, the day on which the bill falls due makes one of the days of grace, but it is not ſo elſewhere.

In *England*, if the laſt of the three days happens to be *Sunday*, the bill is to be paid on *Saturday*.

But bills payable at ſight, are to be paid without any days of grace.]

2. *Of Inland Bills.*

Inland bills of exchange are thoſe drawn by one merchant reſiding in one part of the kingdom, on another reſiding in ſome city or town within the ſame kingdom; and theſe alſo, being found uſeful to trade and commerce, have been eſtabliſhed on the ſame foot with foreign bills. But at common law they differed from them in this, that there was no cuſtom of proteſting them, ſo as to ſubject the drawer to intereſt and damages in caſe of non-payment, as there was on foreign bills. 6 Mod. 29. 80. Salk. 131. pl. 17.

To remedy this inconvenience, by the 9 & 10 *W.* 3. *c.* 17. reciting, that great damages and other inconveniencies do frequently happen in the courſe of trade and commerce, by reaſon of delays of payment and other neglects on inland bills of exchange, it is enacted, "That all and every bill or bills of exchange, drawn in, or dated at and from any trading city or town, or any other place in the kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, of the ſum of 5*l.* or upwards, upon any perſon or perſons of or in *London*, or any other trading city, town, or any other place, (in which ſaid bill or bills of exchange ſhall be acknowledged and expreſſed the ſaid value to be received,) and is and ſhall be drawn payable at a certain number of days, weeks, or months after date thereof; that from and after preſentation and acceptance of the ſaid bill or bills of exchange, (which acceptance ſhall be by the underwriting the

"ſame

" ſame under the party's hand ſo accepting); and after the expira-
" tion of three days after the ſaid bill or bills ſhall become due,
" the party to whom the ſaid bill or bills are made payable, his
" ſervant, agent, or aſſigns, may and ſhall cauſe the ſaid bill or
" bills to be proteſted by a notary publick, and in default of ſuch
" notary publick, by any other ſubſtantial perſon of the city,
" town, or place, in the preſence of two or more credible wit-
" neſſes; refuſal or neglect being firſt made of due payment of
" the ſame; which proteſt ſhall be made and written under a fair
" written copy of the ſaid bill of exchange, in the words or form
" following:——*Know all men, that I* A. B. *on the*
" *day of at the uſual place of abode of the ſaid*
" *have demanded payment of the bill, of which the above is the copy,*
" *which the ſaid did not pay; wherefore I the ſaid*
" *do hereby proteſt the ſaid bill, dated at this day*
" *of* Which proteſt, ſo made as aforeſaid, ſhall within
" 14 days after making thereof be ſent, or otherwiſe due notice
" ſhall be given thereof to the party from whom the ſaid bill or
" bills were received, who is, upon producing ſuch proteſt, to
" repay the ſaid bill or bills, together with all intereſt and charges
" from the day ſuch bill or bills were proteſted, for which proteſt
" ſhall be paid a ſum, not exceeding the ſum of ſix-pence; and
" in default or neglect of ſuch proteſt made and ſent, or due no-
" tice given within the days before limited, the perſon ſo failing
" or neglecting thereof, is and ſhall be liable to all coſts, damages,
" and intereſt, which do and ſhall accrue thereby.

" Provided nevertheleſs, that in caſe any ſuch inland bill or
" bills of exchange ſhall happen to be loſt or miſcarried within
" the time before limited for payment of the ſame, then the
" drawer of the ſaid bill or bills is and ſhall be obliged to give
" another bill or bills of the ſame tenor with thoſe firſt given, the
" perſon or perſons to whom they are and ſhall be ſo delivered,
" giving ſecurity, if demanded, to the ſaid drawer, to indemnify
" him againſt all perſons whatſoever, in caſe the ſaid bill or bills
" of exchange, ſo alleged to be loſt or miſcarried, ſhall be found
" again."

But this ſtatute was deficient, in that it had no effect, unleſs the party, on whom the bill was drawn, accepted it, by underwriting the ſame, which few or none cared to do.

To remedy which, by the 3 & 4 *Ann. c.* 9. it is enacted,
" That in caſe, upon preſenting any ſuch bill or bills of exchange
" the party or parties, on whom the ſaid bills ſhall be drawn, ſhall
" refuſe to accept the ſame by underwriting the ſame as aforeſaid,
" the party to whom the ſaid bill or bills are made payable, his ſer-
" vant, agent, or aſſigns, may and ſhall cauſe the ſaid bill or bills
" to be proteſted for non-acceptance, as in caſe of foreign bills of
" exchange; any thing in the ſaid act, or any other law to the
" contrary notwithſtanding, for which proteſt there ſhall be paid
" 2 *s.* and no more.

" Provided, that no acceptance of any ſuch inland bill of ex-
" change ſhall be ſufficient to charge any perſon whatſoever
" unleſs

" unleſs the ſame be underwritten or indorſed in writing thereupon;
" and if ſuch bill be not accepted by ſuch underwriting or indorſe-
" ment in writing, no drawer of any ſuch inland bill ſhall be liable
" to pay any coſts, damages, or intereſt thereupon, unleſs ſuch
" proteſt be made for non-acceptance thereof, and within 14 days
" after ſuch proteſt, the ſame be ſent, or otherwiſe notice thereof
" be given to the party from whom the bill was received, or left
" in writing at the place of his or her uſual abode; and if ſuch
" bill be accepted, and not paid before the expiration of three
" days after the ſaid bill ſhall become due and payable, then no
" drawer of ſuch bill ſhall be compellable to pay any coſts, da-
" mages, or intereſt thereupon, unleſs a proteſt be made and
" ſent, or notice thereof be given in manner and form above men-
" tioned; nevertheleſs, every drawer of ſuch bill ſhall be liable
" to make payment of coſts, damages, and intereſt upon ſuch
" inland bill, if any one proteſt be made for non-acceptance or
" non-payment thereof, or notice thereof be ſent, given, or left
" as aforeſaid.

" Provided, that no ſuch proteſt ſhall be neceſſary, either for
" non-acceptance or non-payment of any inland bill of exchange,
" unleſs the value be acknowledged and expreſſed on ſuch bill to
" be received; and unleſs ſuch bill be drawn for the payment of
" 20*l.* or upwards, and that the proteſt, hereby required for non-
" acceptance, ſhall be made by ſuch perſons as are appointed by
" the above ſtatute 9 & 10 *W.* 3. *c.* 17.

" And it is further enacted by the ſaid ſtatute 3 & 4 *Ann.*
" *c.* 9. that if any perſon doth accept any ſuch bill of exchange,
" for and in ſatisfaction of any former debt, or ſum of money
" formerly due to him, the ſame ſhall be accounted and eſteemed
" a full and complete payment of ſuch debt; if ſuch perſon, ac-
" cepting of any ſuch bill for his debt, doth not take his due
" courſe to obtain payment thereof, by endeavouring to get the
" ſame accepted and paid, and make his proteſt as aforeſaid,
" either for non-acceptance or non-payment thereof.

" Provided, that nothing herein contained ſhall extend to diſ-
" charge any remedy that any perſon may have againſt the
" drawer, acceptor, or indorſor of ſuch bill."

3. *Of Promiſſory and Negotiable Notes.*

The increaſe of trade, and neceſſity of paper credit, put bankers and others upon an expedient of bringing promiſſory notes within the cuſtom of merchants, and making them negotiable, as inland bills of exchange; but this the judges would not admit of, promiſſory notes being only conſidered, by the common law, as evidences of a debt, and not aſſignable or negotiable in their own nature.

Salk. 24. pl. 8. 129. pl. 12. 2 Ld. Raym. 757. 6 Mod. 29.

But it being found neceſſary to make uſe of this kind of credit, by the (*a*) 3 & 4 *Ann.* *c.* 9. reciting, that whereas it hath been held, that notes in writing ſigned by the party who makes the

(*a*) Made perpetual by the 7 Ann. c. 25. § 3.

ſame, whereby ſuch party promiſes to pay unto any other perſon, or his order, any ſum of money therein mentioned, are not aſſignable or indorſible over within the cuſtom of merchants to any other perſon; and that ſuch perſon, to whom the ſum of money mentioned in ſuch note is payable, cannot maintain an action, by the cuſtom of merchants, againſt the perſon who firſt made and ſigned the ſame; and that any perſon to whom ſuch note ſhould be aſſigned, indorſed, or made payable, could not, within the ſaid cuſtom of merchants, maintain any action upon ſuch note againſt the perſon who firſt drew and ſigned the ſame; therefore to the intent to encourage trade and commerce, which will be much advanced, if ſuch notes ſhall have the ſame effect as inland bills of exchange, and ſhall be negotiated in like manner, it is enacted, "That all notes in writing, that ſhall be made and ſigned "by any perſon or perſons, body politick or corporate, or by the "ſervant or agent of any corporation, banker, goldſmith, merchant, or trader, who is uſually intruſted by him, her, or them, "to ſign ſuch promiſſory notes for him, her, or them, whereby "ſuch perſon or perſons, body politick and corporate, his, her, or "their ſervant or agent as aforeſaid, doth, do, or ſhall promiſe to pay "to any other perſon or perſons, body politick and corporate, his, "her, or their order, or unto bearer, any ſum of money mentioned in ſuch note, ſhall be taken and conſtrued to be, by virtue "thereof, due and payable to any ſuch perſon or perſons, body "politick and corporate, to whom the ſame is made payable; and "alſo every ſuch note payable to any perſon or perſons, body politick and corporate, his, her, or their order, ſhall be aſſignable "or indorſible over, in the ſame manner as inland bills of exchange are or may be according to the cuſtom of merchants; "and that the perſon or perſons, body politick and corporate, to "whom ſuch ſum of money is or ſhall be by ſuch note made payable, ſhall and may maintain an action for the ſame in ſuch "manner as he, ſhe, or they might do upon an inland bill of exchange, made or drawn according to the cuſtom of merchants, "againſt the perſon or perſons, body politick and corporate, who, "or whoſe ſervant or agent, as aforeſaid, ſigned the ſame; and "that any perſon or perſons, body politick and corporate, to "whom ſuch note that is payable to any perſon or perſons, body "politick and corporate, his, her, or their order, is indorſed or "aſſigned, or the money therein mentioned, ordered to be paid "by indorſement thereon, ſhall and may maintain his, her, or "their action for ſuch ſum of money, either againſt the perſon "or perſons, body politick and corporate, who, or whoſe ſervant or agent as aforeſaid, ſigned ſuch note, or againſt any of "the perſons that indorſed the ſame, in like manner as in "caſe of inland bills of exchange; and in every ſuch action, "the plaintiff or plaintiffs ſhall recover his, her, or their damages and coſts of ſuit; and if ſuch plaintiff or plaintiffs "ſhall be nonſuited, or a verdict be given againſt him, her, or "them, the defendant or defendants ſhall recover his, her, or "their

" their coſts againſt the plaintiff or plaintiffs; and every ſuch " plaintiff or plaintiffs, defendant or defendants reſpectively re- " covering, may ſue out execution for ſuch damages and coſts by " *capias*, *fieri facias*, or *elegit*."

And it is further enacted by the ſaid ſtatute, " That all and " every ſuch actions ſhall be commenced, ſued, and brought " within ſuch time, as is appointed for commencing or ſuing " actions upon the caſe, by the ſtatute 21 *Jac.* 1. *c.* 16. § 3. of " *Limitations*.

" Provided, that no body politick or corporate ſhall have power, " by virtue of this act, to iſſue or give out any notes by them- " ſelves or their ſervants, other than ſuch as they might have " iſſued, if this act had never been made."

It hath been adjudged, that a note written by the plaintiff, and ſubſcribed by the defendant, is a note *made and ſigned* by the defendant within this act; for the ſigning or ſubſcribing is the lien, and the writing or making is only the mechanical part of it. Trin. 6 Ann. Aſh v. Baron, in B.R.

[A promiſſory note, in its original form of a promiſe from one man to pay a ſum of money to another, bears no reſemblance to a bill of exchange. When it is indorſed, the reſemblance begins, for then it is an order by the indorſer to the maker of the note, who, by his promiſe, is his debtor, to pay the money to the indorſee. This is the exact definition of a bill of exchange. *Per* Lord Mansfield, in Heylin v. Adamſon, 2 Burr. 676.

The indorſer of the note correſponds to the drawer of the bill; the maker to the drawee or acceptor; and the indorſee to the payee, or party to whom the bill is made payable.

When this point of reſemblance is once fixed, the law is fully ſettled to be exactly the ſame in bills of exchange and promiſſory notes: and as ſome confuſion has ariſen in the books from an inattention to the real analogy between them, it may be proper to obſerve, that whenever the law is reported to have been ſettled with reſpect to the acceptor of a bill, it is to be conſidered as applicable to the drawer, or, as he may, with more propriety, be called, the maker of a note; when with reſpect to the drawer of a bill, then to the firſt indorſer of the note: the ſubſequent indorſers and indorſees bear an exact reſemblance to one another.

Till the twenty-third of *George* III. theſe notes and bills were written on a plain piece of paper unſtamped: by a ſtatute made in that year, certain duties were impoſed on every piece of vellum, parchment, or paper, on which bills and notes, falling under certain deſcriptions, ſhould be written, engroſſed, or printed. By a ſubſequent act theſe duties are taken off, and others impoſed in their ſtead. *Vide* 23 Geo. 3. c. 49. 31 Geo. 3. c. 25. § 1.

By this latter ſtatute, the duties on inland bills and notes vary according to the different claſſes into which they are diſtributed, by the proviſions of the ſame ſtatute.

One diſtinction is marked between thoſe in which the ſum expreſſed does *not* exceed 200 *l.*, and thoſe in which it *exceeds* that ſum.

Of those in which the sum does *not* exceed 200 *l.* there are two general divisions; those payable on *demand*, and those payable *otherwise* than on demand.

Of those payable on *demand* a distinction is made between bills of exchange, drafts, or orders, for the payment of money on *demand*, and *promissory* notes, or *other* notes for the payment of money to the *bearer* on *demand*.

Vide § 7, 8, 9. The latter kind may be re-issued without being subject to the duty a second time; and the holder has the same remedy for the recovery of the sum expressed in them, after their being re-issued, as he would have had at first. But of these there are two classes—those which may be re-issued from time to time, after payment at the place *where they were first issued*; and those which may be re-issued from time to time, after payment *at the same place*, or *any other place*, than where they were first issued. The first may be for sums not exceeding 200 *l.*, the second for sums not exceeding 30 *l.*

Vide § 2. Duties on Bills of Exchange, Drafts, or Orders, for the Payment of Money on demand.

					s.	d.
For any sum amounting to 40 *s.*	not exceeding	5 guineas			0	3
———	exceeding	5 guineas,	——	£. 30 -	0	6
———	exceeding	£. 30	———	50 -	0	9
———	exceeding	50	———	100 -	1	0
———	exceeding	100	———	200 -	1	6
For any sum from -	200	upwards		- -	2	0

Duties on Bills of Exchange, Drafts, or Orders, payable *otherwise* than on demand, and Promissory Notes, or *other* Notes, payable otherwise than to the *bearer* on *demand*.

					s.	d.
For any sum amounting to 40 *s.*	not exceeding	£. 30		-	0	6
———	exceeding	£. 30	———	50 -	0	9
———	exceeding	50	———	100 -	1	0
———	exceeding	100	———	200 -	1	6
For any sum from -	200	upwards		- -	2	0

Duties on Promissory or *other* Notes payable to the *bearer on demand*, and re-issuable from time to time, after payment at the place where they were first issued.

					s.	d.
For sums amounting to 40 *s.*	not exceeding	5 guineas			0	3
———	exceeding	5 guineas	——	£. 30 -	0	6
———	exceeding	£. 30	———	50 -	0	9
———	exceeding	50	———	100 -	1	0
———	exceeding	100	———	200 -	1	6

Duties on Promissory Notes, or *other* Notes, for the payment of money to the *bearer on demand*, re-issuable from time to time after any payment at the *same* place, or any *other* place than where they were first issued.

With reſpect to Foreign Bills, drawn here in ſets, according to the cuſtom of merchants, every Bill of each ſet is ſubject to a ſtamp duty as under:

				s.	d.
For ſums not exceeding £.	100	-	-	0	6
For ſums exceeding -	100	not exceeding £.	200	0	9
———	200	-	-	1	0

The duties are payable by the drawers or makers of the bills or notes reſpectively; and the ſheet or piece of vellum or parchment, or the ſheet or piece of paper, on which the bills or notes are engroſſed, written, or printed, muſt be ſtamped *before* theſe are drawn; and the commiſſioners and their officers are prohibited from ſtamping any vellum, *&c.* at any time *after* any bill of exchange, promiſſory note, or other note, draft, or order, ſhall be engroſſed, written, or printed thereon. § 2. § 19.

And it is enacted, that no bill of exchange, promiſſory note, or other note, draft, or order, liable to the duties, ſhall be pleaded or given in evidence in any court, or admitted in any court to be good, uſeful, or available in law or equity, *unleſs* the vellum, *&c.* on which it ſhall be engroſſed, printed, written, or made, ſhall be ſtamped with a lawful ſtamp to denote the rate or duty, or ſome higher rate or duty in the act contained.

It is likewiſe enacted, that if any bill, *&c.* for the payment of any ſum amounting to 40 *s.* or upwards, be engroſſed, *&c.* on vellum, *&c.* which ſhall not be ſtamped, *&c.*, or which ſhall be ſtamped with a ſtamp of a lower denomination or value than by the act directed; there ſhall be due, anſwered, and paid to his majeſty, *&c.* the full rate or duty chargeable thereon, which ſhall be payable by and charged upon all and every perſon or perſons, ſeverally and reſpectively, who ſhall draw or make, and utter and negotiate, or cauſe to be drawn or made, and uttered and negotiated, any ſuch bill, *&c.* on ſuch vellum, *&c.* not ſtamped, or ſtamped with ſuch lower duty, his, her, and their reſpective executors, adminiſtrators, and aſſigns. § 6.

And any perſon who ſhall write or ſign, or cauſe to be written or ſigned; or who ſhall accept or pay, or cauſe to be accepted or paid, any of theſe inſtruments, without the *proper* ſtamp, ſhall, for every offence, forfeit the ſum of 20 *l.* § 10.

A penalty of 20 *l.* is alſo impoſed on any perſon who ſhall re-iſſue any of the re-iſſuable promiſſory notes, otherwiſe than is permitted by the act. § 7.

Theſe penalties may be ſued for in any of the courts at *Weſtminſter*, for offences committed in *England*; and in the court of Exchequer in *Scotland*, for offences committed there, by action of debt, bill, plaint, or information, in which no eſſoin, privilege, wager of law, nor more than one imparlance ſhall be allowed. § 24.

And any juſtice of peace, reſiding near the place where the offence is committed, is authoriſed and required, on any information exhibited, or complaint made, to ſummon the party accuſed, § 25.

and the witneſſes on either ſide; and, on due proof made, to give judgment for the penalty, and to iſſue his warrant for levying it on the goods of the offender; and unleſs they be redeemed within ſix days, to cauſe a ſale to be made of the goods taken under the warrant, rendering to the party the overplus, if any; and if goods cannot be found ſufficient to anſwer the penalty, to commit the offender to priſon, there to remain for the ſpace of three months, unleſs ſuch pecuniary penalty ſhall be ſooner paid and ſatisfied; but the juſtice may mitigate the penalty as he ſhall think fit, (reaſonable coſts and charges of the officers and informers, as well in making the diſcovery as in proſecuting the ſame, being always allowed, over and above ſuch mitigation,) ſo as ſuch mitigation do not reduce the penalty to leſs than a moiety over and above the ſaid coſts and charges—provided, that any one who ſhall feel himſelf aggrieved by the judgment of ſuch juſtice, may, on giving ſecurity to the amount of ſuch penalty, together with ſuch coſts as ſhall be awarded in caſe ſuch judgment ſhall be affirmed, appeal to the next general quarter ſeſſions for the county, riding, or place, which ſhall happen after 14 days next after ſuch conviction ſhall have been made, and of which appeal reaſonable notice ſhall be given, who are empowered to ſummon and examine witneſſes upon oath, and finally to hear and determine the ſame; and if the judgment be affirmed, the court may award the offender to pay ſuch coſts, occaſioned by ſuch appeal, as to them ſhall ſeem meet.

§ 27. And if any one, being ſummoned to give evidence before ſuch juſtice or juſtices, ſhall refuſe to appear, without a reaſonable excuſe to be allowed by ſuch juſtice or juſtices; or, appearing, ſhall refuſe to give evidence, every ſuch perſon ſhall forfeit the ſum of 40 *s.* to be levied in the ſame manner as directed with reſpect to the other penalties.

§ 24, 25. The time limited for a common informer to ſue in is three months, either in the ſuperior courts or before juſtices of peace; and if a common informer ſue within that time, the penalties are divided in moieties between the informer and the king.

§ 28. If no informer ſue within that time, then the penalties are only recoverable in the name of his majeſty's attorney general in *England*, or advocate in *Scotland*, by information in the reſpective courts; and the whole of the penalties go to the king.

§ 29. And if any perſon ſhall counterfeit, or procure to be counterfeited, any ſtamp directed to be uſed by this act; or ſhall counterfeit or reſemble the impreſſion of ſuch ſtamp on any vellum, &c. or ſhall utter, vend, ſell, or expoſe to ſale, any vellum, &c. liable to the duties, with ſuch counterfeit mark or impreſſion, knowing the ſame to be counterfeited; or ſhall privately or fraudulently uſe any ſtamp or mark directed by this act to be uſed, with intent to defraud his majeſty, &c.; he ſhall be adjudged a felon, and ſhall ſuffer death as in caſes of felony, without benefit of clergy.

§ 43 Drafts or orders for the payment of money to the bearer on demand, bearing date on or before the day on which the ſame are iſſued, and at the place from which the ſame are drawn and iſſued,

iſſued, and drawn on any banker or bankers, or perſon or perſons acting as a banker or bankers, and reſiding and tranſacting the buſineſs of a banker within ten miles of the place where ſuch draft or order ſhall be actually drawn and iſſued, are exempted from the duty.

And all promiſſory and other notes and bills iſſued by the Bank of *England* are exempted from any ſtamp duty, on conſideration of the governors and company paying into the receipt of his majeſty's Exchequer the annual ſum of 12,000 *l.* by half-yearly payments. § 5.

It is alſo provided, that nothing in the preſent act ſhall be conſtrued to give legality to any bill of exchange or promiſſory note which was not legal before.] § 11.

2. What ſhall be ſaid a Bill of Exchange, or Negotiable Note, within the Cuſtom of Merchants.

As the cuſtom of merchants hath eſtabliſhed theſe bills and notes, ſo hath it preſcribed their form, and required that the ſame ſhould be in writing, and drawn by the party, or thoſe having legal authority from him; and ſuch drawing raiſes a contract to pay the money without any expreſs promiſe. Carth. 510. Salk. 128. pl. 10. Ld. Raym. 538. Starky v. Cheeſeman.

As to the form of the bill, it is ſaid, that the ſame ſtrictneſs and nicety are not required in the penning of bills current between merchant and merchant, as in deeds, wills, *&c.*; on the other hand, it may happen, that a writing may have the form of a bill of exchange, and yet be otherwiſe. 10 Mod. 287. See 2 Ld. Raym. 1397. Gilb. Caſ. 94.

As, if *A.* draw a bill upon *B.* in this form, *Sir, you are to pay* S. S. *ſo much of the money belonging to the governors and company of* Devonſhire *miners*, &c.; this is no ſuch bill of exchange as will entitle *S. S.* to an action againſt the drawer on the cuſtom of merchants; for it is only a direction or appointment to the caſhier to pay the money, and that out of a particular fund, and doth not anſwer the neceſſity of trade, not being a negotiable bill, or made indorſible over; and charging the drawer on ſuch a note, would be liable to this further inconveniency, that hereby every one, who gives his ſteward an order or authority to pay money, might be charged for non-payment. Paſch. 10 Geo. Jenny v. Herle, in B. R. adjudged. Stra. 591. S. C. 2 Ld. Raym. 1361. S. C.

So, a bill drawn by *A.* upon *B.*, requiring him to pay *C.* 7 *l.* every month out of the annuity, or growing fund of the drawer, is no bill of exchange, nor the drawee liable, though he accept ſuch bill; for it concerns neither trade nor credit, but is to be paid out of the growing ſubſiſtence of the drawer; ſo that if the party die, or the fund be taken away, the payment is to ceaſe and determine. Paſch. 1 Geo. 1. Joſſelyn v. Lacier, in B. R. adjudged. Forteſc. 281. S. C.

[The Earl of *Delorane* drew a bill on *Brecknock*, requeſting him to pay to Miſs *Read*, thirty-two pounds and ſeventeen ſhillings out of *W. Steward*'s money, as ſoon as he ſhould receive it; which bill *Brecknock* accepted generally. Dawkes & Ux. v. Delorane, 3 Wilſ. 207. 2 Bl. Rep. 782.

Upon *Brecknock*'s refuſing to pay, an action was brought againſt the drawer as on a bill of exchange, but judgment was given

againſt the plaintiff for this among other reaſons, that it was payable out of a particular fund; and it being objected at the bar, that this bill was accepted by *Brecknock* generally, and in an unlimited manner; it was anſwered by the court, that if the bill had been drawn accordingly in a general and unlimited way, both the bill and the acceptance would have been good, but the acceptance here muſt mean that *Brecknock* accepts it to pay out of *Steward's* money, not out of the drawer's.

Banbury v. Liſſet, 2 Str. 1211.

And on the ſame principle which governed theſe caſes, an order from the owner of a ſhip to the freighter, to pay money *on account of freight*, has been held to be no bill of exchange.

Pierſon v. Dunlop, Dougl. 571.

However, ſuch a bill from the freighters of a ſhip to the perſon to whom the freight is due, if good in other reſpects, would certainly not be bad becauſe it was made payable *on account of freight*, becauſe indiſputably there is a *perſonal* credit given to the drawer, the words *on account of freight* only expreſſing the conſideration for which the bill was given.

M'Leod v. Snee, 2 Ld. Raym. 1481. 2 Str. 762. Barnard. 12. K. B.

And there may be caſes where the inſtrument may appear at firſt ſight to be payable out of a particular fund, and in reality be otherwiſe, of which deſcription the following caſe is one:—*A. B.* drew a bill of exchange, dated 25th of *May*, by which he requeſted *M'Leod* "one month after date, to pay to *Snee*, or order, 9*l.* 10*s.* "as his quarterly half-pay, to become due from the 24th of *June* "to the 29th of *September* next by advance." *M'Leod* accepted it, and on his refuſal to pay, was ſued in the Common Pleas, where judgment being given againſt him, he brought a writ of error in the King's Bench, and objected to the judgment that this caſe reſembled the former caſes, being payable out of a particular fund; but the court held that this bill was drawn on the particular credit of the drawer, not on that of the half-pay, for it was to be paid as ſoon as the quarter began, and whether that ſhould ever become due or not; and the mention of the quarterly half-pay was only a direction how the drawee was to reimburſe himſelf.

Burchell v. Slocock, 2 Ld. Raym. 1545.

Of the diſtinction taken between bills and notes in this reſpect, the following is an illuſtration:—"I promiſe to pay to *William* "*Burchell*, the ſum of 101*l.* 12*s.* three months after date, for "value received out of the premiſes in *Roſemary-lane*, late in the "poſſeſſion of *Thomas Rower Sherwin*:" was held a good note under the ſtatute.

3 Will. 213. 1 Burr. 325.

But a bill or note muſt be abſolutely payable at all events, and not depend on any particular circumſtance which may or may not happen in the common courſe of things.

Haydock v. Lynch, 2 Ld. Raym. 1563.

Thomas Rogers made a bill of exchange, by which he requeſted *Roger Lynch* to pay to *Henry Haydock*, or order, the ſum of 14*l.* 13*s.* out of a fifth payment, when it ſhould become due: this was held not to be a good bill of exchange, on account of the uncertainty whether any fifth payment might ever become due, as well as on account of its being payable out of a particular fund.

Kingſton v. Long, B. R. M. 25 Geo. 3.

So, an order to pay money, "provided the terms mentioned in "certain letters written by the drawer were complied with," is not a good bill, though the acceptance admit a compliance with

thoſe

those terms, for it was no bill until after such compliance, and if it was not a bill when drawn, it could never afterwards become one. Bayley, Appendix, No. 2.

Its uncertainty in this respect was one reason of the determination in the case of *Dawkes* against *Delorane*, it being an order to pay out of *Steward*'s money, when received, which might never happen. *Supra*, 695.

So, a note "to pay a certain sum of money, or to render the "body of *J. S.* to prison by such a day," is not a note on which an action will lie by the statute, after failure of rendering the body to prison, because it was not necessarily and originally for payment of money, but only became so by matter *ex post facto*. Smith v. Boheme, cited 2 Ld. Raym. 1362. 1396.

So, neither is a note "promising to pay money, if another do "not pay it within a limited time;" for this is only an eventual promise.] Appleby v. Biddulph, cited 8 Mod. 363. 4 Vin. 240. pl. 16.

Also it hath been resolved, that if *A.* give a note to *B.* for the payment of a sum of money when he the said *A.* should marry such a one; *B.* cannot bring an action on such note, and declare as on a bill of exchange, setting forth the custom of merchants, &c., for that in truth there is no such custom, being only an agreement founded on a marriage-brokage, and to pay money on a collateral contingency; which contingency cannot be called trading, so as to come within the custom of merchants. 4 Mod. 242. Comb. 227. S. C. Pearson v. Garret. [Beardersley v. Baldwin, 2 Str. 1151. S. P.]

[So, a note "promising to pay to *A. B.* a sum of money, value "received, on the death of a particular person, *provided* he leave "me a sufficient sum to pay the same, *or if* I shall be otherwise "able to pay it," is not good within the statute, because it is not absolutely payable at all events, but depends on two contingencies, neither of which may ever happen. Roberts v. Peake, 1 Burr. 323.

In the case of notes, however, it is not necessary that the time of payment should be absolutely fixed; it is sufficient if, from the nature of the thing, the time must certainly arrive on which their payment is to depend.

Thus, a note "to pay to *A.* or order, six weeks after the death "of the defendant's father, for value received," was held to be negotiable within the statute, for there was no contingency by which it might never become payable, but it was only uncertain as to the time, which, it was said, was the case of all bills payable after sight. Cooke v. Colehan, 1 Str. 1217.

So, a note "payable to an infant, when he the infant should "come of age," and specifying the time when that was to be, *viz.* "on the 12th *June* 1750," was held to be negotiable within the statute, for it would have been clearly good, if it had been made payable on the 12th of *June* 1750, which is a day certain, without mentioning that the plaintiff was then to come of age, and it is not the less certain from the addition of that circumstance. *Per* Lord Mansfield. Goss v. Nelson, 1 Burr. 227.

Thus, "a promise to pay within two months after such a ship "shall be paid off," will make a good note: for the paying off of the ship is a thing of a publick nature, and morally certain. [*Qu.* If a private ship?] Andrews v. Franklin, 1 Str. 24.

So, "I promise to pay to *George Pratt*, or order, 8*l.* on the "receipt of his the said *George Pratt*'s wages, due from his "majesty's Evans v. Underwood, 1 Wilf. 262, 263.

" majeſty's ſhip the *Suffolk*, it being in full for his wages, and " prize money, and ſhort allowance money for the ſaid ſhip," was held a good note on the authority of the laſt caſe; and there being an averment that the wages were received, the plaintiff recovered.]

Paſch. 31 Geo. 1. Morris v. Lea, Stra. 629. 2 Ld. Raym. 1356.

But it hath been held, that a note drawn in theſe words, *I promiſe to account with* J. S. *or his order, for* 50 l. *value received by me*, &c. is a good negotiable note, within the ſtatute 3 & 4 *Ann. c.* 9., and that the word *account* ſhall be conſtrued the ſame as to *pay*, and not to render an account as factor or bailiff; and the rather, becauſe he is not only accountable to *J. S.*, but likewiſe to his *order;* which he cannot be as factor or bailiff, and therefore it muſt be to pay the money to the indorſee, or order of *J. S.*

Chadwick v. Allen, 3 Str. 706.

[Neither will the addition of extraneous circumſtances vitiate a note. Thus, " I do acknowledge that Sir *Andrew Chadwick* has " delivered me all the bonds and notes for which 400 *l.* were paid " him on account of Colonel *Synge*, and that Sir *Andrew* delivered " me Major *Graham*'s receipt and bill on me for 10 *l.*, which 10 *l.* " and 15 *l.* 5 *s.* balance due to Sir *Andrew*, I am ſtill indebted for, " and do promiſe to pay;" is good.

The words " value received," being in general inſerted in bills and notes, there ſeems to have been ſome doubt, whether they were eſſential: in one caſe, where the want of theſe words was objected, a verdict was given on that account againſt the inſtrument, but that caſe ſeems to be of very doubtful authority: in a ſubſequent caſe the ſame objection was made, but as the inſtrument was clearly defective on another ground, the court gave no opinion as to this point.

Banbury v. Liſſet, 2 Str. 1212. Dawkes v. Delorane, 3 Wilſ. 207.

On ſeveral occaſions it appears to have been ſaid incidentally by the court, and at the bar, that theſe words are unneceſſary.

Fort. 282. Barnard. K. B. 88. 8 Mod. 267. 1 Show. 5. 497. 2 Ld. Raym. 1556. 1481. Lutw. 889. 1 Mod. Ent. 310.

And the point is now fully ſettled, that they are not neceſſary; for as theſe inſtruments are always preſumed to have been made on a valuable conſideration, words which import no more cannot be eſſential.

White v. Ledwick, B. R. H. 25 Geo. 3. Bayley, Appendix, N. 3.

Whether it be eſſential to the conſtitution of a bill of exchange that it ſhould contain words which render it negotiable, as " to " order," or " to bearer," ſeems not, hitherto, to have received a direct judicial deciſion. There are two caſes in which the want of ſuch words was taken as an exception, but as there were other objections on which the bill was in both caſes held to be bad, it was not thought neceſſary to decide on that point.

Banbury v. Liſſet, 2 Str. 1212. Dawkes v. Delorane, 2 Wilſ. 212.

Chamberlyne v. Delarive, 2 Wilſ. 353.

In another caſe the ſame exception was taken and over-ruled, but under ſuch circumſtances as that the point was not generally determined. The defendant had given the plaintiff a draught on one *Heddy*, for the payment of a ſum of money for work done by the plaintiff for the defendant: the plaintiff had neglected to demand payment for a conſiderable time after the draught was due, and in the mean time *Heddy* became inſolvent. The plaintiff

brought his action for work and labour, and the defendant at the trial proved his having given this draught to the plaintiff in payment. But not being payable to the plaintiff or order, the jury conſidered it as not being a bill of exchange, and gave a verdict for the plaintiff. On an application for a new trial, the court thought it unneceſſary to decide on the general queſtion, whether words importing negotiability were eſſential to the conſtitution of a bill of exchange, becauſe they were of opinion that by accepting the draught, and keeping it ſo long after it became payable, the plaintiff had given credit to *Heddy*, and diſcharged the defendant.

Yet it has been ruled that ſuch words are not neceſſary in notes, and that the perſon to whom they are made payable may maintain an action on them, within the ſtatute, againſt the maker. And there are ſeveral caſes in the books of reports where ſuch words were omitted, and no exception taken on that account. The reaſon of this indulgence to notes may be, that they have leſs reference to trade and diſtant commerce, being properly no more than engagements between party and party; and the ſtatute being remedial, the benefit of it has been extended beyond the literal words.

Per Lord Hardwicke, Moore v. Paine, Ca. temp. Hardw. 288.

It muſt alſo be obſerved, that in moſt of the caſes where the ſeveral inſtruments have been denied the privilege of bills and notes, it is not, for that reaſon, to be concluded that they are of no force: when the fund from which they are to be paid, can be proved to have been productive, or the contingency on which they depend has happened, they may be uſed as evidence of a contract, according to the circumſtances of the caſe, or according to the relation in which the parties ſtand to one another.

William Watts, a merchant, who traded to *Gibraltar*, employed *Moſes Maſſias* as his factor there, who uſed to conſign *Watts*'s goods to certain agents in *Barbary* for ſale. *Maſſias* uſed to keep an account with the agents, and another with *Watts*, but *Watts* had no communication with the agents. On the 21ſt of *May* 1772, *Watts* drew a bill in the following terms, for the balance of an account that day ſtated between him and *Maber* and *Kentiſh*, merchants, with whom he had dealings:

Maber v. Maſſias, Bl. Rep. 1072.

" Sir, pleaſe to pay to Meſſrs. *Maber* and *Kentiſh*, or order,
" 195*l.* 14*s.* 10*d.* out of the produce of goods you have of mine,
" now lying at *Gibraltar*, *Barbary*, and *Leghorn*, as ſoon as the
" ſame ſhall come into your hands, after diſcharging the preſent
" acceptances.

" To Mr. *Moſes Maſſias*, " WILLIAM WATTS."
" No. 63, *Preſcot-ſtreet*."

Which bill *Maſſias* accepted in the following words underwritten, " I agree to conform to this order, MOSES MASSIAS."

Before this bill was paid, *Watts* became a bankrupt, and *Maſſias* refuſing payment, an action was brought againſt him for " money " had and received to the uſe of the plaintiff." On the trial it appeared, that *Maſſias* had large quantities of goods of *Watts* in his hands in 1773, to the amount of 1657*l.* and more in 1772.

That

That he had paid large ſums for *Watts*, but whether for engagements prior to 1772, or not, did not appear.

The defendant gave evidence of ſeveral prior engagements, but theſe did not cover the whole account; and alſo that there was, at the time of acceptance, and ſtill remained, a balance due to *Maſſias* himſelf of 870*l.* There was a verdict for the plaintiff; and an application being made by the defendant for a new trial, the court obſerved that the queſtion was, Whether the defendant had in his hands 195*l.* for the uſe of the plaintiff? He was proved to have had goods to the amount of 1657*l.*, and that his acceptances, in the common and technical ſenſe of the words, as applied to bills of exchange, together with certain other indorſements by which he had engaged himſelf to pay money for *Watts*, left a balance in his hands more than ſufficient to pay the plaintiffs; if the balance of 870*l.* due to *Maſſias* himſelf, be excluded. For this balance, then unliquidated, it never could have been meant to provide, nor was it meant that the bill or its acceptance ſhould be ſubject to it, for then there would have been fraud in the drawer, and alſo in the acceptor; both knew, or muſt be ſuppoſed to have known, at leaſt *Maſſias* knew, how the balance then ſtood. If he meant to have reſerved his own balance, he ſhould have made a ſpecial acceptance; but having accepted it generally in the terms of the draft, ſubject only to prior acceptances, he ſhall not ſhelter himſelf by this concealed balance due to himſelf in the courſe of a running account.

Vide Preamble to ſt. 15 Geo. 3. c. 51.

It having been found by experience, that trade and commerce ſuffered materially from the circulation of bills, notes, and drafts for very ſmall ſums, which paſſed as caſh, and many of them being made payable under certain terms and reſtrictions with which the poorer ſort of manufacturers, artificers, labourers, and others could not comply, without ſubjecting themſelves to great extortion and abuſe, the legiſlature has thought proper to lay certain reſtraints on bills or notes under a limited ſum.

15 Geo. 3. c. 51. § 8.

All notes and bills for the payment of any ſum under twenty ſhillings, which had been iſſued *before* the 24th of *June* 1775, were made payable on demand.

§ 1.

Notes and bills for leſs than twenty ſhillings, iſſued *after* the

§ 2.

24th of *June* 1775, are declared void. And any perſon publiſhing or uttering ſuch bills or notes, or in any manner engaged in the negotiation of them, is liable to a penalty of not more than 20*l.* nor leſs than 5*l.*, to be recovered and applied in the manner

§ 13.

pointed out by the act, which was to continue for five years.

17 Geo. 3. c. 30.

The good effects of this act being found, further proviſions for the ſame purpoſe were made by another two years after.

§ 1.

All promiſſory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable, for the payment of 20*s.*, or for any ſum of money above that ſum and leſs than 5*l.*, or on which 20*s.*, or above that ſum, and leſs than 5*l.*, ſhall remain undiſcharged, iſſued after the firſt of *January* 1778, ſhall ſpecify the names and places of abode of the perſons reſpectively to whom or to whoſe order they ſhall be made payable;

able; ſhall bear date before or at the time of drawing or iſſuing them, and not on any ſubſequent day; ſhall be made payable within the ſpace of twenty-one days next after the day of the date; and ſhall not be transferable or negotiable after the time limited for the payment: and every indorſement ſhall be made before the expiration of that time, and bear date at or before the time of making it, and ſhall ſpecify the name and place of abode of the perſon or perſons to whom or to whoſe order the money is to be paid: and the ſigning of every ſuch note, *&c.*, and alſo every indorſement, ſhall be atteſted by one ſubſcribing witneſs at the leaſt; and all notes, *&c.* of the above deſcription not having theſe requiſites ſhall be utterly void.

The ſame penalties, recoverable in the ſame way as in the former act, are impoſed on every one uttering, publiſhing, or negotiating ſuch notes, *&c.* without the requiſites preſcribed. § 2.

And all negotiable notes, *&c.* iſſued before the 1ſt of *January*, for any ſum between the ſum of 20 *s.* and 5 *l.*, or on which 20 *s.* or leſs than 5 *l.* remained undiſcharged, are made payable on demand. § 3.

And this act and the former act are continued not only for the reſidue of the five years of the former, but alſo for other five years. § 4.

And by a ſubſequent ſtatute, both the former are made perpetual.] 27 Geo. 3. c. 16.

It hath been reſolved, that a bill of exchange drawn by a gentleman, who is no trader, ſhall notwithſtanding make him reſponſible within the cuſtom of merchants; for otherwiſe perſons of diſtinction travelling abroad would ſuffer in their credit; and it might bring a general inconveniency on trade itſelf, when it came to be known to foreign merchants, that there were ſome who, though they took upon themſelves to draw bills of exchange, yet were not liable to the payment thereof. Carth. 82. Show. 125. Witherley v. Sarsfield, Comb. 45. 152. S. C. ill reported.

3. Who ſhall be ſaid liable to the Payment thereof; and therein of ſuing the Drawer, Indorſor, or Acceptor.

It is clear, that (*a*) every drawer of a bill is liable to the payment thereof, as is every (*b*) acceptor and indorſor: alſo, (*c*) if there are ſeveral indorſors of the ſame bill, the laſt indorſee may bring his action againſt the firſt indorſor, or any of them; for the indorſement is *quaſi* a new bill, or at leaſt a warranty, as ſome books expreſs it, by the indorſor, that the bill ſhall be paid. (*a*) That if ſeveral drawers ſubſcribe, all are liable. Molloy, 278. (*b*) And having once accepted it, cannot afterwards revoke it. Molloy, 283. (*c*) Skin. 343. pl. 11. Ld. Raym. 181. Stra. 479.

So, if a bill be drawn upon *A.*, and he accept it, and afterwards refuſe payment, upon which the bill is proteſted, the perſon to whom it is payable may bring ſeveral actions againſt the acceptor and the drawer; for the proteſt is no diſcharge of the acceptor. Molloy, 273.

But though the drawer, acceptor, and indorſor, are all liable, yet the party can have but one ſatisfaction: but, until ſuch ſatisfaction 3 Mod. 86. Lutw. 882. Sk. 255. pl. 3.

Co. 4. 32. S. C. Claxton v. Swift.

faction is actually had, he may ſue all, or any of them; and accordingly it was adjudged in the Exchequer-chamber, where the caſe was, An indorſee ſued the drawer, and had judgment againſt him; and he alſo brought an action againſt the indorſor, to which the indorſor pleaded the judgment againſt the drawer, but the plea was held ill; for that the judgment was no ſatisfaction, without which the party could not be barred of the remedy which he had againſt the other.

[Neither is the engagement of an indorſor diſcharged by an ineffectual *execution* againſt the drawer, or any prior or ſubſequent indorſor.

Hayling v. Mulhall, 2 Bl. Rep. 1235.

A bill was indorſed by *Sheridan*, and afterwards by one *Boon*, and came into the hands of *Hayling*, who ſued *Boon*, and took him in execution, and afterwards let him out on a letter of licence without paying the debt. He then ſued *Sheridan*, and held him to bail: *Sheridan* not paying the bill, *Hayling* brought a third action againſt *Mulhall*, one of the bail, who inſiſted that the debt was ſatisfied by the impriſonment of *Boon*. But it was obſerved by the court, that each indorſor is independent of the reſt, and that the bill-holder had a right to ſue all the indorſors till the bill was ſatisfied: the law indeed ſo highly regards the liberty of the ſubject, that the taking of his body in execution is, with reſpect to him, a full ſatisfaction of the debt. But it only operates as a diſcharge to the identical perſon ſo impriſoned; it does not diſcharge even his goods after his death, ſince the ſtatute of *James* the Firſt. The remedy ſtill remains, after the death or diſcharge, againſt every other indorſor.]

Molloy, 281. 285. (*a*) So, if one ſubſcribe for the honour of him who ſubſcribes for the honour of the drawer. Carth. 129. Lut. 196.

And not only the drawer, acceptor, and indorſor are liable, but alſo by the cuſtom of merchants, if one merchant draw a bill which is proteſted, and another hearing thereof declare that he, for the honour of the (*a*) drawer, will pay the contents; and thereupon ſubſcribes in theſe or the like words, *I the underwritten do bind myſelf as principal, according to the cuſtom of merchants, for the ſum mentioned in the bill of exchange, whereupon this proteſt is made*, &c., this ſhall as effectually bind him, as if he had been the original drawer; and by this the perſon to whom the bill is payable hath his remedy, both againſt ſuch perſon, as ſurety, and alſo againſt the principal. But the principal, or original drawer, is liable to him who thus ſubſcribes for his honour.

10 Mod. 36, 37.

If *A.* draw a bill on *B.*, who has effects of his in his hands, and *B.* accept the bill, which is afterwards proteſted for non-payment, and the bill be afterwards indorſed to *A.* the drawer, he may maintain an action as indorſor againſt *B.*; but if there had been no effects of *A.*'s in the hands of *B.*, ſo that the acceptance was only for the honour of *A.* the drawer, he could have no action; for thereby the money would be recovered only to be repaid again.

Salk. 126. pl. 6. *cont.* Salk. 133. pl. 10.

It hath been held by ſome opinions, that though an indorſor be liable, that yet, in an action againſt him, it muſt be alleged in the declaration, that the money was demanded of the drawer, he being

the principal debtor, and the indorſor only a ſurety, warranting payment in caſe the drawer made default: but the better opinion ſeems to be, that this is not material, every indorſor being to be conſidered as making a new bill, or note, on whoſe credit alone perhaps the money was given, and the drawer not at all known to the indorſee. It ſeems, however, to be more adviſable to give it in evidence, that there was a demand on the drawer, or an endeavour to find him out; but this alſo hath been thought by (a) ſome not to be neceſſary.

(a) The Chief Juſtices Holt, Raymond, and Eyre, held, that a demand on the drawer was requiſite to be given in evidence, the indorſor's engagement being only conditional.—But Parker, Pratt, and King, held it not to be neceſſary; ſaid by Lord Hardwicke, Mich. 10 Geo. 2. to have been ſo ruled by them at the Sittings; and of the latter opinion he ſeemed to be himſelf; and held it clearly, not to be neceſſary to allege it in pleading. [And it is now ſettled, that to entitle the indorſee to recover againſt the indorſor of an *inland* bill of exchange, it is not neceſſary to demand the money of the firſt drawer. Heylin v. Adamſon, 2 Burr. 669.]

4. Who ſhall be ſaid entitled to the Money.

The money is to be paid to him in whoſe favour the bill is drawn, or to the indorſee, in caſe it be indorſed over; of which indorſement it ſeems the drawer, acceptor, and drawee muſt take notice at their peril; alſo, if there are ſeveral indorſors and indorſees, the laſt indorſee is entitled to the money. Carth. 130.

If a bill of exchange is made payable to *A.*, who indorſes it to *B.*, who indorſes it to *C.*, and it is proteſted for non-payment; *B.* may bring an action on this bill, notwithſtanding his indorſement. Show. 163. Dekers v. Harriat.

If *A.* draw a bill of exchange, payable to *B.*, for the uſe of *C.*, and *B.* for valuable conſideration indorſe it over to *D.*, *D.* may bring an action againſt *A.* the drawer; and he cannot plead that the money was extended in his hands at the ſuit of the king, for a debt due from *C.*, for *C.* being only *ceſtui que truſt*, had only an equitable intereſt, and no (b) legal remedy for the money; and *B.* is only reſponſible in equity to *C.* for the breach of truſt. Carth. 5. Skin. 264. pl. 2. Show. 5. S. C. Evans v. Cramlington, adjudged, and affirmed in the Exchequer-chamber. 2 Vent. 309. S. C. adjudged; it appearing that the bill was indorſed before any ſeizure, or writ of execution iſſued out, and that an indorſement on ſuch bill was good by the cuſtom of merchants. (b) So, in debt on a ſingle bill made to *A.* to the uſe of him and *B.*, the defendant pleads a releaſe made to him by *B.*, and on demurrer it was adjudged for the plaintiff without difficulty; for *B.* is no party to the deed, and therefore can neither ſue nor releaſe it; but it is an equitable truſt for him, and ſueable in the Chancery, if *A.* will not let him have part of the money; and the book of E. 4. cited, that he might releaſe in ſuch caſe, was denied to be law. Lev. 235. Offly v. Ward.

Of the Indorſement.

Indorſement is a term known in law, which, by the cuſtom of merchants, transfers the property of the bill or note to the indorſee; and is uſually made on the back of the bill, and muſt be in writing; but the law hath not appropriated any ſet (c) form of words, as neceſſary to this ceremony; and therefore it hath been held, that if a man write on the back of a bill of exchange, *This is to be paid to* J. S., or, *The content of this bill is to be paid to* J. S., and ſet his hand to it, this is a good indorſement. Molloy, 281. 7 Mod. 86, 87. (c) An indorſement ſet forth in theſe words, *indorſavit ſuper billam illam content. billæ illius ſolvend.* is ſufficient after verdict, without ſhewing that it was ſubſcribed. Salk. 130. pl. 14. The bare indorſement of a name transfers no property, and though it may be filled up at any time *before* the note is given

given in evidence, yet that has been denied *after*. Theo. Evid. 84. 2 Str. 1103. *contr.* [But a blank indorſement will transfer the property, and is more frequent than an indorſement in full. Its effect is, to render the bill or note afterwards transferable by delivery only as if it were payable to bearer, for by only writing his name, the indorſer ſhews his intention that the inſtrument ſhould have a general currency, and be transferred by every poſſeſſor. Dougl. 633. 639.]

Salk. 126. pl. 4. Clerk v. Pigot. Molloy, 281. S. P. and ſaid to be an uſual practice among merchants. [Hence, a man to whom a bill was delivered with a blank indorſement, and who carried it for acceptance, was admitted, in an action of trover for the bill against the drawee, to prove the delivery of it to the latter. Lucas v. Haynes, 1 Salk. 130. 2 Ld. Raym. 871.]

So, if *A.* having a bill of exchange, writes his name on the back of it, and ſends it to *J. S.* his friend, to get it accepted, which is done accordingly; *A.* notwithſtanding his name, may bring an action againſt the acceptor; although objected, that the property was transferred to *J. S*, for *J. S.* had it in his power, either to act as ſervant or aſſignee; and if he had filled up the blank ſpace, making the bill payable to him, that would have witneſſed his election to have received it as indorſee; but that being omitted, his intention is preſumed to act only as ſervant to *A.*, whoſe name he would uſe only in order to write the acquittance over it.

Salk. 130. pl. 16. Comb. 401.

A bill payable to a man's order is payable to himſelf, and he may bring an action thereon, averring that he made no order, &c.

Carth. 493. Fiſher v. Pomfret.

So, where a bill of exchange was indorſed in this manner, *Pay the contents of this bill unto the order of* J. S., who brought his action as indorſee, averring he had made no order to any body to receive the money; and on demurrer, it was urged, that *J. S.* could not maintain an action, becauſe the indorſement was not to him, but to his order: the court held the action well brought againſt the indorſer; and that among tradeſmen, this form of indorſement is commonly uſed, although it is intended to be made payable to the perſon whoſe order is mentioned.

Salk. 125. pl. 2. 3 Lev. 299. Salk. 133. Skin. 343. pl. 11. Comb. 204. 466. [(*a*) It is abſurd to indorſe them; they paſs merely by transfer. *Vide infra.*]

As to the indorſing of bills, a difference has been taken between a bill payable to *J. S.* or bearer, and *J. S.* or order; that the firſt is not aſſignable by the contract, ſo as to enable the indorſee (*a*) to bring an action, if the drawer refuſe to pay; becauſe there is no ſuch authority given to the party by the firſt contract; and the effect of it is only to diſcharge the drawee, if he pays it to the bearer, though he comes to it by trover, theft, or otherwiſe; but when the bill is payable to *J. S.* or order, there, an expreſs power is given to the party to aſſign, and the indorſee may maintain an action.

Salk. 125. pl. 2. 133. Skin. 343. pl. 11. 411.

Alſo, though an aſſignment of a bill, payable to *J. S.* or bearer, be no good aſſignment to charge the drawer with an action on the bill, yet it is a good bill between the indorſer and indorſee, and the indorſer is liable to an action for the money; for the indorſement is in nature of a new bill.

Salk. 125. pl. 2. 3 Lev. 299.

So, it hath been adjudged, that an indorſee of a bill, payable to *J. S.* or bearer, may maintain an action againſt the drawer on alleging a ſpecial cuſtom, that ſuch bill ſhould bind him; which cuſtom is ſo found or confeſſed by the defendant.

Alſo, in caſes of bills purchaſed at a diſcount, there is ſaid to be this difference, that if it be a bill payable to *A.* or bearer, it is an abſolute purchaſe; but if to *A.* or order, and it is indorſed blank, and filled up with an aſſignment, the indorſor muſt warrant it as much as if there had been no diſcount. Salk. 128.

A bank bill payable to *A.* or bearer, being given to *A.* and loſt, was found by a ſtranger, who transferred it to *C.* for a valuable conſideration; *C.* got a new bill in his own name; and *per Holt*, Ch. J.; *A.* may have trover againſt the ſtranger who found the bill, for he had no title; though payment to him would have indemnified the bank; but *A.* cannot maintain trover againſt *C.* by reaſon of the courſe of trade, which creates a property in the aſſignee, or bearer. Salk. 126. pl. 5.

[A bank note for 21 *l.* 10 *s.* payable to one *William Finney*, or bearer, on demand, was ſent by *Finney* under cover by the general poſt to his correſpondent in *Oxfordſhire*; the mail on the ſame night was robbed, and this note among others taken and carried away by the robber; it afterwards came into the poſſeſſion of one *Miller*, an innkeeper, for a full and valuable conſideration, in the uſual courſe of his buſineſs, without any notice or knowledge of its having been taken out of the mail. *Finney*, hearing of the robbery, applied to the bank to ſtop the payment of this note, which was ordered, on his entering into ſecurity to indemnify the bank: *Miller* afterwards preſented the note for payment, and delivered it to *Race*, a clerk of the bank, who refuſed either to pay it, or redeliver it. *Miller* brought an action of trover againſt *Race*, for the recovery of the note; and a caſe ſtating theſe circumſtances coming before the court, it was held, that the plaintiff was entitled to recover; becauſe there appeared no circumſtance of colluſion in him; he had taken the note in the uſual courſe of his buſineſs, for a valuable conſideration, and the currency of theſe notes and the nature of trade required that the fair holder ſhould be protected even againſt the true owner, who could only recover them back from the finder, or any other perſon who had given no value for them. Miller v. Race, 1 Burr. 452.

Vaughan, a merchant in *London*, gave to *Bicknell*, one of his ſhips huſbands, a draft on his banker, Sir *Charles Aſgill*, payable to ſhip *Fortune*, or bearer: *Bicknell* loſt the draft: the perſon who found it, or at leaſt was in poſſeſſion, however he might have obtained that poſſeſſion, went four days after the note was payable, to the ſhop of *Grant*, a tradeſman at *Portſmouth*, and having bought ſome tea, gave him the note in payment, and deſired to have the balance. *Grant* ſtepped out to make inquiry who *Vaughan* might be, and being informed he was a reſponſible man, and that the note was in his hand-writing, gave the change out of the note, retaining the price of the tea. *Vaughan* being appriſed that *Bicknell* had loſt the note, ſent notice to Sir *Charles Aſgill* not to pay it. Payment being accordingly refuſed, *Grant* brought his action againſt *Vaughan* as the drawer. The cauſe was tried by a ſpecial jury of merchants, who found for the defendant. On an application for a new trial, the court held, that theſe notes were tranſferable by mere delivery, and however the true owner may Grant v. Vaughan, 3 Burr. 1516. 1 Bl. Rep. 485.

have loſt them, the fair poſſeſſor for a valuable conſideration was entitled to the money, and therefore granted a new trial.

The ſame principle applies to the caſe of a bill negotiated with a blank indorſement.

Peacock v. Rhodes et al. Dougl. 613.

A bill was drawn at *Halifax*, by *Rhodes* and another, on *Smith, Payne*, and *Smith*, bankers in *London*, payable to *William Ingham*, or order, thirty-one days after date, for value received. *Ingham* indorſed it in blank; *John Daltry* received it from him, and indorſed it in the ſame manner, and delivered it to *Joſeph Fiſher*; it was ſtolen from *Fiſher* at *York*, without any indorſement by him: *Peacock*, a mercer at *Scarborough*, afterwards received it from a man unknown, who called himſelf *William Brown*, and by that name indorſed it to *Peacock*, of whom he bought cloth and other articles in the way of his trade as a mercer, and gave him that bill in payment, receiving the balance in caſh and ſmall bills: it appeared, that *Peacock* did not know the drawers, but had, ſeveral times before that, received bills drawn by them, which were duly paid. *Peacock* tendered this bill for acceptance and payment to the drawees, who refuſed; on which he brought an action as the indorſee of *Ingham* againſt the drawers. A verdict by conſent was found for the plaintiff, ſubject to the opinion of the court of King's Bench, on a ſpecial caſe ſtating the preceding facts. The court held, that there was no difference between a bill or note indorſed blank, and one payable to bearer. They both paſs by delivery, and poſſeſſion proves property in both caſes. The holder of either cannot with propriety be conſidered as aſſignee of the payee. An aſſignee muſt take the thing aſſigned, ſubject to all the equity to which the original party was ſubject: if this rule were applied to bills and notes, it would ſtop their currency; it would render it neceſſary for every indorſee to inquire into all the circumſtances, and the manner in which the bill came to the indorſor: but the law is now clearly ſettled, that a holder coming fairly by a bill or note, is not to be affected with the tranſaction between the original parties, except in ſuch caſes as depend on particular acts of parliament.

But a transfer by indorſement, where that is neceſſary, can only be made by him who has a right to make it, and that is ſtrictly only the payee, or the perſon to whom he or his indorſees have transferred it, or ſome one claiming in the right of ſome of these parties.

Where a bill or note is drawn in favour of two or more in partnerſhip with one another, an indorſement by one will bind both, if the inſtrument concern their joint trade: ſo, where it is in favour of them *or* either of them, an indorſement by one is a ſufficient transfer, though they be not in partnerſhip.

Carvick v. Vickery, Dougl. 653. in the notes.

So, where a bill drawn by two is made payable to them or their order, it would ſeem from principle that either might transfer without the other; for when two perſons join in the ſame bill, they hold themſelves out to the world as partners, and, for that purpoſe are to be treated as ſuch; and when a bill goes out into the world, the perſons to whom it is negotiated are to collect the ſtate and relation of the parties from the bill itſelf. If they appear on

the bill as partners, it may be of leſs public detriment to ſubject them to the inconvenience of being treated as ſuch, than to permit them to deny that they are ſo. But there is an univerſal uſage among all the bankers and merchants in *London*, that in ſuch a caſe, an indorſement by one of the payees only is void.]

A note payable to a feme ſole, or order, who afterwards marries, can only be indorſed by the huſband. 10 Mod. 246. Str. 516. Theo. Evid. 81.

[If a man become bankrupt, the property of bills and notes of which he is the payee or indorſee, veſts in his aſſignees, and the right to transfer is in them. And if in fact he indorſe a bill or note after his bankruptcy, and that be diſcovered before it be paid, the aſſignees may recover it back from his indorſee in an action of trover; and if the money be received, they may recover the money in an action for ſo much money paid to their uſe. Beawes, 469, 470.

If he die, it devolves to his perſonal repreſentatives, his executors, or adminiſtrators; and they may indorſe it, and their indorſee maintain an action, in the ſame manner as if the indorſement had been by the teſtator or inteſtate. But on their indorſement they are liable perſonally to the ſubſequent parties, and not as executors; for they cannot charge the effects of the teſtator. Rawlinſon v. Stone, 3 Wilſ. 1. 2 Str. 1260. 2 Barnes, 137. cited 2 Burr. 1225. 1 Term Rep. 487.

They may alſo be the *indorſees* of a bill or note in their quality of executors or adminiſtrators; as, where they receive one from their teſtator or inteſtate, and in that character they may bring an action on it againſt the acceptor or any of the other parties.] King, Ex. v. Thorn, 1 Term Rep. 487. *Vide* alſo 10 Mod. 315.

It hath been adjudged, that a bill of exchange, or promiſſory note, cannot be indorſed over for part, ſo as to ſubject the party to ſeveral actions; as, if *A.* having a bill of exchange upon *B.* indorſes part of it to *J. S.*, *J. S.* cannot bring an action for his part, although he allege a cuſtom among merchants for ſuch kind of indorſements; for the contract being entire, and ſubjecting him only to one man's action, no cuſtom can make him liable to two or more actions for the ſame debt. Carth. 466. Hawkins v. Cardy, Salk. 65. pl. 2. S. C. where it is ſaid, that the plaintiff ſhould have acknowledged ſatisfaction for the reſt.

[A bill or note may be indorſed at any time after it has iſſued, even after the day of payment. However, the indorſement of a note after it is due, throws a degree of ſuſpicion upon it, and in an action againſt the maker by the indorſee, the former is in ſuch caſe entitled to go into evidence to ſhew, that the note has been paid as between him and the indorſor. 1 Ld. Raym. 575. 3 Term Rep. 80.

In an action by an indorſee of a promiſſory note, payable on demand, againſt the maker, the defendant was admitted to give evidence, that the note had been indorſed to the plaintiff a year and a half afterwards; and to impeach the conſideration, by ſhewing that it had originally been given for ſmuggled goods; and that payments had been made upon it at ſeveral times. There was no privity brought home to the plaintiff, but Mr. J. *Buller* was of opinion, that he ought to be nonſuited; for he ſaid, it had been repeatedly ruled at *Guildhall*, that wherever it appears, that a bill or note has been indorſed over ſome time after it is due, which is out of the uſual courſe of trade, that circumſtance throws ſuch a Banks v. Colwell, at Launceſton Spring Aſſizes, 1788.

suſpicion on it, that the indorſee muſt take it on the credit of the indorſor, and muſt ſtand in the ſituation of the perſon to whom it was payable; and here, the conſideration was illegal. He therefore nonſuited the plaintiff.

Taylor v. Mather, Eaſt. 27 G. 3. B. R. 3 Term Rep. 83. note.

In an action by an indorſee of a promiſſory note againſt the maker, it appeared, that the note was indorſed ſome time after it was due, and there were many circumſtances which led the court and jury to conclude that it was fraudulently obtained; whereupon a verdict was found for the defendant. Upon a motion for a new trial, it was refuſed on the merits, and *Buller* J., at the ſame time ſaid, it has never been determined, that a bill or note is not negotiable after it becomes due; but if there are any circumſtances of fraud, and it comes into the hands of a plaintiff by indorſement after it is due, I have always left it to the jury upon the ſlighteſt circumſtance to preſume, that the indorſee was acquainted with the fraud. The reſt of the court concurred in this opinion.

Brown v. Davies, 3 Term Rep. 80.

In an action by an indorſee of a promiſſory note againſt the maker, the plaintiff reſted his caſe upon the proof of the maker's and payee's hand-writing. The note appeared on the face of it to have been drawn on the 6th of *October* 1788, payable to *Sandal* or order, and to have become due on the 13th of *November:* it had *Sandal*'s indorſement upon it, and had been noted for non-payment. Whereupon the defendant's counſel offered to prove theſe facts; that *Sandal*, having indorſed it in blank, delivered it to *Taddy*, by whom it had been noted for non-payment. That on the 6th of *December*, *Sandal*, having been paid by the defendant, the maker of the note, took it up from *Taddy*, and afterwards, without the knowledge or conſent of the defendant, negotiated it to the plaintiff. But Lord *Kenyon*, being of opinion that, unleſs knowledge was brought home to this plaintiff, it would make no difference between theſe parties, rejected the evidence, and the plaintiff had a verdict. Upon a motion for a new trial, his Lordſhip concurred with the reſt of the court in granting it, confining himſelf however to this ground, that the note appeared to be noted for non-payment at the time the plaintiff received it.

It is no objection to the claim of an indorſee, that the indorſement to him does not contain the words "to order."

More v. Manning, Comyns, 311. in C.B. Hil. 6 G. 1. cited 2 Burr. 1222.

Manning had given a promiſſory note to *Statham* or order; *Statham* aſſigned it to *Witherhead*, and *Witherhead* to *More*, who on non-payment at the time, brought an action againſt *Manning*; on a demurrer to the declaration, exception was taken, that the aſſignment to *Witherhead* was made without ſaying to him or order, and that therefore he could not aſſign it over to *More*. But it was held by the whole court, that the indorſement was ſufficient; for if the original note be aſſignable, then, to whomſoever it may be aſſigned, he has the whole intereſt in it, and may aſſign it as he pleaſes; an aſſignment to him comprehends his aſſigns.

Acheſon v. Fountain, Mich. 9 G. 1. B. R. 1 Str. 437.

In another caſe the plaintiff had declared on an indorſement made by *William Abercrombie*, by which he appointed the payment to be to *Louiſa Acheſon*, "or order;" on the bill being produced in evidence, it appeared to be originally made payable to *Abercrombie*

crombie, or order, but *Abercrombie*'s indorſement was only this. cited 2 Burr. 1223.
"Pray pay the contents to *Louiſa Acheſon*." It was objected, "that the indorſement did not agree with the declaration." The court however gave judgment, on the ground of a general propoſition in law, that a bill is negotiable without the addition of thoſe words to the indorſement; the legal import of ſuch indorſement being, that the bill was payable to order, and that the plaintiff might on this have indorſed it over to another, who would have been the proper order of the firſt indorſor.

Colonel *Clive* drew a bill, payable to Mr. *Cambell*, or order, on the *Eaſt-India* Company, who accepted it; Mr. *Cambell* indorſed it to Mr. *Robert Ogilby*, but the words "or order" being originally omitted, were afterwards inſerted by another hand before the trial: *Ogilby* indorſed it over to Meſſrs. *Edie* and *Laird*, or order, and afterwards, before the payment, became inſolvent: *Edie* and *Laird* brought an action againſt the Company as acceptors, who refuſed payment, on pretence that *Ogilby* had no right to aſſign to the plaintiffs: the real queſtion was, Who ſhould bear the loſs, Mr. *Cambell* or the plaintiffs? for the *Eaſt-India* Company, if they did not pay to the plaintiffs, muſt pay to Mr. *Cambell*. The court were clearly of opinion, that the plaintiffs had a right to recover; that the law was ſettled by the two laſt caſes; that ſuch an indorſement as that to *Ogilby* was good, and gave the indorſee a right of indorſing over. Edie v. Eaſt India Company, 2 Burr. 1216. 1 Bl. Rep. 295.

Yet an indorſement may be reſtrictive, and then it operates to preclude the perſon to whom it is made from transferring the inſtrument to another, ſo as to give him a right of action, either againſt the perſon impoſing the reſtriction, or againſt any of the preceding parties; it may give a bare authority to the indorſee to receive the money for the indorſor; as if to ſay, "Pray pay the "money to ſuch a one for my uſe," or uſe ſuch other expreſſions as neceſſarily import that he does not mean to transfer his intereſt in the bill or note, but merely to give a power of receiving the money. In ſuch a caſe it would be clear that no valuable conſideration had been paid; but the intention of reſtraint muſt appear on the face of the indorſement. 2 Burr. 1227. Dougl. 639.

So, if the payee direct by indorſement, that "the within muſt "be credited to the account of a third perſon." This is not a transfer of the bill to that third perſon, but only an authority to the drawees to give him credit for ſo much; the payee does not mean to make himſelf liable as indorſor, or to enable the other to raiſe money on the bill. Dougl. 640.

And, if in ſuch a caſe the drawee accept the bill, inſtead of cancelling it, and an indorſement be forged and the bill negotiated, the party who ſhall advance money on it muſt ſuſtain the loſs; and if afterwards a friend of the drawer, by miſtake, pay the bill for his honour, the drawer may recover back the money, in an action for money had and received to his uſe; for it was the duty of the party advancing the money on the bill to read the ſpecial indorſement, and he muſt ſuffer for his negligence.

Archer v. Bank of England, Dougl. 637.

Thus, where a bill was drawn by a houſe in *Denmark* on a houſe in *London*, payable to a perſon reſiding in *Denmark*, or his order, and the payee made ſuch a ſpecial indorſement; the drawees accepted and gave notice to the drawers and to the perſon in whoſe favour the indorſement was made, that they had received the bill, and placed it to the account of the latter; the clerk of the acceptors forged an indorſement to himſelf, or order, from the perſon to whoſe account the money was to be credited, and diſcounted it at the bank; the acceptors failed before the day of payment, and a friend of the drawers went to the bank and paid the bill for their honour: the drawers afterwards recovered back the money from the bank, on the ground that this ſpecial indorſement reſtrained the negotiability of the bill, and that the money was paid by miſtake.

An indorſement may be made on a blank note, before the inſertion of any date or ſum of money, in which caſe, the indorſor is liable for any ſum, at any time of payment that may afterwards be inſerted; and it is immaterial whether the perſon taking the note on the credit of the indorſement knew whether it was made before the drawing of the note or not; for in ſuch a caſe the indorſement is equivalent to a letter of credit for any indefinite ſum.

Ruſſel v. Langſtaffe, Dougl. 514.

One *Galley* having had frequent money tranſactions with *Ruſſel* a banker, and having overdrawn his caſh account, *Ruſſel* ſuſpecting his credit, refuſed to advance him any more money, without the addition of the name of ſome indorſor of whom he ſhould approve: on this *Galley* applied to *Langſtaffe*, who indorſed his name on five copperplate checks, made in the form of promiſſory notes, but in blank, that is, without any ſum, date, or time of payment, mentioned in the body of the notes. *Galley* afterwards filled up the blanks with different ſums and dates, and *Ruſſel* diſcounted the notes. *Galley* became a bankrupt, and *Ruſſel* demanded payment of *Langſtaffe*, and, on his refuſal, brought an action, in which the court thought he was entitled to recover, though it appeared that he knew the notes were blank at the time of the indorſement.

Bank of England v. Newman, 1 Ld Raym. 442. 12 Mod. 241.

It is ſaid, that on a transfer by delivery, the perſon making it ceaſes to be a party to the bill or note; that ſuch a transfer is a ſale, and that he who ſells it, does not become a new ſecurity, and is not liable to refund the money if the bill ſhould not be paid. Lambert v. Pack, 1 Salk. 128. 7th reſolution.

Kyd on Bills of Exch. 90.

But this can only be true to its full extent when applied to the caſe of a demand by a ſubſequent party, when one or more have intervened between him and the party againſt whom he makes the demand: as between the immediate parties to the transfer, this diſtinction muſt be taken, that when the bill or note has been given in payment of a precedent debt, or for a valuable conſideration at the time of the transfer, without being diſcounted; then, though the perſon who has given the money for the bill or note cannot recover againſt the perſon who received it, as indorſor, yet he

he may certainly recover in an action for money had and received for his use, as the transferer must be understood to undertake that the bill shall be duly paid. But if the bill or note be *discounted* for the accommodation of the transferer, then the transfer is a sale, and the doctrine here laid down will apply.]

6. Of the Acceptance: *And herein,*

1. *What shall be said a good Acceptance.*

It hath been already observed, that an acceptance, by the custom of merchants, as effectually binds the acceptor, as if he had been the original drawer; and that having once accepted it, he cannot afterwards revoke it; so that herein only we are to see, what act of his will amount to an acceptance. Cro. Jac. 308. Hard. 487.

And herein it is said, that a very small matter will amount to an acceptance; and that any words will be sufficient for that purpose, which shew the party's assent or agreement to pay the bill; as, if, upon the tender thereof to him, he subscribes, *accepted;* or, *accepted by me* A. B.; or, *I accept the bill, and will pay it according to the contents;* these clearly amount to an acceptance. Molloy, 278.

So, if the party underwrites the bill presented such a day, or only the day of the month; this is such an acknowledgment of the bill as amounts to an acceptance. Comb. 401.

So, if the party says, *Leave your bill with me, and I will accept it;* or, *Call for it to-morrow, and it shall be accepted;* these words, according to the custom of merchants, as effectually bind, as if he had actually signed or subscribed his name according to the usual manner. Molloy, 280.

But if a man says, *Leave your bill with me, I will look over my accounts and books between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted;* this does not amount to a complete acceptance; for the mention of his books and accounts shews plainly that he intended only to accept the bill, in case he had effects of the drawer's in his hands. Molloy, 279, 280. said to have been ruled by Hale, Ch. J.

But where the drawer wrote a letter to the person, in whose favour the bill was drawn, to this purport, *That if he would let him write to* Ireland *first, he would pay him;* this was held a good acceptance. *cor.* Raymond, C. J. at *Nisi Prius*, 1 Ld. Raym. 444. Mich. 12 Geo. 1. Wilkinson v. Lutwich, 1 Stra. 648.

So, where a foreign bill was drawn on the defendant, and being returned for want of acceptance, defendant said, That if the bill came back again, he would pay it; this was ruled a good acceptance. Mich. 6 G. 1. Car v. Coleman, in B. R.

It seems clear, that a parol acceptance is sufficient at common law to charge the acceptor; also it hath been adjudged, since the statute 3 & 4 *Ann. c.* 9. *supra*, that an indorsee of an inland bill of exchange may maintain an action against the acceptor, on a parol acceptance, as to the principal sum, though not as to interest and costs; for the act being made to give a further remedy, for interest, damages, and costs against the drawer, cannot be supposed to take any advantage from the payee which he had before; and Mich. 8 Geo. 2. Lumley v. Palmer, in B. R. 2 Stra. 1000. S. C. [See *acc.* Julian v. Shobrooke, 2 Wilf. 9. In Pillans v. Van

Mierop, *per* Lord Mansfield, 3 Burr. 1672. Sproat v. Mathews, 1 Term Rep. 182.

and therefore the true conſtruction of the (*a*) act is, that to charge the drawer with intereſt and coſts, the drawee muſt refuſe to accept it in writing; nevertheleſs, if he accepts the bill by parol, he is liable to the principal ſum in the bill, as he would have been before the act.

(*a*) So, on the ſtatute of 9 and 10 W. 3. c. 17. which gives damages and coſts, in caſe of a proteſt, it hath been held, that that ſtatute did not take away the party's remedy againſt the drawer, if there was no proteſt, as to the principal ſum, but only as to the damages and coſts. 6 Mod. 80, 81. Salk. 131. pl. 17. Brough v. Perkins.

Moor v. Withy, Tr. 10 Geo. 3. B. R. Bull. N. P. 270.

[A drawee of a bill underwrote it thus: "Mr. *Jackſon*, pleaſe "to pay this bill, and charge it to Mr. *Newton*'s account." It was contended, that this was not an acceptance, for that the party did not mean to become the principal debtor. It was only a direction to *Jackſon*, to pay out of a particular fund. But the court held, that the underwriting being a direction to pay the ſum, it was of no importance to what account it was to be placed when paid: that was a tranſaction between the parties themſelves, and this was a ſufficient acceptance.

Powell v. Monnier, 1 Atk. 611.

A bill was ſent to the drawee for acceptance; he kept it for ten days before it became due without any objection; and whilſt it continued in his hands, he entered it in his bill-book, under a particular number, and wrote the number on the bill, and at the bottom the day when it would become due, and then ſent it back, refuſing to accept it: it was proved, that it was the common practice of the drawee to enter and mark all bills in the ſame manner, whether he intended to accept them or not: the court ſeemed to think, that theſe circumſtances alone did not amount to an acceptance.

Smith v. Niſſen, 1 Term Rep. 269.

If a merchant be deſired to accept a bill on the account of another, and to draw on a third, in order to reimburſe himſelf, and in conſequence he draw a bill on that third perſon; the bare act of drawing this bill will not amount to an acceptance of the other, for the party evidently ſhews he meant only to make himſelf liable, in caſe the bill drawn by him ſhould be accepted and paid.

Beawes, 466.

An agreement to accept or honour a bill will, in many caſes, be equivalent to an acceptance, and whether that agreement be merely verbal or in writing is immaterial: if *A.*, having given or intending to give credit to *B.*, write to *C.* to know whether he will accept ſuch bills as ſhall be drawn on him on *B.*'s account, and *C.* return for anſwer that he will accept them; this is equivalent to an acceptance, and a ſubſequent prohibition to draw on him on *B.*'s account will be of no avail, if, in fact, previous to that prohibition, the credit has been given.

Pillans v. Van Mierop, 3 Burr. 1663.

White, a merchant in *Ireland*, deſired to draw on the plaintiffs, *Pillans* and *Roſe*, merchants at *Rotterdam*, for 800 *l.* payable to one *Clifford*, and propoſed to give them credit on a good houſe in *London* for their reimburſement, or any other mode of reimburſement: the plaintiffs, in anſwer, deſired a confirmed credit on a houſe of rank in *London*, as the condition of their accepting the bill: *White* named the houſe of the defendants as that houſe of rank:

rank: the plaintiffs honoured the draft, and paid the money, and then wrote to the defendants, *Van Mierop* and *Hopkins*, merchants in *London*, desiring to know whether they would accept such bills as the plaintiffs should in about a month's time draw on their house for 800 *l.* on the credit of *White*: the defendants agreed to honour the bill; but, before it was drawn, *White* failed, and then the defendants wrote to the plaintiffs, informing them that *White* had stopped payment, and desiring them not to draw, as they could not accept their draft. The plaintiffs however drew, holding the defendants not at liberty to retract their engagement. And so held the court of King's Bench.

The mere answer of a merchant to the drawer that he will "duly honour his bill," is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement: but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer. Beawes, 454. Pierson v. Dunlop, Cowp. 572. 574. 1 Atk. 711. Powell v. Monnier.

And an agreement to accept may be expressed in such terms as to put a third person in a better condition than the drawer. If one man, to give credit to another, make an absolute promise to accept his bill, the drawer, or any other person, may shew such promise on the exchange, to procure credit, and a third person advancing his money on it, has nothing to do with the equitable circumstances which may subsist between the drawer and acceptor.] Mason v. Hunt, Doug. 286. 299.

2. *Whose Acceptance shall bind.*

A bill drawn on two, must regularly have a joint acceptance; but if there are two joint traders, and one accepts a bill drawn on both, for him and partner, this shall bind both, if it concerns the trade; otherwise, if it concerns the acceptor only in a distinct interest and respect. Molloy, 279. 284. Salk. 126. pl. 3. Ld. Raym. 175. Pinkney v. Hall.

If a book-keeper or servant having authority, or usually transacting business of this nature for his master, accept a bill of exchange, this shall bind his master. Molloy, 282. But for this *vide* tit. Master and Servant.

A bill of exchange was drawn by *A.*, agent to the *York-Buildings Company* in *Scotland*, on *B.* their cashier in *London*, in the words following: *To Cashier to the Honourable Governor and Assistants of the* York-Buildings Company, *at their house in* Winchester-street: *Sir, Pray pay to* J. S., *or his order*, 200 l., *and place it to the account of the Company, for value received, as* per *advice from your humble servant.* The letter of advice referred to was directed to the Governor and Company, informing them of the draught made upon *B.* in favour of *J. S.*, but it did not appear that this was the usual method of drawing bills on the Company: *B.* accepted the bill generally; and this bill having been indorsed over, and an action thereon brought by the indorsee against *B.*, the question was, Whether this acceptance should charge him in his own right, or not? And it was held, that it should; this being in every respect a good bill of exchange, and only Mich. 7 Geo. 2. Thomas v. Bishop, In B. R. 2 Stra. 955. S. C. 2 Kel. 136. pl. 16. S. C. 2 Barnard. K. B. 320. S. C.

only the drawer, payee, and acceptor concerned in it, as far as appears on the face of the bill; for though it may be for the advantage of the Company, yet they are not liable to the payment of it; nor is the perſon in whoſe favour it was drawn, or the indorſee, obliged to take notice of ſuch advantage, or of any tranſactions between them and their caſhier, or how they ſtand liable to each; for were it allowed, that an indorſee muſt be put to ſeek a paymaſter that bears no viſible part in the tranſaction, this would be ſuch a prejudice to trade, and paper-credit made ſo blind and hazardous a thing, that no man in his ſenſes would ever be engaged in it: and as to the letter of advice, this was held to be only a private tranſaction between the drawer and a ſtranger; which it is not to be imagined the payee or indorſee could be privy to, and therefore cannot be any prejudice to them; nor a circumſtance fit for the conſideration of a jury, before whom nothing ought to be laid, in caſes of this kind, but what all perſons concerned in the tranſaction may be reaſonably ſuppoſed to know; and thoſe are, all things viſible on the bill, but no circumſtance extrinſick to it.

3. *Whether an Acceptance may be qualified.*

Comb. 452. Petit v. Benſon.

It is held, that an acceptance may be qualified, as thus; I accept this bill, half to be paid in money, and half in bills; and this is good by the cuſtom of merchants; for he, who may refuſe the bill totally, may accept it in part; but he, to whom the bill is due, may refuſe ſuch acceptance, and proteſt it ſo as to charge the drawer. Alſo it is ſaid, that after ſuch acceptance and refuſal of payment, he hath the ſame liberty of charging the drawer, which he had in caſe the bill had been accepted abſolutely, and payment refuſed.

Molloy, 283.

So, the drawee may accept the bill, to pay it at a longer day than that on which it is made payable, and this ſhall bind him; but herein care muſt be taken, that the drawee, by ſuch acceptance or agreement, be not a ſufferer.

Molloy, 285. *per* Pemberton, Ch. J.

A bill was drawn payable the firſt of *January*; the perſon on whom the bill was drawn accepts the bill, to be paid the firſt of *March*; the ſervant brings back the bill; the maſter, perceiving this enlarged acceptance, ſtrikes out the firſt of *March*, and puts in the firſt of *January*, and then ſends the bill to be paid; the acceptor then refuſes; whereupon the perſon, to whom the monies were to be paid, ſtrikes out the firſt of *January*, and puts in the firſt of *March* again. In an action brought on this bill, the queſtion was, Whether theſe alterations did not deſtroy the bill? and ruled it did not.

Carth. 459, 460. Salk. 127. pl. 8. 129. pl. 11. Ld. Raym. 364. Lutw. 233.

If *A.* draw a bill payable ſuch a day, and the drawee accept it ſome time after, he is liable; and in an action againſt him the plaintiff may declare, that *ſecundum tenorem & effectum billæ* he did not pay, *&c.*; for the effect of the bill is the payment, and not the day of payment.

Jackſon v. Pigot. See Comyns, 75. pl. 49. 12 Mod. 212. 410.

[The acceptance may direct the payment to be made at a place different from that mentioned in the bill, as, at the houſe of a banker; in which caſe, if the holder neglect to demand payment within a reaſonable time, and the banker afterwards fail, he muſt ſtand to the loſs. Biſhop v. Chitty, 2 Str. 1195.

But if the banker continue ſolvent, the holder is not bound to prove a demand on the banker in an action againſt the acceptor. Smith v. Delafontaine, B. R. Trin. 25 Geo. 3. Bayley App. No. 5.

An acceptance may alſo be "to pay when certain goods conſigned to the acceptor, and for which the bill is drawn, ſhall be ſold;" for it would affect trade if factors were not allowed to uſe this caution when bills are drawn on them, before they have an opportunity to diſpoſe of the goods. Smith v. Abbot, 2 Str. 1152.

So, an acceptance "on account of the ſhip *Thetis* when in caſh for the ſaid veſſel's cargo" is ſufficient to bind the acceptor. Julian v. Shobrooke, 2 Wilſ. 9.

On the ſame principle, an acceptance "to pay as remitted from the place where the perſon on whoſe account the acceptance is made reſides," ſeems binding after the remittance made. Banbury v. Liſſet, 2 Str. 1212.

But what ſhall be conſidered as an abſolute or conditional acceptance is a queſtion of law to be determined by the court, and is not to be left to the jury. 1 Term Rep. 182.

A bill was drawn in *New England* for a ſum of money advanced there, for the repairs of a ſhip, of which *Lutwidge*, the drawee, reſiding at *Whitehaven*, was the freighter. *Wilkinſon*, the holder of the bill, applied to a merchant in *London*, to ſend the bill to *Lutwidge* for acceptance: the merchant ſent it incloſed to the drawee, who by letter acknowledged the receipt, and wrote thus: "The bill which you ſent me I will pay, in caſe the owners of the *Queen Ann* do not; and they living in *Dublin*, I muſt firſt apply to them; I hope to have their anſwer in a week or ten days: I do not expect they will pay it, but I judge it proper to take their advice before I do, with which I requeſt you will acquaint Mr. *Wilkinſon*, and that he may reſt ſatisfied of the payment." In another letter he wrote, "I have not had an opportunity of ſending the bill to *Ireland*, but will take the firſt opportunity, and then will remit to the gentlemen concerned, according to my promiſe." The bill not being paid, an action was brought againſt *Lutwidge*, as acceptor, in which he inſiſted that theſe letters did not amount to an abſolute acceptance, but were only conditional, to pay in caſe the owners of the *Queen Ann* did not; and that his promiſe to procure payment from them was in favour of the plaintiff; but the Chief Juſtice thought it was rather in favour of himſelf; that the letters were a complete acceptance, and amounted to this; that he wiſhed the holder of the bill to give him time to write to *Ireland*, but aſſured him that at all events the money ſhould be ſecured, whether the owners of the *Queen Ann* paid it or not. Wilkinſon v. Lutwidge, 1 Str. 648. Raymond.

A bill was drawn on *Mathews*, payable to one *Lenox*, or order, and by indorſement came into the hands of *Sproat*: *Sproat*'s clerk preſented the bill for acceptance to *Mathews*, who lived in *London*, Sproat v. Mathews, 1 Term Rep. 182.

don, and who told him, "that the drawer had conſigned a ſhip "and cargo to him and another perſon in *Briſtol*; but as he could "not tell whether the ſhip would arrive at *London* or *Briſtol*, he "could not accept at that time:" the clerk, by the conſent of *Mathews*, left the bill, and afterwards called, in company with his maſter, to know whether *Mathews* would accept the bill or not; who, on being preſſed, declared "the bill was a good one, and "would be paid, even if the ſhip were loſt."

The court held that this was only a conditional, not an abſolute acceptance. *Mathews* had three events in contemplation; the arrival of the ſhip at *Briſtol*, her arrival at *London*, or her being loſt: if the ſhip arrived in *London*, the cargo being conſigned to him, he would have effects to reimburſe himſelf; if ſhe were loſt, he had the policy of inſurance, by which he could indemnify himſelf by recovering againſt the underwriters; but if ſhe arrived in *Briſtol*, the cargo was conſigned to another, he would have no effects: in either of the former events he meant to accept the bill; in the latter he did not.

Vide Dougl. 286.

If the acceptance be in writing, and the drawee intend that it ſhould be only conditional, he muſt be careful to expreſs the condition in writing as well as the acceptance; for if the acceptance ſhould, on the face of it, appear to be abſolute, he cannot take advantage of any verbal condition annexed to it, if the bill ſhould be negotiated and come to the hands of a perſon unacquainted with the condition, and even againſt the perſon to whom the verbal condition was expreſſed, the burden of proof will be on the acceptor.

A conditional acceptance, when the conditions on which it depends are performed, becomes abſolute.

Pierſon v. Dunlop, Cowp. 571.

Nichol was the captain of a ſhip of which *Pierſon* was the owner. The ſhip was freighted with naval ſtores by *M'Lintot*, who, being unable to diſcharge the freight, drew a bill on *Dunlop* and Co. payable fifteen days after ſight to the order of *Nichol*, and gave *Nichol* a certificate or navy bill, aſſigned to *Dunlop* and Co. as a ſecurity till the bill of exchange ſhould be accepted: *Nichol* indorſed the bill, and ſent it to *Pierſon*, together with a letter from *M'Lintot* to *Dunlop* and Co. in which was incloſed the certificate which *M'Lintot* deſired them to tender at the Navy-office, and at the ſame time he adviſed them, that he had drawn on them as above. On the 2d of *October* 1776, *Pierſon* ſent this letter, with the certificate incloſed, and alſo the bill of exchange, to *Dunlop* and Co.; when the bill was demanded again the next day, the defendants delivered it up, ſaying, "it would not be accepted "till the navy bill was paid;" but they refuſed to deliver the navy bill, ſaying, they would receive the money themſelves. It was held, that this was a conditional acceptance, which, on the receipt of the money, became abſolute. *Nichol*, the captain, had a lien on the naval ſtores for his freight; the certificate was a ſecurity for that freight; it was given into his poſſeſſion as a pledge for the money till the bill ſhould be paid. It was not ſent to *Dunlop* and Co. by the poſt in the uſual courſe, but was incloſed

to *Pierſon* as his ſecurity. He was therefore not bound to part with it till the bill was accepted. *Dunlop* and Co. by detaining it, and ſaying that the bill would not be accepted till the navy bill ſhould be paid, undertook, on that event, to accept and pay the bill of exchange.

But if the conditions, on which the agreement to accept a bill is made, be not complied with, that agreement will be diſcharged.

As, if a merchant undertake to accept bills to a certain amount, on condition that a cargo of an equal value be conſigned to him, and an order given for inſurance; if the cargo conſigned do not equal the value, he is not bound to accept. Maſon v. Hunt, Dougl. 297.

When a bill is drawn for the account of a third perſon, and is accepted according to its tenor for his account, and he fails without making proviſion for its payment, the acceptor muſt diſcharge the bill, and can have no redreſs againſt the drawer. Beawes, 456.

But if the drawee do not chooſe to accept on the account of him for whoſe account he is adviſed the bill is drawn, he may accept for the account and honour of the drawer. *Id. ibid.*

Or, if a bill, made payable to order, be indorſed by a ſubſtantial man before acceptance be demanded, the drawee, if he have any doubt about the drawer, or of him on whoſe account it is drawn, may accept it for the honour of the indorſor; but in this caſe he muſt firſt have a formal proteſt made for non-acceptance, and ſhould ſend it without delay to the indorſor for whoſe honour he has accepted it. *Id. ibid.*

Such acceptances as theſe are called acceptances *ſupra* proteſt; and have this effect with reſpect to the ſecurity of the acceptor, that they give him a right to call on the party for whoſe honour he accepts; and in the caſe of an acceptance for the honour of the indorſor, on him and all the parties before him; whereas a ſimple acceptance, according to the tenor of the bill, gives him a remedy only againſt the drawer, or againſt him on whoſe account the bill is drawn, as the caſe may be. *Id.* 458.

The method of accepting *ſupra* proteſt is this; the acceptor muſt perſonally appear with witneſſes before a notary, (whether the ſame who proteſted the bill or not, is of no importance,) and declare that he accepts ſuch proteſted bill in honour of the drawer or indorſor, *&c.* and that he will ſatisfy the ſame at the appointed time; and then he muſt ſubſcribe the bill thus, "Accepted *ſupra* "proteſt, in honour of *T. B.*" &c.

But this acceptance *ſupra* proteſt may be ſo worded, that though it be intended for the honour of the drawer, yet it may equally bind the indorſor, and in ſuch a caſe it muſt be ſent to the latter. *Id.* 457.

If the perſon on whom the bill is drawn refuſe to accept it, any *third* perſon after proteſt for non-acceptance may accept *ſupra* proteſt for the honour of the bill or of the drawer, or of any particular indorſor: if he accept for the honour of the bill or of the drawer, he is bound to all the indorſees as well as to the holder: *Id. ibid.*

if

if in honour of a particular indorſor, then to all ſubſequent indorſees.

Beawes, 457, 458. Any one accepting a bill *ſupra* proteſt, though without the orders or knowledge of the perſon for whoſe honour he accepted it, has a remedy againſt that perſon, who is bound to ſatisfy him as if he had acted entirely by his directions, for his commiſſion, poſtage, and other charges.

Id. 457. If a bill be proteſted for non-acceptance, and after it has been accepted *ſupra* proteſt by a third perſon, the drawee, on receiving freſh advice and orders, determine to accept and pay it, the acceptor *ſupra* proteſt may permit him, though the holder cannot be obliged to free him from his acceptance; and if the two acceptors agree, the drawee muſt pay the other his commiſſion, charges, &c. as it was by his acceptance that the bill was prevented from being returned proteſted.

Id. 458. If the acceptor of a bill for the honour of the drawer or indorſor, receive his approbation of the acceptance, then he may ſafely pay the bill without any proteſt for non-payment. But if the perſon, for whoſe honour the bill was accepted, either return no anſwer to the advice, or expreſs a diſapprobation of the acceptance, then the acceptor *ſupra* proteſt muſt cauſe a formal proteſt to be drawn up for non-payment againſt him to whom the bill was directed, and on his continuing to refuſe payment, muſt pay it for him.

Id. ibid. When a bill is proteſted for non-payment, any man may pay it under proteſt, for the drawer's or indorſor's honour, even he who made or he who ſuffered the proteſt; but he muſt previouſly declare before a notary, for whoſe honour he diſcharges it; and of this the notary muſt give an account to the parties concerned, either jointly with the proteſt, or in a ſeparate inſtrument.

Beawes, 459. He who diſcharges a bill proteſted for non-payment, in honour of the drawer, has his remedy againſt the latter, but not againſt the indorſors; but he who diſcharges a bill proteſted for non-payment, in honour of an indorſor, has his remedy not only againſt that indorſor, but againſt all that were before him, including the drawer; but he has no right againſt ſubſequent indorſors.

Id. 458. A man, after having given a ſimple acceptance to a bill, cannot ſatisfy it under proteſt, in honour of an indorſor, becauſe as acceptor, he has already bound himſelf to that indorſor; but a drawee, not having yet accepted the bill, may diſcharge it for the honour of the indorſor or drawee, as if he were a third perſon unconcerned.

Id. ibid. Yet it is ſaid that the poſſeſſor of a bill, proteſted for non-payment, is not bound to admit of its diſcharge from a third perſon under proteſt, either in honour of the drawee or of any indorſor, unleſs he declare and prove that the honour of that bill was particularly recommended to him: and if the proteſted bill be indorſed by the poſſeſſor's correſpondent, and were remitted by him, then, the poſſeſſor ought not to admit of any payment in honour

nour of the indorſements, but under the expreſs condition, that the payer ſhall have no redreſs againſt the ſaid correſpondent.

4. Of the Effect of an Acceptance.

The effect of the acceptance is to give credit to the bill, and to render the acceptor liable according to the tenor of his acceptance; the very act of accepting implies an acknowledgment that he has effects of the drawer in his hands. *Id.* 455.

If therefore the drawee accept a bill generally, and by reaſon of his non-payment, the drawer is obliged to pay it, the latter, as drawer, may maintain an action againſt him, not only for the principal ſum, but, in caſe of a proteſt, for damages, intereſt, and coſts. Symonds v. Parminter, 1 Wilſ. 185.

If indeed the drawee have no effects of the drawer in his hands, and notwithſtanding accept the bill, he has his remedy, if he pay it, againſt the drawer; but with regard to every body beſides, the acceptor is conſidered as the original debtor, and to be entitled to have recourſe againſt him, it is not neceſſary for the holder to ſhew notice given to him of non-payment by any other perſon. Dougl. 249.

When a bill is once accepted abſolutely, it cannot in any caſe be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next moment, even if the failure was before the acceptance. Mar. 17. Beawes, 454.

But the acceptor may be diſcharged by an expreſs declaration of the holder, or by ſomething equivalent to ſuch declaration.

Black held, as indorſee, a bill drawn by one *Dallas*, and accepted by *Peele*. *Black* arreſted *Peele*, but finding that no conſideration had been given for the acceptance, his attorney took ſecurity from *Dallas*, and ſent word to *Peele*, "that he had ſettled "with *Dallas*, and he needed not to trouble himſelf any further." *Dallas* afterwards became bankrupt, and then *Black* demanded payment of *Peele*. The cauſe was tried firſt before Lord *Manſfield*, and afterwards by Chief Juſtice *De Grey*, who both held, that the acceptor was diſcharged. Black v. Peele, cited Dougl. 49.

In another caſe a book of the plaintiff's was produced in which the bill was entered, and over againſt it this memorial, "Mr. "*Pulteney*'s acceptance annulled." The jury, however, gave a verdict for the plaintiff; but the court of Exchequer granted a new trial, on the ground that this was an implied diſcharge; and on the ſecond trial before Chief Baron *Skinner*, one *Alexander*, who had indorſed the bill to the plaintiff, was produced as a witneſs on the part of the defendant, and ſwore that *Walpole* had poſitively agreed to conſider *Pulteney*'s acceptance as at an end; on which the jury found for the defendant. *Walpole* had kept the bill from 1772 to 1775 without calling on *Pulteney*. Walpole v. Pulteney, cited Dougl. 249.

But no circumſtances of indulgence ſhewn to the acceptor by the holder, nor any attempt by him to recover of the drawer, will amount to an expreſs declaration of diſcharge.

Dunſter

Dingwall v. Dunſter, Dougl. 247.

Dunſter accepted a bill merely to lend his credit, and to accommodate *Wheate*, the drawer. *Fitzgerald*, the payee, indorſed it to *Dingwall*, and delivered it to him in payment for jewels. After it became due, the plaintiff, underſtanding that the acceptor never had any conſideration for it, and that *Wheate* was the real debtor, wrote to one *Ready*, *Wheate*'s attorney, on the 6th of *February*, and on the 4th of *November* 1775, preſſing him for payment. *Dunſter*, on the 13th of *February* 1775, wrote a letter to *Dingwall*, thanking him in ſtrong terms for not proceeding againſt *him*, but mentioning in the ſame letter, that he had been informed by a perſon who had been ſent from him to *Dingwall* on the buſineſs, that *Wheate* had taken up the bill, and given another to *Dingwall*'s ſatisfaction. It did not appear that *Dingwall* took any notice of that letter. But he for ſome time received intereſt on the bill from *Wheate*, and alſo the principal due by another bill, made at the ſame time, and drawn and accepted by the ſame parties, and under like circumſtances. The plaintiff ſuffered ſeveral years to elapſe without calling on *Dunſter*, or treating him as his debtor. The queſtion was, Whether the plaintiff, by his conduct, had diſcharged the acceptor? and the court unanimouſly held, that he had done nothing from which it could be concluded he meant to abandon his claim againſt him. He had done right in applying to *Wheate* for payment, as he was appriſed that he was in fact the debtor, and *Dunſter* was ſo far ſenſible of his kindneſs, as to thank him for his indulgence in a letter; had the ſuggeſtion in that letter been true, relative to the plaintiff's having delivered up the bill to *Wheate*, that might have made a material difference: but the plaintiff having returned no anſwer to the letter, and the fact not having been attempted to be proved at the trial, it was probable the aſſertion was not warranted. This caſe had no reſemblance to the two preceding caſes which had been cited in argument.

Neither will any length of time ſhort of the ſtatute of limitations, nor the receipt of part of the money from the drawer or indorſor, nor a promiſe by indorſement on the bill by the drawer to pay the reſidue, diſcharge the holder's remedy againſt the acceptor.

Ellis v. Galindo, Dougl. 250. in the notes.

A bill was drawn by one brother and accepted by another. When it became due, the payee received of the drawer 3*l.* 15*s.* 4*d.* and at the ſame time the following indorſement was made on the bill: "Received on account of this bill 3*l.* 15*s.* 4*d.*:" "Balance "remaining due 26*l.* 4*s.* 8*d.* I promiſe to pay Mr. *Thomas Ellis*, "within three months from the date of this." Signed by *James Galindo*, who was the drawer. The balance was never paid, and at the diſtance of three years an action was brought againſt the acceptor; the cauſe was tried before Lord *Mansfield*, who thought the acceptor was diſcharged, and nonſuited the plaintiff. The ground of his Lordſhip's opinion probably was, that the indorſement was as a new bill accepted by the plaintiff in payment of the old; and on an application for a new trial, his Lordſhip ſaid he did not think that this caſe at all interfered with the determination

ation in *Dingwall* and *Dunſter*. The plaintiff's counſel contended that the indorſement was made to prevent an imputation of neglect, becauſe delay in coming againſt an acceptor may diſcharge a drawer or indorſor. The court all ſeemed to think that this was a queſtion of intention, and ought therefore to have been left to the jury, but they refuſed a new trial on account of the ſmallneſs of the ſum.

But, when the holder of a bill receives part of the money from the drawer, he cannot recover more than the reſidue from the acceptor; and where the drawer pays the whole, the acceptor is completely diſcharged. Bacon v. Searles, 1 H. Bl. Rep. C. B. 88.

By the law of *Leghorn*, if a bill had been accepted and the drawer had failed, and the acceptor had not ſufficient effects of the drawer in his hands at the time of acceptance, the acceptance became void. This happening to be the caſe of one *Burrowes*, he inſtituted a ſuit at *Leghorn*, to diſcharge himſelf of his acceptance, which was accordingly vacated by a ſentence in the court there. He afterwards returned to *England*, and was ſued here on his acceptance; on which he filed a bill in Chancery for an injunction and relief. Lord Chancellour *King* was clearly of opinion, that this cauſe was to be determined according to the laws of the place where the bill was negotiated; and the acceptance having been vacated by a competent juriſdiction, that ſentence was concluſive, and bound the court here. Burrowes v. Jemino, 2 Str. 733.

If the drawee offer a conditional acceptance, and the holder, inſtead of acquieſcing, do ſomething which ſhews that he does not admit ſuch acceptance, the drawee is not bound, even if the event afterwards happen on which the acceptance was to depend.

A bill payable to one *Lenox*, or order, forty days after ſight, was drawn on the defendant; *Lenox* indorſed it to the plaintiff: *Allen*, the plaintiff's clerk, preſented the bill to the defendant, who lived in *London*, for acceptance: the defendant told him that the drawer had conſigned a ſhip and cargo to him and another perſon at *Briſtol*, but as he could not then tell whether the ſhip would arrive at *London* or *Briſtol*, he could not accept at that time: on which *Allen* ſaid that he would leave the bill upon this condition, that in the event of the defendant's not accepting it as from the day when it was preſented, he ſhould be at liberty to note it for non-acceptance as from that time: to this the defendant aſſented, and the bill was accordingly left at his houſe till a future day, when *Allen* called again, in company with the plaintiff, to know whether the defendant would accept the bill or not, who, on being preſſed to accept it, ſaid that the bill was a good one, and would be paid, even if the ſhip were loſt. *Allen* immediately on this carried the bill to a notary publick, and had it noted for non-acceptance from the time when it was firſt left with the defendant. The ſhip afterwards arrived ſafe at the port of *London*, and the defendant diſpoſed of the cargo. This being a conditional acceptance, the conduct of the plaintiff was held to have been a Sproat v. Mathews, 1 Term Rep. 182.

waiver of it, and to have precluded him from holding the defendant to his engagement.

Though an agreement to accept, on condition of a certain fund being conſigned to the acceptor for the diſcharge of the bill, may amount to an acceptance on the performance of the conditions, yet, if the indorſee take the fund out of the hands of the drawee, he diſcharges him from his engagement.

Maſon v. Hunt, Dougl. 284. 297.

Rowland Hunt, in *Dominica*, agreed with a houſe there, that his partner, *Thomas Hunt*, in *London*, ſhould, on a cargo of tobacco being conſigned to him, with the bills of lading, and an order for inſurance, accept ſuch bills as that houſe ſhould draw on him, at the rate of 80 *l. per* hhd., from ninety days to ſix months ſight: inſurance for the ſum of 3600 *l.* was ordered on forty hhds. of tobacco, which *Thomas Hunt* procured for a premium of 303 *l.* He afterwards received a letter, adviſing him of ſix bills of exchange being drawn on him for 3200 *l.*, in conſequence of *Rowland Hunt*'s agreement, payable to one of the partners of the houſe, on account of forty hhds. of tobacco, and indorſed by him to *Maſon*. The bills arrived, and were preſented for acceptance. *Thomas Hunt* refuſed to accept them, on an apprehenſion that the tobacco was not worth the money at which it was valued. After a negotiation of ſome days, *Maſon* took the bill of lading for the forty hhds. and the policy of inſurance out of the hands of *Thomas Hunt*. The tobacco afterwards arriving, was received and ſold by the plaintiff *Maſon*, and produced only 1400 *l.* The occaſion of this difference between the real produce and the valued price did not appear. Under the direction of Lord *Mansfield*, a verdict was given for the defendant; and on an application for a new trial, his Lordſhip expreſſed himſelf thus:—An agreement to accept, may in many inſtances amount to an acceptance: but an agreement is ſtill but an agreement, and if it be conditional, and a third perſon, knowing of the conditions annexed to the agreement, take the bill, he takes it ſubject to ſuch agreement. Here there were many things ſpecified as the conditions of the acceptance—the number of hhds. to be delivered—of a certain value rated by the hhd.—the inſurance—the bills of lading—the conſignment. On the face of the agreement, I thought at the trial, and ſtill incline to think, that the meaning of the parties was, that tobacco ſhould be conſigned which ſhould be worth 80 *l. per* hhd.: this fell immenſely ſhort of that ſum. It is plain the *Hunts* never *meant* to be in advance, and I think ſo great a difference in the value ſuch a fraud as to entitle the defendants to relief againſt the agreement. But as to this the reſt of the court have doubted, chiefly becauſe there is no evidence to ſhew how the decreaſe in the value aroſe; whether from the inferiority of the quality, or the fluctuation in the market. But the reſt of the court are extremely clear that the ſubſequent conduct of the plaintiff makes an end of the whole, and I think the reaſons are unanſwerable. As to that part of the caſe, it ſtands thus: the *Hunts* ſay, "We are not "bound: this is an impoſition:—the tobacco is of inferior value.

"The

" The letter repreſents it as worth 80 *l.*, the inſurance makes it " 90 *l. per* hhd., and it turns out not to be worth 40 *l.*" If *Maſon* had meant to ſay, " You are liable, and ſhall pay the bills," what would his conduct have been?—He would have left the policy of inſurance and the bills of lading in their hands, and ſued them upon the acceptance. The temptation to accept was the commiſſion on the conſignment, and they were to have the ſecurity of the goods and the inſurance. But the plaintiff undoes all this, and ſays, " Then I will take all from you, ſecurity, commiſſion," *&c.* This was ſaying, " I will ſtand in your place, but not ſo as to be " anſwerable for more than the produce of the tobacco." It is impoſſible the defendants could mean to accept, without any benefit or ſecurity. We are all clear, that this made an end of the agreement.

Though the receipt of part from the drawer or indorſor be no diſcharge to the acceptor for more than the part received, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a diſcharge to the drawer and indorſors in the one caſe, and to the indorſors in the other, unleſs due notice be given of the non-payment of the reſidue; for the receipt of part from the maker or acceptor without notice, is conſtrued to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional, to pay in default of the original debtor, on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker will not diſcharge the drawer or indorſors; for it is for their advantage that as much ſhould be received from others as may be.

1 Ld. Raym. 744. Kellock v. Robinſon, 2 Str. 745. cited 1 Wilſ. 48.

Bull. N. P. 271. cites Johnſon v. Kenyon, C. B. Hil. 5 Geo. 3.

The receipt of part from an indorſor, is no diſcharge of the drawer or preceding indorſor, for more than the part received.

Vide Johnſon v. Kenyon, 2 Wilſ. 262.

One *Scraiſton* drew a note, by which he promiſed to pay to one *Pitfield*, or order, the ſum of 200 *l.*, and indorſed it to *Hull*. *Hull* brought an action againſt *Scraiſton*, in which he held him to ſpecial bail; *Hull* recovered interlocutory judgment againſt *Scraiſton*, on which his bail paid the debt and coſts, amounting to 220 *l.* 15 *s.* *Hull* executed an inſtrument between himſelf on the one part, and the bail on the other, reciting the note, and that he had recovered interlocutory judgment on it againſt *Scraiſton*: that the bail had purchaſed the note, and paid the debt and coſts, in conſideration of which *Hull* aſſigned over to them the note and the interlocutory judgment, with a power of attorney to make uſe of *Hull*'s name to ſue the indorſor, and covenanted in the common manner, not to do any act to hinder the bail from recovering the money on the note. An action was afterwards brought in *Hull*'s name againſt *Pitfield* the indorſor, on which theſe circumſtances were ſtated, and the court held the indorſor was diſcharged by the payment by the bail in the former action, as much as if the drawer had paid the money himſelf.]

Hull v. Pitfield, 1 Wilſ. 46.

7. Of the Proteſt: *And herein,*

1. *Of the Neceſſity and Validity of the Proteſt.*

[A proteſt is made for non-acceptance, non-payment, and alſo for better ſecurity. This laſt is uſual, when a merchant, who has accepted a bill, happens to become inſolvent, or is publickly reported to have failed in his credit, or abſents himſelf from change before the bill he has accepted has become due, or when the holder has any reaſon to ſuppoſe it will not be paid; in ſuch caſes he may cauſe a notary to demand better ſecurity, and on that being refuſed, make proteſt for want of it; which proteſt muſt, as in other caſes, be ſent away by the next poſt, that the remitter or drawer may take the proper means to procure better ſecurity.

Mar. 27. 1 Ld. Raym. 743.

In making a proteſt there are three things to be done; the noting, demanding, and drawing up the proteſt: but the noting is unknown in the law, as diſtinguiſhed from the proteſt; it is merely a preliminary ſtep, and has grown into practice only in modern times. The party making the demand muſt have authority to receive the money, and in caſe that be refuſed, the drawing up of the proteſt is mere matter of form, the demand being the material part.]

Leftley v. Mills, 4 Term Rep. 175. The noting is a minute made by the officer upon the bill itſelf, in conſequence of the drawee's refuſing to accept or pay, as the caſe may be, conſiſting of his (the officer's) initials, the month, the day, and the year, with his charges for minuting. The proteſt itſelf is a ſolemn declaration afterwards drawn up by the officer, that the bill has been preſented for acceptance or payment, which was refuſed, and that the holder intends to recover all damages, which he, or the deliverer of the money to the drawer, may ſuſtain on account of the non-acceptance.

A proteſt does not raiſe any debt, but only ſerves to give formal notice, that the bill is not accepted, or accepted, and not paid; and this by the common law was, and is ſtill neceſſary on every foreign bill, before the drawer can be charged; but it was not required on any inland bill, before the ſtatute of 9 & 10 *W.* 3. *c.* 17. nor does the want of it ſince that ſtatute deſtroy the remedy, which the party had before againſt the drawer, but only deprives him of intereſt and coſts againſt the drawer, unleſs there be notice by proteſt, as that ſtatute preſcribes.

Molloy, 279. 6 Mod. 80. Salk. 131. pl. 17. 2 Ld. Raym. 692.

He, to whom the bill is payable, muſt regularly reſort to the drawee, and deſire him to accept the bill, before there can be a proteſt; but if he be dead, or cannot be (*a*) found, theſe are good cauſes for proteſting the bill. Alſo, if after acceptance the drawee die, there is to be a demand of his executors or adminiſtrators, and in default of payment, a proteſt; and in caſe the money become due before an executor or adminiſtrator can be appointed, yet this delay is ſufficient cauſe to proteſt the bill.

Molloy, 285. (*a*) Alleging in pleading, that the party, on whom the bill was drawn, *non fuit inventus*, is ſufficient to entitle the party to a proteſt, without ſhewing that inquiry was made after him; for this ſhall be intended, being according to the cuſtom of merchants, and is therefore the uſual form of pleading in thoſe caſes. Carth. 510.

But if he, to whom the money is to be paid, dies, there can be no proteſt before probate of his will or adminiſtration granted; for none but his executors or adminiſtrators can give a legal diſcharge or acquittance for the money, and conſequently none others can ſue for or demand the ſame; and though ſecurity be offered to indemnify

Molloy, 285.

indemnify the drawee againſt the executors or adminiſtrators, yet is he not obliged to accept thereof, being a matter left entirely to his own diſcretion, to judge and determine on the ſufficiency of ſuch ſecurity; and in this caſe it is ſaid, that if a publick notary proteſt the bill, an action on the caſe lies againſt him.

[Where the drawee cannot be found at the place mentioned in the bill, or has abſconded, proteſt is to be made for non-acceptance in the ſame manner as if acceptance had been refuſed on preſentment. Mal. 265.

So alſo, if the drawee offer an acceptance differing from the the tenor of the bill, and the holder be inclined to admit it without giving up his claim on the other parties, he muſt proteſt it for that cauſe; as, if the drawee offer an acceptance for part, the holder may permit him to accept in that way; but then he muſt cauſe it to be proteſted for non-acceptance of the whole, and ſend the proteſt to his correſpondent, that he may endeavour to procure ſecurity for the remaining ſum. When the bill becomes due, the holder muſt preſent it for payment, and may receive the ſum for which it was accepted, and write a receipt for ſo much on the bill; but he muſt proteſt it for non-payment of the reſt, and ſend back the proteſt with the bill.] Mar. 17, 18.

If a bill be left with a merchant to accept, which is (*a*) loſt or miſlaid, he to whom it is payable is to requeſt the merchant to give him a note for the payment, according to the time limited in the bill; otherwiſe there muſt be two proteſts, the one for non-acceptance, and the other for non-payment; and though ſuch note be given, yet, if the merchant happens to fail, there muſt be a proteſt for the non-payment, in order to charge the drawer. Molloy, 281.

(*a*) Where a bill is caſually loſt, and no new one can be had, and the party on whom it is drawn does not inſiſt on having the original bill, but refuſes payment for another reaſon, a proteſt made on a copy is ſufficient. Show. 164.

The proteſt is uſually made by ſome publick notary, and ſuch proteſt is *primâ facie* good evidence that the bill was not accepted, or, if accepted, that it was not paid, and ſufficient to put the proof on the other ſide. Molloy, 281. Skin. 272. pl. 1.

And as, by the cuſtom of merchants, publick notaries uſually proteſt bills, it hath been held, that pleading *proteſtavit ſeu proteſtari cauſavit* is ſufficient; and that the party may plead *proteſtavit*, and give in evidence that the publick notary did it. Comb. 153.

[The demand of payment of a *foreign* bill muſt be made by the notary publick himſelf, and not by his clerk; and even in the caſe of an *inland* bill, it is doubtful, whether the demand, as the foundation of the proteſt made in conſequence of the ſtatute of *W.* 3. above mentioned, can be made by the notary's clerk, or by any other perſon, than the notary himſelf.] Leſtley v. Mills, 4 Term Rep. 170.

2. *At what Time to be made; and therein of giving Notice to the Drawer, of the Drawee's Refuſal, ſo as to entitle the Party to Principal, Intereſt, and Coſts.*

A proteſt on a foreign bill of exchange is abſolutely neceſſary to entitle the party to recover againſt the drawer, not only intereſt Molloy, lib. 2. c. 10. § 15. 17.

and 31. Vent. 45. Skin. 411.

and coſts, but likewiſe the principal ſum; and for this purpoſe the bill muſt be preſented in a reaſonable time; and in caſe of refuſal of acceptance, or in caſe the drawee cannot be found, it muſt be proteſted in reaſonable time, and notice of ſuch proteſt, as alſo notice of a proteſt after acceptance and non-payment given to the drawer in a reaſonable time; for though the drawer is bound to the party to whom the bill is payable, till payment be actually made, yet it is with this condition and proviſo, ſays *Molloy*, that proteſt be made in due time, and a lawful and ingenuous diligence uſed for obtaining payment of the money. And the reaſon hereof is, that the drawer might have had effects, or other means of his, upon whom he drew, to reimburſe himſelf the bill, which ſince, for want of timely notice, he hath remitted or loſt, it were unreaſonable he ſhould ſuffer through the holder's neglect. But as to the exact time herein, the law hath not determined it, but the ſame is to be left to a jury, who are to govern themſelves according to the cuſtoms of merchants in theſe caſes, and the uſages of particular (*a*) countries.

(*a*) It is ſaid, that in France, if a bill be not preſented in two months, the drawer is not anſwerable, and in Holland in ſo many poſts. Show. 165.

6 Mod. 80, 81. Salk. 131. pl. 17. 2 Ld. Raym. 992. Comb. 384. Carth. 510. Show. 318.

As to inland bills, though a proteſt was not neceſſary by the common law, in order to ſue the drawer, and is only now neceſſary by the ſtatute 9 & 10 *W.* 3. *c.* 17. and 3 & 4 *Ann. c.* 9. *ut ſupra*, to entitle the party to intereſt and coſts; yet convenient notice muſt be given by the party, to whom the bill is payable, to the drawer, of the drawee's refuſal of payment, and if any damage accrue to the drawer for want of ſuch notice, it muſt be borne by the perſon to whom the bill is payable. But this muſt alſo be left to a jury (*b*), who are to determine herein, according to the circumſtances and the cuſtom of merchants.

[(*b*) The practice certainly was formerly, as here ſtated, to leave the reaſonableneſs of the time in which payment was to be demanded to the jury. But as this was productive of endleſs uncertainty, it is now conſidered as a queſtion of law ariſing out of the fact. Metcalfe v. Hall, B. R. Trin. 22 Geo. 3. Bull. N. P. 275. Appleton v. Sweetapple, B. R. Mich. 23 Geo. 3. Bayley on Bills, 73. Tindal v. Browne, 1 Term Rep. 167. The periods of time within which bills are to be preſented, are, however, ſtill unfixed. The only rule that can be applied is, that due diligence muſt be uſed. Due diligence is the only thing to be looked at, whether the bill be foreign or an inland one, whether it be payable at ſight, or ſo many days after, or in any other manner.]

Salk. 127. pl. 7. Allen v. Dockwra, at Guildhall.

A. drew a bill on *B.*, payable in three days, *B.* broke; the perſon, to whom the bill was payable, kept it by him four years, and then brought *aſſumpſit* againſt the drawer; & *per Treby*, Ch. J. When one draws a bill of exchange, he ſubjects himſelf to the payment, if the perſon on whom it was drawn refuſes either to accept or pay; yet that is with this limitation, that if the bill be not paid in convenient time, the perſon to whom it is payable ſhall give the drawer notice thereof; for otherwiſe the law will imply the bill paid, becauſe there is a truſt between the parties; and it would be prejudicial to commerce, if a bill might riſe up to charge the drawer at any diſtance of time, when in the mean time all reckonings and accounts are adjuſted between the drawer and the drawee.

Kyd on Bills, 117.

[Where the payment of a bill is limited at a certain time after ſight, it is evident that the holder muſt preſent it for acceptance, otherwiſe the time of payment would never come: it does not appear,

appear, however, that any preciſe time, within which this preſentment muſt be made, has in any caſe been aſcertained: but it muſt be done as ſoon as, under all the circumſtances of the caſe, it conveniently can be.

Whether the holder of a bill payable at a certain time after the date, be bound to preſent it for acceptance immediately, or, whether he may wait till it become due, and then preſent it for payment, is a queſtion which ſeems never to have had a direct judicial determination: in practice however it frequently happens that a bill is negotiated and transferred through many hands without acceptance, and not preſented to the drawee till the time of payment, and no objection ever made on that account. Mar. 12. *Vide* 5 Burr. 2671. 1 Term Rep. 713.

Where indeed a bill is remitted to a factor or agent, to procure acceptance, for the benefit of his principal, it is the duty of the factor to uſe all diligence to have it accepted, and to give advice to his principal of the event, that he may take the proper ſteps in caſe of non-acceptance; and the factor may be liable to make good any loſs to his principal ariſing from his negligence: but this does not affect the bill itſelf, nor the right of the principal on it. Mar. 12, 13. Beawes, 454.

If, however, the holder in fact preſent the bill for acceptance, and that be refuſed, he is bound to give regular notice to all the preceding parties to whom he intends to reſort for non-payment; to the drawer, that he may know how to regulate his conduct with reſpect to the drawee, and make other proviſion for the payment of the bill; and to the indorſors, that they may ſeverally have their remedy in time againſt the parties on whom they have a right to call: and if, on account of his delay, any loſs accrue by the failure of any of the preceding parties, *he* muſt bear the loſs. Bleſard and Hirſt, 5 Burr. 2670. Goodall v. Dolley, 1 Term Rep. 712.

Thus, if in the mean time the drawer fail, the holder cannot call on the payee indorſor, becauſe *he* can have no remedy againſt the drawer. Bleſard v. Hirſt, 5 Burr. 2670.

So, alſo, if the drawee fail, the holder cannot recover againſt either the drawer or indorſor, becauſe, if he could, a loſs muſt fall on one of them, as the drawer can have no remedy againſt the drawee. Goodall v. Dolley, 1 Term Rep. 712.

Nor will it make any difference, though the indorſor, from an ignorance of the law, thinking himſelf bound to make good the money, promiſe afterwards to take up the bill at ſome future time. 5 Burr. 2670.

Much leſs can the indorſor be bound by a propoſal to diſcharge the bill by inſtalments, made after the return of the bill for non-payment, under an ignorance of acceptance being refuſed; more eſpecially, if that propoſal be rejected by the indorſee. 1 Term Rep. 712.

If an acceptance varying from the tenor of the bill be offered by the drawee, the holder acquieſcing muſt ſend the ſame notice to the preceding parties, as if acceptance were refuſed, otherwiſe he cannot have recourſe to them; for to admit of ſuch acceptance without notice is to give credit to the acceptor. Mar. 17.

It ſeems eſtabliſhed, that the next day after a banker's draft is given, is the ſtated time allowed by law for demanding payment, Metcalf v. Hall, B. R. Tr. 22 Geo. 3.

in order to exonerate the holder from the consequences of the drawer's insolvency.

2 H. Bl. 569. Although no precise rule can be laid down as to the time when bills payable at sight, or so many days after, are to be presented for payment, yet it is certain, that if the holder do not present them, he ought to put them in circulation. If he keep them by him, and do neither, he is guilty of laches and cannot recover on them.

We have seen above, that it is the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply that payment has been had, and it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawee.

Reed v. Coats, Dom. Proc. Feb. 21, 1794. The same diligence, and the same attention to the usual rules of negotiation is required from the party who takes a bill by way of security for an antecedent debt, as from one who receives it in the common course of business, or in solutum of a debt. A contrary opinion appears to have prevailed in *Scotland*, and was sanctioned by the decisions of the courts of that country. Thus, a bill drawn by *A.* upon and accepted by *B.*, payable twelve months after date, was given to *C.*, by way of security for the payment of a bill which had been indorsed by *A.* to *C.*, and had been dishonoured. In the receipt which *C.* gave for the bill so given in security, it was declared, that it was in no respect to exonerate the acceptors of the original bill, or any of the parties thereby bound, till actual payment of the bill given in security was made. Almost three years elapsed without *C.*'s taking any one step to obtain payment of this last bill. About that time the acceptors failed, upon which *C.* demanded payment of the original bill from the parties whose names appeared upon it, and on their refusal, he instituted a suit against them in the court of session, and obtained two interlocutors in his favour. Upon appeal to the Lords of this country, these interlocutors were reversed, and the defenders were assoilzied.

Tassel v. Lewis, 1 Ld. Raym. 743. Coleman v. Sayer, 2 Str. 829. The time of payment of a bill is the last of the three days of grace, and on that day the money must be demanded; and if the last day be *Sunday* or a great holiday, the demand must be made on the second.

Vide Beawes, 461.

Lestley v. Mills, 4 Term Rep. 173. And the holder is not bound to wait till the last moment of the last day of grace, for the undertaking of the acceptor is, to pay the bill on demand on any part of the last day of grace.

Brown v. Harraden, 4 Term Rep. 148. The three days of grace are allowable on promissory notes, as well as upon bills of exchange.

A presentment either for payment or acceptance must be made at seasonable hours: and seasonable hours are the common hours of business in the place where the party lives to whom the presentment is to be made.

As to bills, *vide* 1 Str. 441. 515. It is not enough to say in the notice, that the drawee or maker refuses, is insolvent, or has absconded; but it must be added, that the

the holder does not intend to give him credit. The purpoſe of giving notice is not merely that the indorſor ſhould know that default has been made, for he is chargeable only in a ſecondary degree; but to render him liable, it muſt be ſhewn that the holder looked to him for payment, and gave him notice that he did ſo. A caſe might eaſily be imagined, where the indorſor might have notice from the holder, and yet would not be liable; as, if that notice contained circumſtances which ſhewed that the indorſee had given time and credit to the acceptor or maker.

Daggliſh v. Weatherby, 2 Bl. Rep. 747. As to notes, *vide* 1 Str. 549. 2 Str. 1087. Tindal v. Brown, 1 Term Rep. 170.

It is therefore neceſſary that notice ſhould come from the indorſee himſelf: it is not ſufficient that the indorſor ſhould be informed by ſome third perſon, as by the drawee or maker, that he does not chooſe to accept, or cannot pay.

With reſpect to acceptance, it is uſual to leave a bill for that purpoſe with the drawee till the next day, and that is not conſidered as giving him time; it being underſtood to be the uſual practice: but if, on being called on the next day, he delay or refuſe to accept according to the tenor of the bill, the rule now eſtabliſhed, where the parties, to whom notice is to be given, reſide at a different place from the holder and drawee, is, that notice muſt be ſent by the next poſt. Under the ſame circumſtances, the ſame rule obtains in the caſe of non-payment.

Mar. 16.

1 Term Rep. 169.

So, alſo, in caſe the drawee or maker has abſconded, or cannot be found, notice of theſe circumſtances, either in caſe of non-acceptance or non-payment, muſt be ſent by the firſt poſt.

The reaſon why the law requires notice is, that it is preſumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if the drawer have no effects in the other's hands, then he cannot be injured for want of notice, and if it be proved on the part of the plaintiff, that, from the time the bill was drawn, till the time it became due, the drawee never had any effects of the drawer in his hands, notice to the latter is not neceſſary in order to charge him, for he muſt know whether he had effects in the hands of the drawee or not: and if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice, that it has been diſhonoured.

1 Term Rep. 410.

A queſtion ariſing on the validity of a commiſſion of bankrupt on account of the inſufficiency of the debt due to the petitioning creditor, the facts appeared to be theſe: the bankrupt being indebted to the petitioning creditors in the ſum of 115*l.* 3*s.* 8*d.* on the 15th of *September* 1784, drew a bill for 20*l.* on the defendant, "who, till the time of the bankruptcy and of the bill becoming "due, was a creditor of the bankrupt," payable to the petitioning creditors, two months after date, and paid it to them on account of part of their debt: the bill was preſented for payment on the 18th of *November* following, and diſhonoured. No notice, however, was ever given by the petitioning creditors to the bankrupt, or left at his houſe;

Bickerdike v. Bollman, 1 Term Rep. 405.

houſe; a commiſſion iſſued againſt the drawer on the 20th of *November*, on which he was declared a bankrupt in the afternoon of the 24th; that commiſſion was afterwards ſuperſeded, and another commiſſion was iſſued on the petition of the parties, on the amount of whoſe debt the preſent queſtion aroſe. If the petitioning creditors, by not giving notice to the bankrupt of his bill being diſhonoured, had made the bill their own, their debt was reduced within 100 *l.*, and then the commiſſion could not be ſupported; but if notice was not neceſſary, the bill was not paid; their debt remained as it originally was, and the commiſſion was valid. On the principles before ſtated, the court held, that notice in this caſe was not neceſſary, and therefore the commiſſion was good.

1 Term Rep. 714.

Yet though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained againſt the *indorſor* if no notice was given him of the bill being diſhonoured; for though the drawer may have received no injury, the indorſor, who muſt be preſumed to have paid a valuable conſideration for the bill, probably has.

Rogers v. Stephens, 2 Term Rep. 713.

Though in the caſe where the drawer has effects in the hands of the drawee, the want of notice cannot be waived by a ſubſequent promiſe by him to diſcharge the bill; yet where he had no effects, it may; though it appear that in fact he ſuſtained an injury for want of ſuch notice: ſuch a ſubſequent promiſe is an acknowledgment that he had no right to draw on the drawee, and if he has in fact ſuſtained damage, it is his own fault.

See Rogers v. Stephens, 2 Term Rep. 714.

But where damage in ſuch a caſe has been ſuſtained, and no ſubſequent promiſe appears, it may be very doubtful whether want of notice can be waived.]

Molloy, 284. Show. 164. S. P. that the third day is the day of grace.

Merchants generally allow three days after a bill becomes due for the payment, and for non-payment within three days proteſt is made, but is not ſent away till the next poſt after the time of payment is expired, and if *Saturday* be the third day, no proteſt is made till *Monday*.

Leſtley v. Mills, 4 Term Rep. 170.

[But there is a difference between foreign and inland bills in this reſpect: the former muſt be preſented for payment *before* the expiration of the laſt day of grace, and in time to have the proteſt ſent off the ſame night, if the poſt then ſets out: but on inland bills, the proteſt cannot be made till *after* the expiration of three days, and notice may be ſent at any time within *fourteen* days after the proteſt.

To the conſtitution of a bill of exchange, it is not neceſſary that the words "value received" ſhould be inſerted, and the want of theſe in a foreign bill cannot deprive the holder of the benefit of a proteſt; but that benefit in caſe of non-payment is not given to inland bills which want theſe words; and therefore they cannot be proteſted for non-payment: for the act of Queen *Anne* provides, that "where theſe words are wanting, or the value is "leſs than twenty pounds, no proteſt is *neceſſary* either for non-"acceptance or non-payment."

In

In foreign bills, there is no diſtinction between thoſe payable at ſuch a time after *date*, and after *ſight*; but the ſtatute confines the benefit of proteſt on inland ones to thoſe payable after *date*; ſo that in *ſtrictneſs* there can be no proteſt on thoſe payable after ſight: and this has been lately ſo adjudged.

In foreign bills, where the acceptance is in words only, or in ſome collateral writing, a proteſt may be made for non-payment, as well as if the acceptance had been in writing on the bill: but the ſtatute of *William* confines the proteſt for non-payment to thoſe bills on which the acceptance is written; and therefore, in order to have the benefit of a proteſt for non-payment, where the acceptance is collateral, the holder muſt proteſt for non-acceptance. Leftley v. Mills, 4 Term Rep. 170. *Vide* Mar. 17.

But in practice a proteſt is hardly ever made for non-acceptance of an inland bill; it is only noted for non-acceptance, and if not paid when due, it is frequently proteſted for non-payment: however, notice muſt be given of the non-acceptance and noting, otherwiſe, the holder takes the riſk upon himſelf.

[In the caſe of a foreign bill, noting alone for non-acceptance will not be ſufficient, it muſt alſo be *proteſted* for non-acceptance; nor will the omiſſion to make ſuch proteſt be ſupplied by a ſubſequent proteſt for non-payment.] Rogers v. Stephens, 2 Term Rep. 713.

Intereſt upon a bill of exchange commences from the demand made; and therefore if there was no demand made till action brought, defendant may plead tender and refuſal, and *uncore priſt*, and ſo diſcharge himſelf of intereſt; but if it be the defendant's fault, that demand could not be made, as if he were out of the kingdom, there, want of demand ought not to prejudice the plaintiff.

[Wherever intereſt is allowed, and a new action cannot be brought for it, which is the caſe on bills of exchange and promiſſory notes, the intereſt is to be calculated up to the time of ſigning final judgment. 2 Burr. 1086.

Where a bill indorſed over is not duly paid, the indorſee may charge the indorſor with intereſt, exchange, and other incidental expences, beyond the amount of 5 *per cent.*, if ſuch charges be reaſonable, warranted by uſage, and not made a colour for uſury: thus, the conſtant courſe has been with reſpect to bills returned, proteſted, from *India*, to allow 10*s.* *per* pagoda, which includes intereſt, exchange, and all other charges; and this, notwithſtanding the current price of exchange at which the bill was diſcounted, may have been greatly below 10*s.*, as, at 6*s.* 6*d.*: and the indorſee will alſo be entitled to intereſt at 5 *per cent.* from a reaſonable time after notice given to the indorſor of the bill having been returned unpaid.] Auriol v. Thomas, 2 Term Rep. 52.

8. Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.

It ſeems to be agreed, that againſt the drawer an action of debt, or a general *indebitatus aſſumpſit*, will lie, for he having received the money, Hard. 485. Vent. 152. Lev. 298.

2 Keb. 695. 713. 758. 822. Salk. 125. pl. 2. 2 Lutw. 1594. Skin. 255. pl. 3. 6 Mod. 129.

money, the law raiſes a contract, and lays him under an obligation to pay it. But it hath been adjudged, that neither an action of debt, nor an *indebitatus aſſumpſit*, will lie againſt the acceptor of a bill of exchange, and that therefore the remedy againſt him muſt be by a ſpecial action on the caſe, founded on the cuſtom of merchants; for the acceptance is only a collateral engagement to pay the debt for another, in the ſame manner as a promiſe by a ſtranger to pay, *&c.* if the creditor will forbear his debt.

Vent. 153. (*a*) So, if goods delivered. Roll. Abr. 32.

But though a general *indebitatus aſſumpſit*, will not lie againſt the acceptor of a bill of exchange, yet if *A.* delivers money to *B.* to pay over to *C.*, and gives *C.* a bill of exchange drawn upon *B.*, and *B.* accepts it, *C.* may have an *indebitatus aſſumpſit* againſt *B.* (*a*) as having received money to his uſe, but muſt not declare only upon the bill of exchange accepted.

Co. Lit. 182. 2 Inſt. 404. Yelv. 136. 4 Co. 76. Cro. Car. 301. Hard. 486. Salk. 125. pl. 2. 127. pl. 7. Lutw. 233. Carth. 83. 269. 5 Mod. 367.

As to the manner of declaring on a bill of exchange, this is ſaid to have varied, the declaration in ſome caſes being general, ſometimes ſpecial, and laid with an expreſs promiſe, and at other times without; but it ſeems to be now ſettled, that the cuſtom of merchants, concerning bills of exchange, being part of the common law, of which the judges will take notice *ex officio*, it is unneceſſary to ſet forth the cuſtom ſpecially in the declaration, and that it is ſufficient to ſay, that ſuch a perſon, according to the uſage and cuſtom of merchants, drew the bill.

Show. 127. 3 Mod. 226. Ld. Raym. 175. 281. 575. 759. 774. 10 Mod. 287.

1 Burr. 324, 325.

[In ſtating a bill or the note, regard muſt be had to the legal operation of each reſpectively.

Vere v. Lewis, 3 Term Rep. 183. Minet v. Gibſon, *Id.* 485. Collins v. Emet, 1 H. Bl. 313.

It has been decided, that the legal operation of a bill or of a note, payable to a fictitious payee, is, that it is payable to the bearer, and therefore, if that deciſion be right, it is proper, in the ſtatement of ſuch a bill, to allege that the drawer thereby requeſted the drawee to pay ſo much money to the bearer; in the ſtatement of ſuch a note, that the maker thereby promiſed to pay ſuch a ſum to the bearer. Or in ſuch a caſe, the plaintiff may ſtate all the ſpecial circumſtances, and if the verdict correſpond with them, he will be entitled to recover.

A bill or note payable to the order of a man, may, in an action by him, be ſtated as payable to himſelf, for that is its legal import: or it may be ſtated in the very words of it, with an averment that he made no order.

Semb. 1 Burr. 323.

If a note purport to be given by two, and be ſigned only by one, a declaration generally as on a note by that one who ſigned it will be good; for the legal operation of ſuch a note is, that he who ſigned it promiſed to pay.

Burchell v. Slocock, 2 Ld. Raym. 1545.

On a note to pay jointly *and* ſeverally, a declaration againſt one in the terms of the note will be good.

Butler v. Maliſſey, Str. 76. Neale v. Ovington, 2 Ld. Raym. 1544. 2 Str. 819.

Where a note is given by two, to pay jointly *or* ſeverally, the payee may ſue both or either; if he ſue both, he may declare on the note in the words of it jointly *or* ſeverally: but if he ſue either of them ſingly, it was formerly held, that he could not declare in that way, but that he muſt ſtate the note as given only by one, and

and that the joint *or* ſeveral note would be good evidence to ſupport ſuch a declaration.

But the doctrine in the latter caſe has been ſince over-ruled; and it is now held, that in an action on a joint *or* ſeveral promiſſory note, againſt one, a declaration that he and another made their promiſſory note, by which they *jointly or ſeverally* promiſed to pay, is good: for if *or* muſt be underſtood as a disjunctive, the election, whether the note ſhall be joint or ſeveral, is in the perſon to whom it is given, and by ſuing one, he ſhews his election to conſider it as a ſeveral note: but in this caſe, the true conſtruction of the word *or* is, that it is ſynonymous with *and*. They both promiſe that *they* or *one* of them ſhall pay; therefore the liability is on *both*, and on *each*. The nature of the tranſaction forces this conſtruction. Rees v. Abbot, Cowp. 832.

And if the note had been joint only, and it had been ſtated as a ſeveral one, no advantage could have been taken of this but by a plea in abatement. *Ibid.* per Buller, J.

Where the payment of a bill or note is limited at a certain time after the date, it muſt be ſtated as being made on the day of the date, that it may appear on the face of the declaration, at what time it became due; if the bill have no date, as on the day when it iſſued, or the firſt day the plaintiff had knowledge of its exiſtence; for an inſtrument not dated muſt be conſidered as dated at the time of the delivery. 1 Str. 22. 2 Ld. Raym. 1082.

But in ſtating the bill or note, it is not neceſſary to allege that it bore date, though that be generally done; it is ſufficient that the date appear by implication, which it does from the allegation, that on ſuch a day the drawer made the bill or note. 2 Show. 422.

In ſtating the drawing of a bill or note, it is unneceſſary to ſay that the drawer ſubſcribed it with his own hand-writing, though that is generally done; the allegation that he made his bill of exchange or promiſſory note, and, in the caſe of the former, that he directed the bill to the drawee, by which he requeſted him to pay, and in the caſe of the latter, that by ſuch note he promiſed to pay, ſufficiently implies that his name was ſomewhere on the inſtrument, and that he or ſomebody by his authority wrote it; otherwiſe it could not with propriety be ſaid that he requeſted in the one caſe or promiſed in the other. Ereſkine v. Murray, 2 Ld. Raym. 1542, 1543. Taylor v. Dobbins, M. 7 G. 1. B. R. 2 Ld. Raym. 1543. Elliot v. Cooper, 2 Ld. Raym. 1376.

If the bill was in fact drawn by a ſervant, by the authority of a maſter, it is ſufficient to ſtate it as drawn by the maſter himſelf, unleſs the ſubſcription be alleged, and then it muſt be ſtated according to the truth of the caſe, that the ſervant, by the authority of his maſter, drew and ſubſcribed the bill on his maſter's account. *Vide* 12 Mod. 346.

The ſame obſervations apply to the caſe of an indorſement or acceptance by the ſervant, by the authority, and on the account of his maſter. *Vide* 12 Mod. 564.

Where partners are concerned in the drawing, negotiating, or accepting of a bill or note, the uſual way of introducing the partnerſhip is to mention it by way of inducement, and to ſtate that one of them, according to the cuſtom of merchants, ſubſcribed, accepted, *Vide* Morg. Prec. 43.

accepted, or indorſed the bill for the partnerſhip account: but the alluſion to the cuſtom is not abſolutely neceſſary; nor is it abſolutely neceſſary that it ſhould be directly charged that the partner acting for the reſt ſubſcribed, accepted, or indorſed for the parnerſhip; it is ſufficient if, on the whole, it appear to have been ſo.

2 Ld. Raym. 1484.

Where a bill is drawn in ſets, and the action is brought on the firſt, the uſual way of ſtating the requeſt to the drawee is, "that "he requeſted him to pay that firſt of exchange, (ſecond and "third not paid,) following the very form of the bill;" and then it is not neceſſary, in the ſubſequent part of the declaration, to aver that the ſecond and third were not paid, for if either of them was paid, that would be a ſufficient defence at the trial.

Ellington v. Eaſt, 2 Ld. Raym. 810. 1 Salk. 130. Wegerſloſe v. Keene, 1 Str. 224.

In an action againſt the acceptor, it muſt be alleged that he accepted the bill, for the acceptance is the foundation of the action; but the manner of acceptance needs not to be alleged.

Ereſkine v. Murray, 2 Str. 817. 2 Ld. Raym. 1542.

And if the acceptance be alleged generally without any ſpecification of time, evidence of acceptance after time of payment will maintain the declaration, though the acceptance be alleged to have been according to the tenor and effect of the bill, for this ſhall be conſtrued as a general promiſe to pay the money, and the words, "according to the tenor and effect of the bill," ſhall be rejected as ſurpluſage; but if the acceptance be alleged to have been *before* the time of payment, perhaps evidence of an acceptance after will not do.

1 Ld. Raym. 364, 365. 574, 575. 1 Salk. 127. 129. Carth. 459.

In an action againſt the drawer or indorſor of a bill, or againſt the indorſor of a note, it is abſolutely neceſſary, on account of non-payment of the bill or note, to ſtate a demand of payment from the acceptor of the bill or the maker of the note, and due notice of refuſal given to the party againſt whom the action is brought; for theſe circumſtances are abſolutely neceſſary to entitle the plaintiff to maintain his action; and a verdict will not help him on a writ of error.

Ruſhton v. Aſpinall, Dougl. 654.

Due notice of the diſhonour of a foreign bill can only be by proteſt; yet the omitting to allege a proteſt in the declaration is only matter of form; notice being alleged generally, it ſhall be preſumed to have been given with all the neceſſary formalities, and if theſe be not proved at the trial, the plaintiff cannot recover.

Salomons v. Stavely, B. R. M. 24 G. 3. Doug. 684. in the notes.

It is not neceſſary, in an action againſt an indorſor, to ſtate that the indorſee demanded the money of the drawer of a bill, or the firſt indorſor of a note, becauſe ſuch demand is not neceſſary to be made in order to complete the title of the indorſee.

Whether the drawer of a bill, or the indorſor of a bill or of a note, receiving the bill or the note in the regular courſe of negotiation before it has become due, can maintain an action on it, againſt the acceptor or maker, in the character of indorſee, ſeems undecided: that ſuch actions have been brought, has been incidentally ſaid from the bench; but the only caſe in which it is directly held, that the drawer may maintain an action in the character

Per J. Aſhhurſt, Tr. 14 G. 3. Loaviere v.

racter of indorſee, is no authority to eſtabliſh this point: for there it appears that the bill was proteſted for non-payment before the indorſement; and a more recent caſe, determined on principle, clearly ſhews that a drawer or indorſor cannot maintain an action againſt the acceptor in the character of indorſee, where the indorſement is after the refuſal of payment; becauſe, when a bill is returned unpaid, either on the drawer or indorſor, its negotiability is at an end.

Laubray, 10 Mod. 36. Beck v. Bobley, Tr. 14 G. 3. B. R. 1 H. Bl. 89. in the notes.

The action, therefore, in which the drawer or indorſor, after payment of the money in default of the acceptor, may recover, the firſt againſt the acceptor, and the latter againſt any of the preceding parties, muſt be brought in their original capacity as drawer or indorſor, and not as indorſee.

Vide Symonds v. Parminter, 1 Wilſ. 185. *Vide* Morg. Prec. 43. 44. 50.

In this action, after ſtating the drawing of the bill, the delivery, the neceſſary indorſements, the preſentment for acceptance, and the acceptance or refuſal to accept, it muſt be further ſtated, that at the proper time it was preſented to the acceptor for payment, who refuſed, or that the acceptor could not be found; and if on a foreign bill, a proteſt for non-payment may be ſtated; then that it was returned to the plaintiff, and that the defendant had notice of the premiſes.

2 Show. 180.

It may alſo be ſtated, that the plaintiff paid the contents of the bill, and, in the caſe of a proteſt, the coſts, intereſt, and damages ariſing from the delay; but this does not ſeem abſolutely neceſſary; that the bill was returned to the plaintiff implies payment by him.

1 Wilſ. 185. *Vide* Morg. Prec. 44.

One who has indorſed a bill or note cannot, in general, maintain an action on a re-indorſement to him, againſt the party to whom he indorſed it.

Biſhop v. Hayward, 4 Term Rep. 470.

It is not neceſſary, in any action on a bill of exchange or promiſſory note, to ſtate an expreſs promiſe by the defendant: the law implies a promiſe where the party is liable; and therefore it is ſufficient, after ſtating the circumſtances, to ſay, that by theſe he became liable to pay.

Starkey v. Cheeſeman, 1 Ld. Raym. 538. 1 Salk. 128. Carth. 409.

But it is uſual to allege an expreſs promiſe after ſtating the liability, that no exception may be taken to the addition of other counts in *aſſumpſit*, which are uſually added; for it is ſaid, that where the declaration was upon the cuſtom, and likewiſe on an *indebitatus aſſumpſit*, the judgment was arreſted, which could not have been the caſe had an expreſs promiſe been added to the count on the cuſtom, becauſe it is an eſtabliſhed rule in pleading, that wherever the ſame plea may be pleaded, and the ſame judgment given on different counts, they may be joined in the ſame declaration.

1 Vent. 153. *Vide* 1 Salk. 24. 1 Term Rep. 276.

Inſtead of bringing an action on the cuſtom or on the ſtatute, the plaintiff may in many caſes uſe a bill or note, only as evidence in another action; and where the inſtrument wants ſome of the requiſites to form a good bill or note, the only uſe he can make of it is to give it in evidence; or if the count on the inſtrument be defective, he may give it in evidence, in ſupport of ſome of the other counts for money had and received, or money lent

Tatlock v. Harris, 3 Term Rep. 174.

lent and advanced, according to the circumſtances of the tranſaction.

Vide Grant v Vaughan, 3 Burr. 1516. *Vide* 3 Term Rep. 183.

A bill is preſumptive evidence of money lent by the payee to the drawer, and a note of money lent by the payee to the maker, and both, conſequently, of money had and received to the uſe of the holder, whether they be payable to the bearer, or to the order of the payee.

He who transfers a bill or note without indorſement, gives no additional credit to the inſtrument, and therefore cannot be ſued on the inſtrument itſelf; nor is he liable to anſwer in any ſpecies of action to any holder but him to whom he immediately transferred it, and to him only for the conſideration on which it was given, whether for work and labour, goods ſold and delivered, money lent and advanced, or any other legal conſideration.

Vide Chamberlyne v. Delarive, 2 Wilſ. 353.

But if the party who took the bill or note did not uſe due diligence to obtain payment from the acceptor or maker, nor give due notice of their default to the party from whom he received it; the latter may either plead, or give in evidence, the bill or note, to an action on the original conſideration.

The holder of the bill or note may ſue all the parties who are liable to pay the money, either at the ſame time or in ſucceſſion, and he may recover judgment againſt all, if ſatisfaction be not made by the payment of the money before judgment obtained againſt all; and proceedings will not be ſtaid in any one action, but on payment of the debt and coſts in that action, and the coſts in all the others in which he has not obtained judgment.

Vide Golding v. Grace, 2 Bl. Rep. 749. 2 Veſey, 215.

But though he may have judgment againſt all, yet he can recover but one ſatisfaction. But though he be paid by one, he may ſue out execution for the coſts in the ſeveral actions againſt the others.

Windham v. Wither. Idem v. Trull, 2 Str. 515.

And if he have recovered judgment in more than one action, a tender of the principal recovered in one, and the coſts in all the reſt, will prevent him from taking out execution; and it will be conſidered as a contempt of the court, if he take out execution againſt more than one.

Macdonald v. Bovington, 4 Term Rep. 825.

Macdonald drew a bill of exchange for 20*l.* on *Bovington*, who accepted it; the bill afterwards came into the hands of *Thompſon*, who recovered judgment againſt *Bovington*, and charged him in execution. *Bovington* having obtained his diſcharge under the Lords' act in that ſuit, *Thompſon* ſued *Macdonald* the drawer, and recovered the amount of the bill, on which *Macdonald* ſued *Bovington*, on his acceptance, and charged him in execution. On a rule to diſcharge *Bovington* out of cuſtody, it was contended, that he had ſatisfied the debt, by being charged in execution at the ſuit of *Thompſon*, and that he was not liable to be ſued again for the ſame ſum. But the court ſaid, that nothing could be more clear than that this was not a ſatisfaction of the debt as between theſe parties, though it was as between the defendant and *Thompſon*: that to the holder it was a mere *formal* ſatisfaction, and not like actual payment: that the preſent plaintiff, having been obliged to pay the amount of the bill ſince the defendant was charged

charged in execution at the ſuit of *Thompſon*, had a right to have recourſe to this defendant as acceptor; for that by this payment a new cauſe of action aroſe againſt the defendant, without regard to what had paſſed in the former action.

The plea generally pleaded to this action is that of *non aſſumpſit*: but the defendant may, if the truth will warrant him, plead *non aſſumpſit infra ſex annos*; for by ſtatute 21 *Jac.* 1. *c.* 16. actions on the caſe, except upon *accounts* between merchants, muſt be brought within ſix years: and by the expreſs proviſion of the ſtatute of Queen *Anne*, all actions on promiſſory notes muſt be brought within the ſame time as is limited by the ſtatute of *James*, with reſpect to actions on the caſe. § 2.

But an acknowledgment of the debt, or a promiſe to pay, made within ſix years of the commencement of the action, will take the caſe out of the ſtatute.

To an action on the caſe on a bill of exchange againſt the defendant as acceptor, he pleaded, that after acceptance he gave a bond in diſcharge of it: it was held that this plea was bad, becauſe it amounted to the general iſſue; for the debt on the bill being extinguiſhed by the bond, the defendant ought to have pleaded *non aſſumpſit*, and to have given the bond in evidence. 8 W. & M. 5 Mod. 314.

In an action againſt the acceptor, it is a general rule that the drawer's hand is admitted, becauſe the acceptor is ſuppoſed to be acquainted with the writing of his correſpondent, and by his acceptance he holds out to every one who ſhall afterwards be the holder, that the bill is truly drawn. 1 Ld. Raym. 444. Jenys v. Fowler, Str. 946. Price v. Neal, 3 Burr. 1354. 1 Bl. Rep. 390.

On a bill payable to bearer, there is no perſon through whom the holder derives his title: in an action againſt the acceptor, therefore, he has only to prove the hand-writing of the acceptor himſelf.

In an action againſt the acceptor of a bill payable to order, the plaintiff muſt prove the hand-writing of the payee or firſt indorſor; and this, though it were on the bill at the time it was accepted: if his indorſement be ſpecial to "another perſon," or to "another, or his order," the ſame rule, on the ſame principle, applies to the indorſement of that other perſon, as it does to the indorſement ſpecifically made of every ſubſequent indorſor, between the payee and plaintiff. If the indorſement of the payee be general, the proof of his hand-writing is ſufficient; that of any other of the indorſors is not requiſite, though all the ſubſequent indorſements be ſtated in the declaration; for by indorſing generally, the payee has ſhewn his order to be, that the bill ſhould be payable to any ſubſequent holder; and accordingly it has been ſhewn, that any ſuch ſubſequent holder may declare as the indorſee of the firſt indorſor, or of that indorſor who firſt indorſes in blank: but in this caſe, in order to render the evidence correſpondent to the declaration, all the ſubſequent names muſt be ſtruck out, either at the time of the trial or before. Smith v. Cheſter, 1 Term Rep. 654.

Vide Collins v. Emett, 1 H. Bl. 313.

In an action by an indorſee againſt the drawer, the ſame rules obtain with reſpect to proof of the hand-writing of the indorſors, as in an action againſt the acceptor.

That of the drawer himſelf muſt of courſe be proved: it muſt alſo be proved, that the plaintiff has purſued that diligence with reſpect to the drawee, and given ſuch notice to the drawer, of the default of the former, as we have ſeen to be neceſſary on his part to entitle him to have recourſe to the latter.

From the rule that, in an action againſt the drawer or acceptor of a bill payable to order, there muſt be proof of the ſignature of the firſt indorſor, and of all thoſe to whom an indorſement has been ſpecially made, has ariſen the queſtion which has ſo long agitated the commercial world on the ſubject of indorſements, in the name of fictitious payees.

Minet v. Gibſon, 3 Term Rep. 483. Gibſon v. Hunter, 2 H. Bl. 288.

The reſult of the caſes upon this point ſeems to be, that in all caſes, where the holder of ſuch a bill declares againſt the acceptor, as on a bill *payable to the bearer*, it is ſufficient to maintain the action, that he ſhould prove, 1. That the payee was fictitious, and, 2. That the defendant knew this at the time when he accepted the bill:— or, 1. That the payee was fictitious, and, 2. That the defendant had given a *general* authority to the drawer, *&c.* to draw bills upon him in the name of fictitious payees.

1 Ld. Raym. 174. Str. 444. 2 Burr. 675.

In an action by an indorſee againſt an indorſor, it is not neceſſary to prove either the hand of the drawer or of the acceptor, or of any indorſor before him againſt whom the action is brought; for by his indorſement, he virtually undertakes to every ſubſequent holder, that the names of the drawer, acceptor, and previous indorſors are really in the hand-writing of thoſe to whom they reſpectively purport to belong.

The ſame diligence alſo, with reſpect to the drawee, and the ſame notice to the defendant as indorſee, muſt be proved in this action, as in that againſt the drawer, every indorſor being, with reſpect to ſubſequent indorſees or holders, a new drawer. But proof of a demand from the drawer, and notice of non-payment by him, is not neceſſary.

1 Ld. Raym. 743.

Where the action is by an indorſor who has paid the money, proof muſt be given of the payment.

Vide Louviere v. Laubray, 10 Mod. 36, 37. Symonds v. Parminſter, 1 Wilſ. 185.

In an action by the drawer againſt the acceptor, it is neceſſary to prove the hand-writing of the latter; demand of payment from him, and refuſal; the return of the bill, and payment by the plaintiff: but it does not appear neceſſary to prove, that the acceptor had in his hands effects of the drawer; his acceptance is preſumption that he had, and if he had not, the proof muſt lie upon himſelf.

Vide 3 Wilſ. 18.

In an action on the caſe by the acceptor againſt the drawer, the plaintiff muſt prove the hand-writing of the defendant, and payment of the money by himſelf, or ſomething equivalent to that, ſuch as his being in priſon in execution.

In actions againſt the drawer or indorſor, the proteſt is ſufficient evidence that the bill is not paid; and the mere production of the proteſt is ſufficient; it is not neceſſary to prove either the writing of the notary, or to give any account how the plaintiff had the proteſt; for that would be deſtructive to publick commerce, and throw too great a difficulty on tranſactions of this kind: and beyond ſeas, it is ſaid, that it is ſufficient to ſhew the court the proteſt without producing the bill itſelf; but here in general the bill itſelf muſt be ſhewn, as well as the proteſt, becauſe the whole declaration muſt be proved, which cannot be without giving the bill in evidence. 12 Mod. 345. Gilb. L. E. 118. Gilb. L. E. 119.

But in an action againſt the drawer of a bill which was loſt, it was held by *Holt*, C. J. that proof of the defendant's having owned that he had made the bill was ſufficient. Hart v. King, 12 Mod. 309.

With reſpect to a promiſſory note, the ſame rules, of what is neceſſary to be proved, apply, as in a bill of exchange; the maker being in the place of the acceptor; the payee, after indorſement, in that of the drawer; and the indorſors and indorſees the ſame in each.

In general, direct proof is required of the ſignature of thoſe parties whoſe indorſement muſt be proved: but with reſpect to the party himſelf againſt whom the action is brought, proof of other circumſtances may be ſufficient to ſupply the place of actual proof of his ſignature; particularly, confeſſion. Thus, where the defendant was ſued as indorſor of a note, and it was proved, that a perſon to whom application had been made to diſcount it, ſent it to the defendant, who looked on it, and ſaid it was his hand, and that the note, which had ſome months to run, would be paid when due; the Chief Juſtice would not permit the defendant to ſhew forgery, by ſimilitude of hands, becauſe that would tend to deſtroy all negotiation of bills and notes. But he ſeemed inclined to have admitted actual proof of forgery, if the defendant could have given it, but this he was unable to do, and the plaintiff had a verdict. Ld. Hardwicke. Cooper v. Le Blanc, 2 Str. 1051.

So, where a letter was produced under the defendant's hand, in which he wrote to a friend that he had received a bill of exchange from the drawer on the acceptor, bearing date ſuch a day, and payable to him or order ſix months after date, and in all theſe circumſtances the bill agreed with the letter, though no ſum was mentioned in the letter, this was thought ſufficient evidence that the defendant had had the bill in queſtion in his poſſeſſion; and to ſhew that he had indorſed it over, it was proved that he had ſaid he had come to town to haſten the trial of a cauſe brought againſt him on an indorſement he had made on a bill of exchange, and that in fact he had brought down this very cauſe by proviſo. Dale v. Lubbock, 1 Barnard. B. R. 198.

But where, in an action againſt any one party, proof of the ſignature of another is neceſſary to ſupport the action againſt the defendant, that proof muſt be direct; confeſſion of the party whoſe ſignature it purports to be, will not be ſufficient evidence. Barnes, 436. Hemmings v. Robinſon.

Thus in an action againſt the drawer or acceptor of a bill, or maker of a note, a confeſſion of an indorſor that he indorſed the bill or note, will not be proper proof of the indorſement.

Whitcomb v. Whiting, Doug. 652.

But where an action is brought againſt one, on a joint and ſeveral promiſſory note, ſigned by him and others, proof of payment by one of the others, of intereſt and part of the principal within ſix years before the action brought, will be ſufficient to bind the defendant, and take the caſe out of the ſtatute as to him.

Pinkney v. Hall, 1 Salk. 126. 1 Ld. Raym. 175. *vide* Carwick v. Vickery, Dougl. 653. Gilb. L. E. 117.

Where a partner accepting, drawing, or indorſing, is ſufficient to bind all the reſt.

Where a ſervant has a general authority, to draw, accept, or indorſe bills or notes, proof of his ſignature is ſufficient againſt the maſter; but his authority muſt be proved.

Comb. 450.

Subſequent aſſent, it ſeemeth, is evidence of authority.

12 Mod. 346.

A general cuſtom of the ſervant's ſignature, and payment by the maſter, is ſufficient proof of a general authority; and a general authority will continue to bind the maſter till its determination be generally known. Therefore, if a ſervant, having authority, draw a bill of exchange in ſo ſhort a time after he is diſmiſſed, that the world cannot take notice of his being out of ſervice; or, if he were a long time out of ſervice, but that kept ſo ſecret, that the world could not take notice of it, the bill in thoſe caſes will bind the maſter.

1 Barnard. B. R. 198.

Where notice is to be given by the poſt, it ſeemeth, that proof of putting the letter into the poſt is ſufficient, that being in general all that is in the plaintiff's power to prove, though this in one place is denied.

Where the defendant ſuffers judgment by default, and the plaintiff executes a writ of inquiry; it is ſufficient for the latter to *produce* the note or bill, without any proof of the defendant's hand; this was determined ſo long ago as the 14th *G.* 2. in a caſe in the King's Bench, where the plaintiff having offered *collateral* evidence to prove the defendant's hand, the court not only held that that was ſufficient, but ſaid, that the note being ſet out in the declaration, was admitted by the default, and that the only uſe of producing it was, to ſee whether any money was indorſed on it as paid.

Bevis v. Lindſell, B. R. 2 Str. 1149. Green v. Hearne, 3 Term Rep.

Ruled Anon. B. R. Hil. 26 Geo. 3. Bailey, 67. Raſhleigh v. Salmon, C. B. T. 29 Geo. 3. 1 H. Bl. 252.

On ſuch judgment, a writ of inquiry is not neceſſary, for the court on application by the plaintiff will, if no good reaſon ſhewn to the contrary, refer it to the proper officer to aſcertain the damages and coſts, and calculate the intereſt.]

[N) Of the Provisions for the Encouragement of Shipping and Navigation.]

1. Of the Plantation Trade: And,

1. Of the General Trade with the Foreign Dominions of his Majesty in *Asia*, *Africa*, or *America*.

NO goods or commodities may be imported into, or exported out of, any colony or plantation to his Majesty, in *Asia*, *Africa*, or *America*, belonging, or in his possession, but in *British*-built ships, owned by *British* subjects, and navigated by a master and three-fourths at least of the mariners *British* subjects. St. 7 & 8 W. 3. c. 22.

Except such goods and commodities as may be imported into, and exported from the free ports in the islands of *Jamaica*, *Grenada*, *Dominica*, and *New Providence*, and from the port of *St. John's* in the island of *Antigua*, by foreign ships, owned and navigated by the subjects of some foreign *European* sovereign or state, or by any persons inhabiting any country on the continent of *America*, under the dominion of some foreign *European* sovereign or state (*a*); except salt, which may be exported from *Turk's Island*, in ships belonging to any of the *United States* (*b*); and except sugar and coffee the produce of any foreign country or plantation, which may be imported into such port or ports in the islands called *Caicos*, as his majesty in council shall approve, in foreign ships (*c*).

(*a*) Stat. 27 G. 3. c. 27. stat. 30 G. 3. c. 29. stat. 31 G. 3. c. 39. stat. 33 G. 3. c. 50.
(*b*) Stat. 28 G. 3. c. 6. § 9.
(*c*) Stat. 33 G. 3. c. 50. § 10, 11, 12.

No sugar, tobacco, cotton-wool, indigo, ginger, fustick, or other dying woods, rice, molasses, copper ore, coffee, pimento, cocoa-nuts, whale-fin, raw silk, hides or skins, pot or pearl ashes, iron or lumber, of the growth, production, or manufacture of any *British* plantation in *Asia*, *Africa*, or *America*, may be transported to any place whatsoever (*d*), other than to some *British* plantation, or to *Great Britain*, or to *Ireland* (*e*). § 22. st. 4 G. 3. c. 15. § 27.

(*d*) Stat. 12 Car. 2. c. 4. § 18. st. 25 Car. 2. c. 7. st. 3 & 4 Ann. c. 5. § 12. st. 8 G. 1. c. 18.
(*e*) St. 20 G. 3. c. 10.

Except sugars, which may be carried from the sugar colonies to any part in *Europe*, in a ship clearing out from *Great Britain*, and having a licence from the commissioners of the customs for that purpose (*f*); and lumber, which may be carried from any *British* colony or plantation to the *Madeiras*, or the *Western Islands*, called *Azores*, or to any part of *Europe* to the southward of *Cape Finisterre* (*g*).

(*f*) Stat. 12 G. 2. c. 30.
(*g*) Stat. 5 G. 3. c. 45. § 22.

All other goods and commodities, not so enumerated, being the growth, production, or manufacture of any *British* colony, or plantation in *Asia*, *Africa*, or *America*, may be transported to any place whatsoever; except hops to *Ireland* (*h*); rum, and other spirits to the *Isle of Man* (*i*); rum to *Guernsey* and *Jersey* (*k*); and *East India* goods, which must be brought to the port of *London* (*l*).

(*h*) Stat. 5 G. 2. c. 9.
(*i*) Stat. 5 G. 3. c. 39.
(*k*) Stat. 9 G. 3. c. 28. § 1, 2.
(*l*) St. 7 G. 1. st. 1. c. 21. § 9.

No goods or commodities of the growth, production, or manufacture of *Europe*, may be imported into any land, island, plantation, colony, territory, or place, to his Majesty belonging, or in his possession in *Asia*, *Africa*, or *America*, but such as shall be shipped in *Great Britain* (*m*) or *Ireland* (*n*).

(*m*) Stat. 15 Car. 2. c. 7. § 6.
(*n*) Stat. 20 G. 3. c. 10.

Except ſalt for the fiſheries of *Newfoundland*, and wines from the *Madeiras* (*a*), and from the *Weſtern Iſlands* of *Azores;* and craft, clothing, or other goods, the growth, production, or manufacture of *Great Britain*, *Guernſey*, or *Jerſey*, or food or victuals, the growth, production, or manufacture of *Great Britain*, *Ireland*, *Guernſey*, or *Jerſey*, from *Guernſey* or *Jerſey* to *Newfoundland*, or any other *Britiſh* colony, where the fiſhery is carried on, for the uſe of the fiſhery (*b*).

(*a*) Stat. 15 Car. 2. c. 7. § 7.

(*b*) Stat. 9 G. 3. c. 28.

Lands, iſlands, territories, or places, to his Majeſty belonging, in *Aſia*, *Africa*, or *America*, not being colonies or plantations, are not included in any of the foregoing prohibitions or reſtrictions, other than the laſt-mentioned prohibition, and the reſtriction that all goods and commodities muſt be imported into and exported out of them in *Britiſh*-built ſhips, or in *Britiſh* ſhips owned by his Majeſty's ſubjects, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects.

2. Of the Trade of the Colonies with the Territories of the *United States*.

St. 28 G. 3. c. 6. § 3. Sugar, molaſſes, coffee, cocoa-nuts, ginger, and pimento, and all goods and commodities which were not prohibited in the year 1788, to be exported into any foreign country in *Europe*, may be exported from the *Weſt India* Iſlands to the *United States*.

St. 28 G. 3. c. 6. § 1. No goods or commodities may be imported from the *United States* into the *Weſt India* Iſlands, except tobacco, pitch, tar, turpentine, hemp, flax, maſts, yards, bowſprits, ſtaves, heading-boards, timber, ſhingles, and lumber of any ſort; horſes, neat-cattle, ſheep, hogs, poultry, and live-ſtock of any ſort; bread, biſcuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, and grain of every ſort, being the growth or production of any of the territories of the *United States*.

§ 12. 14. No goods or commodities may be imported from the *United States* by ſea or coaſtwiſe into the province of *Quebec*, or the countries or iſlands within that government, or up the river *St. Laurence*, nor at all into the provinces of *Nova Scotia* or *New Brunſwick*, the iſlands of *Cape Breton*, *St. John's*, or *Newfoundland*, or any country or iſland within their reſpective governments.

St. 33 G. 3. c. 50. § 14. Except pitch, tar, and turpentine, the growth and production of the *United States*, which may be imported from any of the territories of thoſe ſtates into the provinces of *Nova Scotia* and *New Brunſwick*, in *Britiſh*-built veſſels, owned and navigated by *Britiſh* ſubjects.

St. 28 G. 3. c. 6. § 13. Except alſo that the governors of *Nova Scotia*, *New Brunſwick*, the iſlands of *Cape Breton*, and *St. John's*, may, in caſes of publick emergency and diſtreſs, authorize the importation of ſcantling, planks, ſtaves, heading-boards, ſhingles, hoops, or ſquared timber of any ſort; horſes, neat-cattle, ſheep, hogs, poultry, or live-ſtock of any ſort; bread, biſcuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, or grain of any ſort, for a limited time; and the governor of *Newfoundland*, being empowered by order of his Majeſty in council, may authorize, in caſe of neceſſity, the importation of bread, flour, *Indian* corn, and live-ſtock, for the then enſuing ſeaſon only.

Goods

Goods and merchandize, being the growth or production of any of the territories of the *United States* of *America*, may be imported directly from thence in *Britiſh*-built ſhips, owned by *Britiſh* ſubjects, and navigated according to law, or in ſhips built in the countries belonging to the *United States*, owned by ſuch ſubjects, and navigated by a maſter and three-fourths of the mariners of thoſe countries; namely, unmanufactured goods and merchandize, (except fiſh-oil, blubber, whale-fins, and ſpermaceti); and alſo tobacco, pig-iron, bar-iron, pitch, tar, turpentine, roſin, potaſh, pearl-aſh, indigo, maſts, yards, and bowſprits, upon the ſame duties as if they came from any *Britiſh* iſland or plantation in *America*. Secondly, Fiſh-oil, blubber, whale-fins, ſpermaceti, and all other goods and merchandize (except ſnuff), upon the loweſt of the duties impoſed by law upon thoſe articles, if they came from countries not under the *Britiſh* dominion. Thirdly, Snuff upon the ſame duties as if it was the product and manufacture of *Europe*.

This ſtands upon the order of council of 1ſt April 1792, made by virtue of ſt. 23 G. 3. c. 39. continued by ſt. 36 G. 3. c. 38. The duties to be taken on the ſecond claſs of goods and merchandize are thoſe contained in the tables and ſchedules A, D, and F, of the conſolidation act, 27 G. 3. c. 13. and thoſe enacted by any law paſſed ſubſequent touching the duties in thoſe ſchedules. Snuff is further to be ſubject to the regulations of ſtat. 29 G. 3. c. 68.

2. Of the Trade with *Aſia*, *Africa*, and *America*.

No goods or commodities of the growth, production, or manufacture of *Aſia*, *Africa*, or *America*, may be imported into *Great Britain*, in any other than in *Britiſh*-built ſhips, or in *Britiſh* ſhips owned by his Majeſty's ſubjects, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects. St. 12 Car. 2. c. 18. § 3.

Except ſuch goods and commodities of the growth or production of the *United States*, as are permitted by the before mentioned order in council to be imported in ſhips belonging to the *United States*.

This is the only direct exception; but ſome of the inſtances which are given as exceptions under the next head of exceptions, are exceptions alſo to this, as far as they relate to ſhips.

No goods or commodities of the growth, production, or manufacture of *Aſia*, *Africa*, or *America*, may be ſhipped or brought from any other place or country, but only from thoſe of their growth, production, or manufacture, or from thoſe ports where they can only, or are, or uſually have been, firſt ſhipped for tranſportation.

This reſtriction applies as well to the trade with the plantations, as the general trade with Aſia, Africa, and America; and is founded on the conſtruction of the fourth ſection of the act of navigation.

Except the commodities of the *Streights* or *Levant* ſeas, from the uſual ports of lading them within the *Streights* or *Levant* ſeas (*a*); *Eaſt India* commodities, from the uſual ports for lading them to the ſouthward and eaſtward of the *Cape of Good Hope* (*b*); the goods of the *Spaniſh* or *Portugueſe* plantations or dominions, from the ports of *Spain* or *Portugal*, or the *Weſtern Iſles*, commonly called *Azores*, or the *Madeira* or *Canary Iſlands* (*c*); all bullion and prize-goods, from any port in any ſort of ſhips (*d*);

(*a*) Stat. 12 Car. 2. c. 18. § 12.
(*b*) § 13.
(*c*) § 14.
(*d*) § 15.

jeſuits bark, ſarſaparilla, balſam of *Peru* and *Tolu*, and all drugs the produce of *America*, from the *Britiſh* plantations (*a*); raw ſilks or other goods of *Perſia*, from any place belonging to the Emperor of *Ruſſia*, in *Britiſh*-built ſhips (*b*); cochineal and indigo, from any port, in *Britiſh* ſhips, or ſhips of a ſtate in amity (*c*); gum ſenega, coarſe printed callicoes, cowries, arangoes, and other *Eaſt India* goods, prohibited to be worn here, from any port in *Europe*, in *Britiſh*-built ſhips (*d*); cotton-wool, and goat-ſkins, raw or undreſſed, from any place, in *Britiſh*-built ſhips (*e*); and goods the merchandize of the dominions of the Emperor of *Morocco*, from *Gibraltar*, in *Britiſh* ſhips (*f*).

(*a*) Stat. 7 Ann. c. 8. (*b*) Stat. 14 G. 2. c. 36. (*c*) Stat. 13 G. 1. c. 15. ſt. 7 G. 2. c. 18. (*d*) Stat. 5 G. 3. c. 30. (*e*) Stat. 16 G. 3. c. 52. 15 G. 3. c. 35. (*f*) Stat. 27 G. 3. c. 19.

3. Of the *European* Trade.

St. 12 Car. 2. c. 18. § 8. amended by ſt. 27 G. 3. c. 18. § 10.

No goods or commodities of the growth, production, or manufacture of *Europe*, hereinafter enumerated and deſcribed, namely, no goods or commodities the growth, production, or manufacture of *Muſcovy*, or of any territories belonging to the Emperor of *Ruſſia*; nor any ſort of maſts, timber, or boards; no foreign ſalt, pitch, tar, roſin, hemp, or flax, raiſins, prunes, olive-oils; no ſorts of corn or grain, ſugar, pot-aſhes, wines, vinegar, or ſpirits called aquavitæ, or brandy-wine; may be imported but in *Britiſh*-built ſhips, or in *Britiſh* ſhips owned by his Majeſty's ſubjects, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects, nor any currants or commodities of the growth, production, or manufacture of any country belonging to the *Turkiſh* empire, may be imported but in *Britiſh*-built ſhips, owned by *Britiſh* ſubjects, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects; or in ſhips of the built of any country or place in *Europe* under the dominion of the ſovereign or ſtate in *Europe* of which ſuch goods are the growth, production, or manufacture; or of the built of ſuch port where the ſaid goods can only be, or uſually are, firſt ſhipped for tranſportation, and navigated by a maſter and three-fourths at leaſt of the mariners of that country, place, or port.

Stat. 13 & 14 Car. 2. c. 11. § 23.

No ſort of wines (other than Rheniſh), no ſort of ſpicery, grocery, tobacco, pot-aſhes, pitch, tar, ſalt, roſin, deal boards, fir timber, or olive-oil, may be imported from the *Netherlands* or *Germany*, upon any pretence, in any ſort of ſhips or veſſels whatſoever.

(*g*) Stat. 6 Geo. 1. c. 16. (*h*) Stat. 22 Geo. 3. c. 78. § 2. amended by ſtat. 27 Geo. 3. c. 19. § 10.

Except timber, fir planks, maſts, and deal boards, the production of *Germany*, from any port or place in *Germany*, by *Britiſh* ſubjects, in *Britiſh*-built ſhips (*g*); and wines (*h*), the growth or production of *Hungary*, the *Auſtrian* dominions, or any part of *Germany*, from the *Auſtrian Netherlands*, or any port or place belonging to the Emperor of *Germany* or the Houſe of *Auſtria*, in any ſuch ſhips or veſſels as are deſcribed in the preceding clauſe.

Bullion

Bullion and prize-goods, and all other goods and commodities, of the growth, production, or manufacture of *Europe*, (not prohibited abſolutely to be imported,) may be imported from any country, place, or port, in any ſort of ſhips, owned and navigated in any ſort of manner: for bullion and prize-goods are excepted by the fifteenth ſection out of all the proviſions of the act of navigation; and what is not prohibited by ſtatute muſt of courſe be open and free.

4. Of the Coaſting Trade.

No perſon may lade or carry on board any ſhip or veſſel, other than a *Britiſh*-built ſhip, or a *Britiſh* ſhip owned by *Britiſh* ſubjects, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects, any commodities, or things, of what kind ſoever, from one port or creek of *Great Britain* or *Ireland*, or of the iſlands of *Guernſey* or *Jerſey*, to another port or creek of the ſame, or any of them. St. 12 Car. 2. c. 18. § 6.

Every foreign-built ſhip or veſſel bought and brought into *Great Britain*, to be employed in carrying goods and merchandize from port to port, is to pay at this port of delivery, for every voyage, five ſhillings *per* ton, over and above all other duties. St. 1 Ja. 2. c. 18.

5. Of the Fiſheries.

Freſh fiſh of every kind, caught by the crew of any *Britiſh*-built ſhip or veſſel, owned by *Britiſh* ſubjects, uſually reſiding in *Great Britain*, *Ireland*, *Guernſey*, *Jerſey*, or *Man*, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects, may be imported in ſuch ſhips free of duty. St. 27 G. 3. c. 13. § 32.

No ſort of fiſh whatever of foreign fiſhing (except eels, ſtock fiſh, anchovies, ſturgeon, botargo or caveare, turbots, lobſters, and oyſters) may be imported into *Great Britain*. St. 10 & 11 W. 3. c. 24. St. 1 G. 1. ſt. 2. c. 18.

enforced by ſtat. 9 G. 2. c. 33.; and ſtat. 26 G. 3. c. 81. § 43, 44. Oyſters are not ſpecially excepted in any ſtatute, but there is a duty on them in the conſolidation act, which, not being leviable on Britiſh caught fiſh, muſt be conſtrued as a permiſſion to import foreign-caught oyſters.

Perpetual bounties are payable on the export of pilchards or ſhads, cod-fiſh, ling, or hake, whether wet or dried, ſalmon, white herrings, red herrings, and dried red ſprats, being of *Britiſh* fiſhing and curing. St. 5 G. 1. c. 18. § 6. St. 26 G. 3. c. 81. § 16.

Temporary bounties are payable on the tonnage of ſhips carrying on the *Britiſh* and the *Greenland* fiſheries; on the quantity of fiſh taken in the *Britiſh* and the *Newfoundland* fiſheries; on the quantity of oil, head-matter, blubber, and whale-fins, taken in the *Southern* whale-fiſhery; and on the export of pilchards, ſeal ſkins, head-matter, blubber, and whale-fins, taken in the *Newfoundland*, *Greenland*, and *Southern* whale-fiſheries, may be imported free of duty, provided *Britiſh* ſhips are employed, owned by *Britiſh* ſubjects uſually reſiding in the king's *European* dominions, and navigated St. 26 G. 3. c. 81. as to the Britiſh fiſheries continued by 27 G. 3. c. 10. and 35 G. 3. c. 56. ſtat. 26 G. 3. c. 41. continued, and

amended by 29 G. 3. c. 53. gated by a maſter and three-fourths at leaſt of the mariners uſually reſiding in the king's *European* dominions.

31 G. 3. c. 43. 32 G. 3. c. 22. as to the Greenland fiſhery; ſtat. 26 G. 3. c. 26. as to the Newfoundland fiſhery; ſtat. 26 G. 3. c. 50. continued by ſtat. 35 G. 3. c. 92. as to the Southern whale-fiſhery.

6. Of *Britiſh* Ships.

St. 26 G. 3. c. 60. § 1, 2. A BRITISH-BUILT ſhip is ſuch as has been built in *Great Britain* or *Ireland*, *Guernſey*, *Jerſey*, or the *Iſle of Man*, or in ſome of the colonies, plantations, iſlands, or territories in *Aſia*, *Africa*, or *America*, which at the time of building the ſhip belonged to, or were in the poſſeſſion of, his Majeſty; or any ſhip whatſoever which has been taken or condemned as lawful prize.

But ſuch *Britiſh*-built ſhips as ſhall be rebuilt or repaired in any foreign port or place, to an amount exceeding fifteen ſhillings *per* ton, ſhall not be conſidered as *Britiſh* built, unleſs ſuch repairs ſhall be proved to have been neceſſary to enable the ſhip to perform her voyage.

A BRITISH ſhip is, FIRST, ſuch as is foreign built, and before 1ſt *May* 1786 belonged wholly to any of the people of *Great Britain* or *Ireland*, *Guernſey*, *Jerſey*, or *the Iſle of Man*, or of any colony, iſland, plantation, or territory in *Aſia*, *Africa*, or *America*, in poſſeſſion of his Majeſty.—SECONDLY, ſuch as has been built or rebuilt on a foreign-made keel or bottom, and regiſtered before 1ſt *May* 1786, as a *Britiſh* ſhip.—THIRDLY, ſuch as had begun to be repaired or rebuilt on a foreign-made keel or bottom before 1ſt *May* 1786, and has ſince been regiſtered by order of the commiſſioners of the cuſtoms in *England* or in *Scotland*.

26 G. 3. c. 60. § 3. 28. Every ſhip or veſſel having a deck, or being of the burden of fifteen tons, and belonging to a ſubject in *Great Britain* or *Ireland*, *Guernſey*, *Jerſey*, or *the Iſle of Man*, or any colony, plantation, iſland, or territory, to his Majeſty belonging, muſt be regiſtered by the perſon claiming property therein, who is to obtain a certificate of ſuch regiſtry in the port to which the ſhip or veſſel properly belongs; and the certificate is to diſtinguiſh the ſhip or veſſel under one of theſe two claſſes; CERTIFICATES OF BRITISH PLANTATION REGISTRY; or, CERTIFICATES OF FOREIGN SHIPS REGISTRY FOR THE EUROPEAN TRADE, BRITISH PROPERTY.

§ 5. The port to which a ſhip ſhall be deemed to belong, is the port from and to which ſhe uſually trades, or, being a new ſhip, ſhall intend to trade, and at or near which the huſband, or acting and

§ 6. managing owner, uſually reſides. No ſhip, the property of the king or royal family, nor any lighters, barges, boats, or veſſels, of any built or deſcription whatever, uſed ſolely in rivers or inland

§ 7. navigation, need be regiſtered; and no ſhip built in the *United States*, or owned by the people thereof, during the time the prohibitory acts were in force, and not before regiſtered, is entitled to be regiſtered, unleſs it has been condemned as prize, or having been ſtranded ſhall have been built or rebuilt, and regiſtered in

§ 8. the manner before practiſed and allowed. No ſubject, whoſe uſual reſidence is out of the king's dominions, ſhall, during ſuch

reſidence, be entitled to be owner in whole or in part of a *Britiſh* ſhip to be regiſtered under this act, unleſs he is a member of ſome *Britiſh* factory, or agent for, or partner in, any houſe or copartnerſhip actually carrying on trade in *Great Britain* or *Ireland*.

An oath is to be taken before the perſon making the regiſtry and granting the certificate by the owner; and, if there are two joint owners, by both, if they both live within twenty miles of the port, otherwiſe by one: if more than two, then by the greater part, not exceeding three, if ſuch greater number of them are reſident within twenty miles of the port; or by one, if all ſhall be reſident at a greater diſtance; and where one of three joint owners takes the oath, he is alſo to ſwear, that thoſe who are abſent are not reſident within twenty miles of *London*, and have not wilfully abſented in order to avoid the oath, or are prevented by illneſs. § 10. § 11.

No ſhip is to be permitted to clear out as a *Britiſh*-built ſhip, or a *Britiſh* ſhip, or to be entitled to the privileges of a *Britiſh*-built ſhip, or a *Britiſh* ſhip, unleſs the owner has obtained a certificate of regiſtry; and any ſhip departing from port without being ſo regiſtered, and obtaining ſuch a certificate, ſhall be forfeited. § 32.

All ſhips not entitled to the privileges of a *Britiſh* built ſhip, or a *Britiſh* ſhip, and all ſhips not regiſtered as aforeſaid, are deemed, although they may belong to *Britiſh* ſubjects, to all intents and purpoſes, alien or foreign ſhips. St. 27 G. 3. c. 19. § 13.

As often as the property of a ſhip is transferred from one *Britiſh* ſubject to another, in whole or in part, the certificate of the regiſtry is to be truly and accurately recited in words at length in the bill or other inſtrument of ſale, otherwiſe the bill of ſale is to be void. St. 26 G. 3. c. 60. § 17. This clauſe of the act is general, and applies to a transfer of ſhips at ſea; and if the requiſitions of it are not ſtrictly complied with, the vendee, or perſon claiming under the bill of ſale, has neither a legal, nor equitable, intereſt in the ſhip. Rolleſton v. Hibbert, 3 Term Rep. 406. Hibbert v. Rolleſton, 3 Br. Ch. Ca. 371. Camden v. Anderſon, 5 Term Rep. 709.

As often as the maſter of a ſhip is changed, a memorandum thereof is to be indorſed on the certificate by the proper officer of the cuſtoms. § 18.

The owner is to cauſe the name by which the ſhip is regiſtered to be painted on a conſpicuous part of the ſtern; and ſuch name is not to be changed. § 19.

If a certificate of regiſtry is loſt or miſlaid, or, if a ſhip ſhall be altered in form or burden, or from any denomination of veſſel to another, by rigging or fitting, ſhe muſt be regiſtered *de novo*, and a new certificate granted. § 22, 23.

Maſters of ſhips are, on demand, to produce their certificates to the principal officer in any port within the king's dominions, or to the *Britiſh* conſul or chief officer in any foreign port. § 34.

A ſhip had originally been regiſtered, and was ſaid to be bought by *Macneal* at *Savannah* in *South Carolina*. Having taken in a cargo there, he ſailed for *Naſſau*, where he applied to the governor for Macneal's caſe. Reeves' Shipping, 501.

for a regiſter. The officer whoſe duty it was to make out the certificate of regiſtry, alleged that he had no printed forms left, but that he was ready to make an indorſement upon the old certificate, on *Macneal*'s taking the oath preſcribed by ſtat. 26 *G.* 3. *Macneal* afterwards ſailed to *Savannah*, and returned again to *Naſſau* with a cargo, where the ſhip was ſeized; but on a hearing in the court of Admiralty, ſhe was releaſed as not forfeited.

On the part of *Macneal* it was now contended, that the ſale of a *Britiſh* ſhip in a foreign port was not an act forbidden by any law; that he did all in his power to obtain a fair and legal regiſtry; that it was a blunder in the collector not to give him a certificate, alleging he had no printed forms; that on his return to *Naſſau* he meant to renew his endeavours to obtain a regiſtry, his intention being to trade between *Naſſau* and *Savannah*; and that in the caſe of a change of property in a foreign port, he was left at large as to the *proper* port for the regiſtry of the ſhip; and having declared his intention to trade thereafter from *Naſſau*, that, and that only, became the *proper* port where the ſhip ſhould be regiſtered.

Lord Camden.

Upon which it was obſerved by the Lord Preſident, how material it was to aſcertain, in caſes where a ſhip was ſold, whether in a foreign or *Britiſh* port, what ſhall be the port to which ſuch ſhip ſhall be ſaid *to belong*, and within what ſpace of time ſhe ſhall repair to ſuch port? For if it ſhould be once laid down that ſuch a ſhip might regiſter in any other port than that where ſhe was firſt regiſtered, he was ſatisfied the act of the 28th of the king, which, he ſaid, is founded upon the beſt principles, and is wiſely and ſagaciouſly contrived by the noble perſon who was the author of it to prevent the many frauds committed under the act of King *William*, would be wholly diſappointed of its effect.

He then conſidered the defects in ſtat. 7 & 8 *Will.* 3. the frauds that were committed under it, and to what thoſe frauds were owing. It directs, that in all caſes of change, whether of the name or the property of the ſhip, if in another port, it ſhould be regiſtered *de novo*; but in neither caſe does the act give any direction to point out the particular port where ſuch ſhip ſhould be regiſtered. The conſequence of this want of proviſion in the act had been the multitude of frauds that were continually practiſed in the regiſtry of ſhips; for in any port whatſoever, if a perſon preſented himſelf and took the oath required by that act, he was entitled to have the ſhip regiſtered. For it was remarkable, that the act required no other ſecurity than the tranſient oath, as he called it, of any man whatſoever who choſe to offer himſelf, and who the next minute might ſlip away and never be heard of afterwards. He ſaid, he did not wonder that the noble perſon who framed the ſtatute of the 26th of the king conſidered theſe frauds, and the preventing of them, as particularly deſerving his attention; and he was very happy to ſay, that if they were right in the judgment they were then going to give, he believed they ſhould ſo fully ſecond the deſign of this act, that he would defy any man finding a loop-hole to evade it.

He

He thought that ſtat. 26 *G.* 3. was an act which in every view of it ſhould be conſidered as a remedial act; it was for preventing a publick miſchief, to amend and alter ſtat. 7 & 8 *Will.* 3. It had appeared that frauds without number were committed under that act; and that was, and was ſtated to be, the reaſon of making this act.

The rule, therefore, of conſtruction in applying and explaining the act, ſhould be ſuch as will moſt aid in advancing the means of relief and in ſuppreſſion of fraud. And ſhould it be conſidered in any light as a penal act, he was clearly of opinion, that every thing ariſing from ſuch a conſideration ſhould be controlled by the other character of it as a remedial act.

He obſerved, that by ſect 5. of the act, the port where the regiſtry ought to be made, was expreſsly defined *the port from and to which ſhe has uſually traded;* and if a new ſhip, *the port to and from which ſhe intends to trade.* It is eſſentially neceſſary, and expreſsly required, that the huſband's or acting owner's reſidence ſhould be near ſuch port. This circumſtance of reſidence ſeems to be made the moſt indiſpenſable requiſite in the ſection. Beſides this, there are added ſecurities, controls, ſurveys of the ſhip; all which, if complied with, eſpecially that of reſidence near the port, it ſhould ſeem that fraud would be almoſt impoſſible.

He forebore making more obſervations on the act, except only as to one point; that is, *how long time ſhould be allowed after the change of property in the ſhip for arriving at the proper port where the ſhip ought to be regiſtered:* for if the time allowed were indefinite, ſo that a ſhip might be trading from port to port without regiſtering, the deſign and object of the act would be at an end.

It is remarkable, that ſtat. 7 & 8 *Will.* 3. ſpecifies no time for new regiſtering; no more does ſtat. 26 *G.* 3; but the latter act does in one clauſe decide what is to be done in a particular caſe; and he thought the direction there given might, by analogy, be applied to all caſes of a new regiſtry—"or to any other port "in which ſhe can be legally regiſtered by this act." Now there is no caſe under this act but that of a change of property in a foreign port. Every court before which a caſe of this ſort comes, is to conſider *the time.* Common ſenſe and common reaſon muſt ſay, a ſhip ſhall be at liberty to navigate without a regiſter, and ſhall be protected by law, if in the mean time ſhe is uſing due diligence to reach a port where a regiſter may be obtained. As for inſtance, ſuppoſe a ſhip is ſold at ſea, and ſhe is then making a voyage under a charter-party, and the port at which ſhe firſt arrives after ſuch ſale is not a proper port for her regiſtering, he held ſhe would be juſtified in going to ſuch port; but that no further delay would be excuſed, as ſhe ought in convenient time to proceed to the port where ſhe can be regiſtered.

Upon the whole the rule is this: Where the property of a ſhip is transferred in a foreign port, ſhe muſt with all due diligence proceed to the proper port where ſhe may be regiſtered: this port

muſt

muſt be that of which ſhe is, as it were, an inhabitant. This circumſtance is a part of the certificate, is a part of the oath, and is eſſentially neceſſary to the regiſtry.

Compare *Macneal*'s ſituation with theſe requiſites. He was ſaid to be the purchaſer of this ſhip at *Savannah;* nothing more appears of him: it might fairly be aſked, Who is he? Whence comes he? What property has he? what relations? what friends? By his own account he paid only a part of the purchaſe-money, for the remainder he was to draw on merchants in *Jamaica:* whether thoſe bills were paid or not, does not appear. Theſe merchants, by his account, were to become part owners of the ſhip; which alone makes his oath incorrect, and brings great ſuſpicion on the whole tranſaction. He comes to *Savannah* with a cargo belonging to ſome *American* merchants, but which in the bill of lading is made to belong to *Macneal;* all which was probably a mere colour to give him the credit of the property, in order to enable him to obtain a regiſtry.

He conſidered it as a fundamental objection to this ſhip, that *Macneal* had no known reſidence. He looked upon him as a ſea-vagabond; and obſerved, that he felt he was under the neceſſity of ſwearing with care; for in his oath he did not go farther than to ſay, "he had not been a reſident in any country not under the "dominion of his Majeſty."

On this ſingle objection, without taking into conſideration any other, the court might decide againſt this ſhip. But he had thought it proper to give more at large the ſenſe of the court upon the policy of the act, becauſe it is extremely material that its principle ſhould be thoroughly underſtood; and as to the point in queſtion, if the act was not ſcrupulouſly adhered to, he was perſuaded the whole of its regulations would be futile and uſeleſs. It became the more neceſſary to be thus explicit, as the Judge below had ſeemed greatly to have miſunderſtood the act; declaring, that *Macneal* had offended only againſt the letter of the act, and not againſt its ſpirit. Indeed, ſaid his Lordſhip, it is in general beyond ſea, in our plantations, that the laws of navigation are broke through and evaded; added to which, the application of them is left for a time with governors, collectors of the cuſtoms, and other perſons not ſufficiently converſant with legal matters, who contribute to aggravate ſuch miſchiefs by miſconſtruction and falſe interpretations of the law.]

Miſnomer and Addition.

THE names of men, at this day, are only ſounds for diſtinction ſake, though perhaps they originally imported ſomething more, as ſome natural qualities, features, or relations; but now there is no other uſe of them, but to mark out the families or individuals we ſpeak of, and to difference them from all others; ſince therefore they are the only marks and *indicia* of things which human kind can underſtand each other by, we muſt ſee what certainty the law requires herein, and what the effects and conſequences are of the omiſſion of the name, or falſe ſpecification of the party; and this we ſhall do under the following heads:

(A) What Names are conſidered as the ſame.

(B) What Names and Additions are required by Law, and muſt be truly inſerted: And herein,

1. Of the Difference between the Chriſtian Name and Sirname.
2. Of the Addition of the Eſtate or Degree.
3. Of the Addition of the Myſtery.
4. Of the Addition of the Town, Hamlet, Place, or County.
5. Of Additions which are only Conveyances to the Action.

(C) Where the Name is truly put at firſt, and afterwards varied from.

(D) Of the Difference between a Miſtake in Grants, Obligations, *&c.* and Judicial Proceedings.

(E) At what Time the Miſtake muſt be taken Advantage of, and how the ſame is ſalved.

(F) Of the Manner of taking Advantage of, and Pleading a Miſnomer or Want of Addition.

(G) Who may take Advantage thereof.

(A) What

(A) What Names are conſidered as the ſame.

Cro. Jac. 225. 2 Roll. Abr. 135. Piers Griffith v. Hugh Middleton.

IF two names are in an original derivation the ſame, and are taken promiſcuouſly to be the ſame in common uſe, though they differ in ſound, yet there is no variance; and therefore where *Piers Griffith* brought an *audita querela*, to which an outlawry was pleaded by the name of *Peter Griffith*, the plea was allowed; for it appears by acts of parliament, that *Piers* and *Peter* have been uſed promiſcuouſly, as ſignifying the ſame perſon.

2 Roll. Abr. 135. Leon. 147.

So, *Saunders* and *Alexander*, *Jane* and *Joan*, *Jean* and *John*, *Garret*, *Gerat*, and *Gerald*, are the ſame names.

2 Roll. Abr. 135. Palm. 71.

But *Ralph* and *Randall*, *Randulphus* and *Randalphus*, *Sibel* and *Iſabella*, have been held to be diſtinct names; and ſo of others, in which there is a ſubſtantial variance in ſound, original, and common uſe.

2 Roll. Abr. 135. *Vide* head of Amendment and Jeofail.

So, *Agnes* and *Anne* are different names; and therefore if one declare againſt *J. S.* and *Agnes* his wife, and on the record of *niſi prius* it is *Anne* his wife, this is a material variance, and not amendable.

2 Roll. Abr. 136. 3 Keb. 278. Mod. 107.

If there are two *Engliſh* names that are diſtinct, and one *Latin* name for them both, ſuch name ſhall ſerve for both, as *Jacobus* for *James* and *Jacob*, although two diſtinct *Engliſh* names.

(B) What Names and Additions are required by Law, and muſt be truly inſerted: And herein,

1. Of the Difference between the Chriſtian Name and Sirname.

Cro. Jac. 558. 640. Owen, 107. Dyer, 279. 5 Co. 43. Poph. 57. Noy, 135. Cro. Eliz. 57. 222.

IF the chriſtian name be wholly miſtaken, this is regularly fatal to all legal inſtruments, as well declarations and pleadings, as grants and obligations; and the reaſon is, becauſe it is repugnant to the rules of the chriſtian religion, that there ſhould be a chriſtian without a name of baptiſm, or that ſuch perſon ſhould have two chriſtian names, ſince our church allows of no re-baptizing; and therefore if a perſon enters into a bond by a wrong chriſtian name, he cannot be declared againſt by the name in the obligation, and his true name brought in an *alias*, for that ſuppoſes the poſſibility of two chriſtian names; and you cannot declare againſt the party by his right name, and aver he made the deed by his wrong name; for that is to ſet up an averment contrary to the deed; and there is this ſanction allowed to every ſolemn contract, that it cannot be oppoſed but by a thing of equal validity; and if he be empleaded by the name in the deed, he may plead that he is another perſon, and that it is not his deed (*a*).

[(*a*) But if plaintiff ſues defendant by the name he ſubſcribed to the bond, &c. and defendant pleads a miſnomer, plaintiff may reply he is as well known by the one name as the other, and give in evidence the defendant's actual ſubſcription by that name.]

But

But, though perſons cannot have two chriſtian names at one and the ſame time, yet, they may, according to the inſtitution of the church, receive one name at their baptiſm, and another at their confirmation; for though it allows no re-baptizing to make double names, yet it doth not force men to (*a*) abide by the names given them by their godfathers, when they come themſelves to make profeſſion of their religion. Co. Lit. 3. 2 Roll. Abr. 135. Judge Gawdy's caſe, who was chriſtened by the name of *Thomas*, and confirmed by the name of Francis.

(*a*) But a perſon, by taking a new name of confirmation, does not loſe his name of baptiſm. 6 Mod. 115, 116. Salk. 6. pl. 15. 2 Ld. Raym. 1015, 1016.

The miſtake of the ſurname does not vitiate, becauſe there is no repugnancy that a perſon ſhould have different ſurnames; and therefore if *John Gape* enters into an obligation by the name of *John Gate*, he may be empleaded by the name in the deed, and his real name brought in by an *alias*, and then the name in the deed he cannot deny, becauſe he is eſtopped to ſay any thing contrary to his own deed. 3 H. 6. 25. 2 Roll. Abr. 146.

The declaration muſt be of the name in the obligation, with an *alias* of the real name; for the declaration muſt ſhew the cauſe of complaint as it is; therefore it muſt in all things follow the obligation, and the intent of the *alias* is only to ſhew he has been differently called from the name in the obligation; and therefore if a man oblige himſelf by the name of *J. S.* eſq. and afterwards he be made a knight, the plaintiff may declare againſt *J. S.* knight, *alias J. S.* eſq. Dyer, 273. Bulſ. 216.

It is ſaid, that a perſon cannot take advantage of a miſtaken ſurname in an indictment, either by plea in abatement or otherwiſe, notwithſtanding ſuch ſurname have no affinity with his true one, and he was never known by it. And in this reſpect, an indictment differs from an appeal, whereof it is certain, that a miſnomer of a ſurname may be pleaded in abatement, as well as any other miſnomer whatſoever. 2 Hawk. P. C. c. 25. § 68.

2. Of the Addition of the Eſtate or Degree.

It ſeems that the common law in no caſe required any other deſcription of a perſon, than by his chriſtian name and ſurname, unleſs he were of the degree of a knight or ſome higher dignity; but the names of dignity were always required, being marks of diſtinction impoſed by publick authority, and therefore making up the very name of the perſon to whom they are given. And they are of two ſorts; 1*ſt*, Such marks of diſtinction as exclude the ſurname, ſo that the perſons may not ſeem to be of any common family; and ſuch are the names of earls, dukes, *&c.* 2*dly*, Such marks of diſtinction as are alſo impoſed by the ſupreme power, and parcel of the name itſelf, but do not exclude the ſurname, ſuch as knight, baronet, *&c.* And theſe marks of diſtinction were always to be made uſe of as part of the name in all legal proceedings; and ſo curious was the law herein, that if a plaintiff in any action gained a new name of dignity, pending a writ, he made it abateable. But this 1 Inſt. 665. 2 Roll. Abr. 469. Show. 392. Comb. 189.

this inconvenience is remedied by 1 *E.* 6. *c.* 7. § 3. by which it is enacted, "That if any plaintiff, in any manner of action, ſhall "be made a duke, archbiſhop, marquis, earl, viſcount, baron, "biſhop (*a*), knight, juſtice of either bench, or ſerjeant at law, de- "pending the ſame action, that ſuch action for ſuch cauſe ſhall "not be abateable or abated."

(*a*) But it hath been holden, that the dignity of a baronet is not within the ſtatute, becauſe there was no ſuch dignity at the time of the making of it. Sid. 40. Lit. Rep. 81. Cro. Car. 104.

2 Inſt. 666. But names of worſhip, ſuch as eſquire, gentlemen and yeomen, ſince they are only names of diſtinction in popular uſe, and not given by the publick authority of the ſupreme power, the law doth not count them parcel of the name, and therefore were not neceſſary at common law.

2 Inſt. 670. 2 Roll. Rep. 225. In the time of *H.* 5. it was perceived, that the chriſtian and ſurname were not ſufficient denominations of perſons, and did not ſufficiently avoid the confuſion that might happen by the miſtake of perſons; and that an innocent perſon might, upon a proceſs of execution, be diſtrained upon having the ſame name with the real defendant: therefore, by the 1 *H.* 5. *c.* 5. it is enacted, "That in every original writ of actions perſonal, appeals and in- "dictments, and in which the exigent ſhall be awarded, to the "names of the defendants in ſuch writs original, appeals and "indictments, additions ſhall be made for their eſtate or degree, "or myſtery, and of the towns or hamlets, or places and counties "of the which they were or be, or in which they be and were "converſant; and if by proceſs upon the ſaid original writs, ap- "peals or indictments, in the which the ſaid additions be omit- "ted, any outlawries be pronounced, that they be void, fruſtrate, "and holden for none; and that before the outlawries pro- "nounced, the ſaid writs and indictments ſhall be abated "by the exception of the party, wherein the ſaid additions be "omitted."

[This ſtatute is to be taken ſtrictly, and confined to thoſe caſes where proceſs of outlawry lies; therefore want of proper addition is not pleadable to an information in nature of a *quo warranto*. Rex v. Brough, 1 Wilſ. 244.]

By this law the name of (*a*) worſhip was made equally neceſſary in theſe actions, as the name of dignity was before.

(*a*) But it is ſaid to be no fault to give an eſquire the addition of gentleman, *& ſic e converſo*. Bro. Addition, 44. Eſquire and gentleman no variance. Forteſc. Rep. 354.

2 Inſt. 665. 6 Mod. 85. This law doth not extend to the names of plaintiffs, for they were in no miſchief or danger to be miſtaken, nor does it extend to real or mixt actions; becauſe here the poſſeſſors were empleaded who were ſufficiently ſpecified, and ſo no other mark of diſtinction is needful; beſides, no man can in the proceſs poſſibly be grieved, becauſe there is no proceſs but of diſtreſs upon the land, and no (*b*) impriſonment at all in theſe actions.

(*b*) In an aſſiſe, if the diſſeiſin be found with force, ſo that a *capias pro fine* and *exigent* lies for the king; yet, becauſe the original is in the realty, the defendant ſhall have no addition within this act. 2 Inſt. 665.——So, there needs none in an inferior court where proceſs of outlawry does not lie. Moor, 354. pl. 478.—Nor needs there any in any action where outlawry does not lie. Bro. Addition, 2.

As to the eſtate and degree required by the ſtatute to be added, we muſt obſerve, that ſtate is defined by the civilians the capacity of moral perſons; for, as natural perſons have a certain ſpace in which their natural exiſtence is placed, and in which they perform

their natural actions; ſo have perſons in a community a certain ſtate or capacity, in which they are ſuppoſed to exiſt, to perform their moral acts, and exerciſe all civil relations; and therefore where one, who is neither by birth, office, creation, or reputation, an eſquire or gentleman, is named, with either of theſe additions; or where a gentleman, by birth, who follows a trade or huſbandry, is named with the addition of the trade or huſbandry, and not of gentleman *; or where a peer, who has more than one name of dignity, is not named by the moſt noble; or where a gentlewoman is named ſpinſter, or a yeoman is named gentleman; and ſuch matter is pleaded in abatement, and found for the perſon who pleads it, the writ ſhall abate.

2 Inſt. 669. 2 Hawk. P. C. c. 23. § 103.

* *Sed qu.* If ſuch exception would now be allowed? —A trader may be ſued by his degree, or by his trade;

and if by his degree, the writ ſhall not abate unleſs he ſhews he has a higher degree. Ld. Raym. 1541. Stra. 556. 816.

It hath been adjudged to be a good plea in abatement to a writ or indictment againſt one by the name of *J. S.* knight, that he is a baronet and no knight.

Cro. Car. 371. Jon. 346.

So, in treſpaſs againſt the defendant by the name of *William Snow*, baronet, who pleaded in abatement, that at the time of the bill purchaſed he was, and yet is a knight and baronet; and becauſe he is not called knight as well as baronet, he prayed judgment, *&c.*; upon demurrer to this plea, the court were of opinion that it was good.

Carth. 14. Jeffereys v. Snow. Comb. 65. S. C.

So, if a man be empleaded by the name of *J. S.* where he is garter king at arms; this is not good, becauſe it is not only a name of office, but of dignity and grant, made to him by the words, *creamus*, *coronamus*, and *nomen imponimus*, &c.

Leon. 249. Cro. Eliz. 542. *Vide* Stra. 850. S. P.

A biſhop may be deſcribed by the name of his biſhoprick, without the addition of his ſurname; but a parſon muſt be empleaded by chriſtian and ſurname, and not *John*, parſon of *D.*, becauſe bodies politick are founded by publick authority to political ends; therefore the biſhop, the ſuperintendant of the dioceſe, is made a body politick to ſubſerve all the purpoſes of government in the care of religion; and it is not thought neceſſary to give every perſon ſuch a capacity.

2 Inſt. 666.

A biſhop of an *Iriſh* dioceſe may be as well deſcribed by the addition of his biſhoprick, as an *Engliſh* biſhop may by the addition of an *Engliſh* one; but it ſeems clear, that no one can be well deſcribed by the addition of a temporal dignity in *Ireland*, or any other nation, beſides our own; becauſe no ſuch dignity can give a man a higher title here than that of eſquire.

2 Inſt. 668. Theol. lib. 6. c. 15. § 12, 13.

The degree of a ſerjeant at law is certainly a good addition; and ſo, as is generally holden, is a degree in either univerſity; yet a doctor in divinity may be deſcribed by the addition of clerk, as well as by that of doctor. *Armiger*, *generoſus*, yeoman, labourer, are good additions of the eſtate and degree of a man, but not of that of a woman. *Generoſa*, widow, ſingle woman, wife of *J. S.* ſpinſter, are good additions of the eſtate and degree of a woman; and, as ſome ſay, ſpinſter *, is a good addition for the eſtate and

2 Inſt 667. 2 Hawk. P. C. c. 23. § 110.

* *Sed qu.?*

degree of a man; but neither burgeſs, citizen, nor ſervant, are good additions, as being too general.

Salk. 7. pl. 16. 2 Hawk. P. C. c. 23. § 106.

If ſeveral defendants, of different names, have the ſame addition, it is ſafeſt to repeat the addition after each name; and if a father have the ſame name and addition with his ſon, the writ againſt the ſon is abateable, unleſs the addition of *puiſne* be added to the other additions: but, if a father alone be a defendant, there is no need of the addition of *eigne:* alſo, if the ſon be declared againſt *in cuſtodia mareſchalli*, there is no need of the addition of *puiſne*, unleſs the father be alſo in the cuſtody of the marſhal.

2 Leon. 183. Cro. Eliz. 583. Dyer, 88.

It hath been held a fatal fault, to apply the addition to the name which comes under the *alias dictus* only, and not to the firſt name; but it is ſaid not to be material, whether any addition be put to the name which comes under the *alias dictus*, or not; becauſe what is ſo expreſſed is not material.

2 Hawk. P. C. c. 23. § 107.

The additions of the eſtate, degree, and myſtery of the party are not ſufficient, unleſs they be the ſame which he had at the time of the writ. And in this reſpect, ſuch additions differ from that of place, which is ſufficiently ſhewn, by naming the defendant late of ſuch a place.

2 Inſt. 670. 2 Hawk. P. C. c. 23. § 108. 2 Hal. Hiſt. P. C. 177.

Alſo, it muſt plainly appear that the addition is referred to the party; and therefore it is not well expreſſed by the addition of his myſtery, naming him *B. A.*, ſon of *A.* of *C.*, butcher; becauſe butcher refers to *A.* rather than to the ſon.

3. Of the Addition of the Myſtery.

2 Inſt. 668.

It ſeems agreed, that the word *myſtery* includes all lawful arts, trades, and occupations; and that if one, under the degree of a gentleman, have divers of ſuch arts, trades, or occupations, he may be named by any of them.

2 Hawk. P. C. c. 23. § 114. 2 Hal. Hiſt. P. C. 176.

The additions of this kind, which are ſaid to be clearly good, are thoſe of huſbandman, merchant, broker, tailor, point-maker, ſmith, miller, carpenter, cook, brewer, baker, butcher, pariſh-clerk, mercer, fiſhmonger, dyer, ſchool-maſter, ſcrivener, and ſuch like.

2 Hawk. P. C. c. 23. § 115.

The additions of this kind, which are ſaid to be clearly inſufficient, are thoſe of maintainer, extortioner, thief, vagabond, heretick, common informer, and ſuch like.

2 Hawk. P. C. c. 23. § 116.

But the following additions of this kind are ſaid to be queſtionable:

* *Sed qu.* If this addition is not now frequently uſed, and, as being well underſtood, not objected to?

1*ſt*, Farmer *; which by the better opinion ſeems to be an inſufficient addition; becauſe if any myſtery be implied in the notion of it, it is that of huſbandry, of which huſbandman is the proper addition.

2 Hawk. P. C. c. 23. § 117. and ſeveral authorities there cited.

2*dly*, Chamberlain, butler, and pantler; which are holden to be inſufficient additions, becauſe they denote only a ſpecial kind of officer or ſervant, and imply nothing which, in the common underſtanding of the words, comes under the notion of a myſ-

tery;

tery; and from this ground it ſeems to follow, that neither groom nor page are good additions; and yet in ſome of the old books they ſeem to have been ſo admitted.

3*dly*, Hoſtler; which hath been holden to be a good addition, and ſeems properly enough to come under the notion of a myſtery; and though it hath been reſolved, that any one who keeps an inn, may be ſued by the addition of a labourer, upon the cuſtom of the realm, for want of due care of the goods of his gueſts; becauſe whoever keeps a common inn is, in that reſpect, liable to anſwer for ſuch defects, by whatſoever addition he may be ſtyled; yet this does by no means prove that ſuch perſon may not as well be ſued by the addition of hoſtler, but only that he may be ſued as well under any other addition. 2 Hawk. P. C. c. 23. § 118.

4. Of the Addition of the Town, Hamlet, Place, or County.

It is a good addition of this kind to name the party late * of ſuch a town; in which reſpect this addition differs from that of the eſtate, degree, or myſtery; and it is ſaid, that if a defendant be named of *A.* and late of *B.*, it is ſufficient to prove either addition. 2 Hawk. P. C. c. 23. § 119. 2 Hal. Hiſt. P. C. 175. * On ſpecial original

againſt *A nuper de London*, merchant, he pleaded he had for four years been commorant at *B.*, and traverſed that at the time of the writ, *vel nuper tunc, vel unquam poſtea*, he was of *London*, and made affidavit; but the plea was ſet aſide on motion. Cortiſos v. Mienoz Stra. 924. [In Shelly v. Wright, Barnes, 338. it is ſaid not to be uſual to ſet aſide ſuch a plea upon motion; but that the plaintiff ought to demur.]

The addition of place is ſufficiently ſhewn by naming the defendant *de Londino*, or *de Norwico*; but not by naming him *Londini*, or *Briſtoliæ*, for that imports only that he belongs to ſuch town, but not that he lives there; nor by naming him of a town which is not a county of itſelf, without ſhewing the county. If it name him of a pariſh which contains ſeveral towns, he may plead ſuch matter in abatement; for the ſtatute ſays, that the addition ſhall be of the town or hamlet; but a pariſh ſhall be intended to contain no more than one town, unleſs the contrary be ſhewn. 2 Inſt 669. Dyer, 213. Cro. Jac. 167 2 Hawk. P. C. c. 23. § 120.

If there be two towns in a county, the one called *Great Dale*, the other *Little Dale*, and the defendant be named only of *Dale*; he may plead, that there are two *Dales* in the county, called *Great Dale* and *Little Dale*, and none without an addition; and as ſome ſay, he may plead that there is no ſuch town as *Dale*, either in this caſe, or where there is but one town called *Little Dale*, and he is named of *Dale*. 2 Hawk. P. C. c. 23. § 121.

If a defendant live in a hamlet, which is ſo far part of a town, that thoſe who live in it are indifferently ſtyled ſometimes of the hamlet, and ſometimes of the town; it ſeems to be in the election of the plaintiff, to name him either of the hamlet or of the town. 2 Hawk. P. C. c. 23. § 122.

If a defendant live in a place known by a ſpecial name, out of a town or hamlet, he may be named of ſuch place. 2 Hawk. P. C. c. 23. § 123.

2 Hawk. P. C. c. 23. § 124.

The habitation of the wife is ſufficiently ſhewn by ſhewing that of the huſband*.

* The place where defendant is *converſant* is ſufficient, though not *commorant* nor inhabitant. Barnes, 162.

5. Of Additions which are only Conveyances to the Action.

Vide tit. Executors and Adminiſtrators.

When any particular character or relation gives any perſon rights and privileges, or makes him ſubject to any burden; to demand the one, or be liable to the other, the particular character or relation ought to be ſet forth; for ſince it is the cauſe of the action, it muſt certainly be material; and therefore when perſons ſue or are ſued, as heirs, executors, or adminiſtrators, they muſt be named as ſuch, for theſe are neceſſary conveyances or inducements to the action, which if miſtaken is fatal.

Vide tit. Heir and Anceſtor. Cro. Eliz. 333.

But, where the inducement is not neceſſary, but ſurpluſage only, as, if an action of detinue of charters be brought againſt *J. C.*, and the writ be *præcipe* J. C. *filio & hæredi* of *R. C.* and he count of a bailment to the defendant himſelf; the defendant plead, that he was ſon and heir to *W. C.* and not to *R. C.*, this is no good plea, becauſe he is charged with an injury done by himſelf. But, if he had been charged upon any covenant of his anceſtors, as their repreſentative, there, the periphraſis, or inducement, muſt have been rightly formed; for otherwiſe the plaintiff doth not entitle himſelf to his action; and, there, this had been a good plea.

Saund. 111. Dean v. Guire.

If this inducement be not at firſt in a declaration, yet if it afterwards appear, that the party is charged as executor, this is ſufficient; as, if an action of covenant be brought againſt *J. S.* executor, and he be not named at firſt *J. S.* executor of the laſt will and teſtament; but afterwards it be ſhewn, that the teſtator did covenant and bind himſelf his executors, *&c.* and made *J. S.* his executor, and died; and a breach be aſſigned; this is ſufficient, without a formal nomination.

2 Inſt. 666.

If an action of account be brought againſt a parſon, they need not call him parſon of *Dale*; but, if an aſſize be brought againſt a parſon or prebend, for land that he hath in right of his church, he muſt be named parſon or prebendary of the ſaid church.

Vide head of Privilege.

So, if an attorney of the Common Pleas bring a writ of debt, he need not name himſelf attorney; but if he bring a writ of privilege, he ought.

(C) Where the Name is truly put at firſt, and afterwards varied from.

Cro. Eliz. 913. Law v. Saunders.

THE name muſt be truly put at firſt; for if that be omitted, there is a complaint againſt no perſon; therefore, where, in an *aſſumpſit*, *J. Law* declares thus; *J. L. queritur de* Thom. Saunders, *&c. cum in conſideratione quod idem* J. L. would marry the daughter of the ſaid *Thomas Saunders*, *ſuper ſe aſſumpſit* to pay him 100*l.*, the declaration is bad, though after a verdict; becauſe it

it does not say *prædict.* Thom. Saunders *super se, &c.* for no body is expresly charged with assuming; and when it is indifferent whether there can be an injury, or no, it is not by the court to be supposed *.

* But as the pleadings are now in English, the pronoun *he* would have been used, and, referring to the last antecedent, would have been sufficient.

But if the plaintiff counts against *J. S. quod præd. J. S.* was seised of the manor of *Dale*, without saying *prædict. J. S.* or *de manerio prædict.*; this, after a verdict, shall be taken to be so; for he being named to be seised, and this by verdict being found, it is necessary it should be intended *J. S.* mentioned, for here it cannot possibly be taken indifferently either way. Cro. Eliz. 192. Watts's case.

If *J. W.* declares against *T. W.* and the judgment is *quod prædict. T. recuperet*, *T.* shall be amended and made *John*; and *note*, that by the statute 16 & 17 *Car.* 2. *c.* 18. it is expresly provided, that judgment shall not be reversed for any mistake in christian name, or surname, in any declaration, plaint, or pleading. Hob. 327. Cro. Jac. 662. Cro. Eliz. 865. *Vide* tit. Amendment and Jeofail.

But this must be understood where the record is before them, for otherwise it may be very fatal to a just cause; as, if *A.* brings an *assumpsit* against *B.* and declares he was bail for him at the suit of *W. Adderly*; and the defendant assumed to save him harmless, and that the plaintiff was taken in execution, and paid the debt; upon *non assumpsit* pleaded it was found, that the defendant was arrested by the same *William Adderly*, but that he declared against him by the name of *William Adderby*, and the plaintiff became bail for him, *&c.* In this case the opinion of the court was, that the defendant was not chargeable; for *Adderby* and *Adderly* shall not be intended the same person, at whose suit the plaintiff became bail; for the verdict hath no credit against a record, and therefore it cannot reconcile the difference that appeared to be between the records; but in this case, if it had been before the court, it might have been amended. Cro. Eliz. 459. Franson v. Delamere.

If the surname in the judgment differs from the surname in the declaration, yet it shall be amended; for in the judgment the christian name need only be mentioned, and the surname is redundant, and then *utile per inutile non vitiatur*; as, if a declaration be against *John Morgan Wolf*, and the judgment be against *John Morgan*, this is well enough: so, if a declaration be *Henry Skinner*, and judgment be entered *quod Henricus Soiner recuperet* 10*l.* assessed by the jury, and 5*l. eidem Henrico Skinner de incremento*, this is well enough. Cro. Eliz. 865. Hob. 327. Cro. Jac. 632.

The variance of the surname in the process to the sheriff destroys not the verdict; otherwise it is in the variance of the christian name; for, when any man is named by two different surnames on record, it shall be intended he has two different surnames, as by law he may have; therefore, if a *venire facias* be to one by the name of *George Thompson*, and in the *distringas* he be named *Gregory Thompson*, and he appear and be sworn, the verdict is not good; but if there be two different surnames in the record, they shall be intended his real names, and then the verdict shall not be avoided; as, if a man be named in the *venire facias*, *Thomas* Cro. Eliz. 57. Depy v. Sprat.

Barker of *B.*, and in the *diſtringas*, *Thomas Carter* of *B.*, and he appears and is ſworn, and tries the iſſue, the verdict is good notwithſtanding.

Roll. Abr. 196. 3 Bulſ. 18. Hob. 64. Brownl. 174.

So, if the chriſtian name be wrong in the *diſtringas*, or in the panel returned, or in the panel of the jury ſworn, if it can be proved to be the ſame man that was intended to be returned in the *venire*, having there his right chriſtian name, it may be amended.

(D) Of the Difference between a Miſtake in Grants, Obligations, &c. and Judicial Proceedings.

Co. Lit. 3. Dyer, 279. pl. 9. Cro. Jac. 558. Owen, 107.

IF the chriſtian name be wholly miſtaken, this, as hath already been obſerved, is not only fatal in judicial proceedings, but alſo in grants, obligations, &c. and therefore if *Edward* obliges himſelf by the name of *Edmund*, it is ill.

Co. Lit. 3. 2 Roll. Abr. 43.

But in grants, &c. if there be ſuch ſufficient marks of diſtinction, that the grant would be good without any name at all, there, a miſtake of the chriſtian name or ſurname, being only ſurpluſage, will not vitiate, according to the rule *utile per inutile non vitiatur*; and therefore a grant to *George* Biſhop of *Norwich*, where his name is *John*; or to *Henry* Earl of *Pembroke*, where his name is *Robert*, is good (*a*).

[(*a*) So, in judicial proceedings. 1 Str. 316.]

Co. Lit. 3. 2 Roll. Abr. 43.

So, a grant to a man and his wife is good, without naming her by the name of baptiſm: ſo, if a grant be made to *T.* and *Elen* his wife, where, in truth, her name is *Emlyn*, yet the grant is good; for being called the wife of *T.* reduces it to a ſufficient certainty.

Leon. 18. *Vide* tit. Deviſe.

So, in a deviſe, though the chriſtian name be miſtaken, yet, if there be a ſufficient ſpecification of the party, the deviſe is good; becauſe it muſt be conſtrued according to the intent of the deviſor; and therefore if a deviſe be made to *Abraham*, the eldeſt ſon of *B.*, where his name is *William*, this is a good deviſe.

Co. Lit. 3.

But in pleading, in theſe caſes, the chriſtian name ought to be ſhewn; for the death of the individual is a good plea in abatement, which often falls out where the ſame office, dignity, or relation continues in another.

Perk. § 37.

If there be father and ſon of the ſame name, and the father grant an annuity by his name, without any addition, it ſhall be intended the grant of the father; and if the ſon, being of the ſame name with his father, grant an annuity, without any addition, yet the grant is good, for he cannot deny his own deed.

2 Roll. Abr. 44.

If *A.* be created an herald, and in the patent he be called *Cheſter*, a grant or obligation made to him by the name of *Cheſter*, is good; for this ſufficiently diſtinguiſhes him from other men.

Cro. Jac. 374.

If a grant be made to a father and his ſon, he having but one ſon, the grant is good for the apparent certainty of it: but, if the father has ſeveral ſons, or, if a grant be made to a man's couſin, or friend, theſe are void for uncertainty.

If

If *J. S.* reciting by his deed, that his name is *J. S.* by the ſame deeds grants an annuity by the name of *Tho. S.*, this is a good grant; for the writ ſhall be brought upon the whole deed. Perk. §40.

So, if *J. S.* knight, reciting by his deed, that he is a yeoman, grants an annuity, the grant is good. Perk. §43.

A grant to a duke's eldeſt ſon by the name of a marquis, or to the eldeſt ſon of a marquis by the name of an earl, *&c.* is good, becauſe of the common courteſy of *England*, and their places in heraldry. Carth. 400.

So, where a conveyance was made of a reverſion to *Ralph Evers*, knight, Lord *Evers*, and he brought an action of covenant, to which the defendant pleaded, that at the time of the grant he was not *cognitus & reputatus per nomen mil.*, it was held to be no good plea; for the perſon is ſufficiently expreſſed by Lord *Evers*, and the addition of knight, though falſe, doth not take away the deſcription of the true perſon. Bulſ. 21. Cro. Car. 240. Lord Evers v. Strickland.

But it was adjudged in *C. B.*, and affirmed by three judges in *B. R.*, where the party ſet forth his title to an advowſon, by virtue of letters patent granted to *A.*, *tunc armigero & poſtea militi*, and upon oyer of the letters patent it appeared, that the grant was made to *A.*, knight, that it could not be intended the ſame perſon, becauſe knight is a name of dignity, but *armiger*, or eſquire, a name of worſhip; and if he is afterwards made a knight, the name of eſquire is thereby extinguiſhed, and, conſequently, that a grant made by the king to *A.*, knight, when there was no ſuch man a knight, was a void grant. Carth. 440. 5 Mod. 297. 2 Salk. 560. pl. 3. The King v. Biſhop of Cheſter. But Rokeby, Juſtice, held, that he might take by a grant made unto him by the name of *knight*, *& ſic vice verſâ*, *ſi conſtat de perſonâ*, *ut res magis valeat*, &c.—And note, this judgment was reverſed in parliament, becauſe it was only a miſtake in the pleader, the party being in truth a knight at the time of the grant. Carth. 440.

(E) At what Time the Miſtake muſt be taken Advantage of, and how the ſame is ſolved.

IT ſeems agreed, that he who would take advantage of a miſnomer, or the want of a proper addition, muſt do it before he pleads to iſſue; for the addition is ordained by the ſtatute, that the party who happens to be outlawed may have notice; but, if he appears and takes no exception, *conſtat de perſona*, and he thereby waives any benefit he may have by the miſnomer or want of addition. Roll. Abr. 780. Cro. Jac. 609. 2 Roll. Rep. 225. Johnſon's caſe. 2 Hal. Hiſt. P. C. 175. Sid. 247. Keb. 885. Shew. 394. Comb. 188. Carth. 207. Lil. Ent. 509.

The defendant was ſerved with proceſs by the name of *Dubois*, plaintiff entered an appearance for him, and obtained judgment by default; and on motion to ſet aſide the judgment, upon an affidavit that his name was *Davois*, the court refuſed it and ſaid, that ſuch kind of motions would deſtroy all pleas in abatement; ſince the laſt act enabling the plaintiff to appear for the defendant, his appearance by the name of *Dubois* is the ſame, as if entered by the defendant himſelf*. Paſch. 7 Geo. 2. in B. R. Halcock v. Dubois. * If defendant is ſerved by a wrong name, appears by his true name, and plaintiff declares againſt him by that name, the court will not, on motion, ſtay proceedings for irregularity, but leave defendant to plead variance.—So, if it is in the addition of his degree or myſtery. 2 Wilſ. 293.

(F) Of the Manner of taking Advantage of, and Pleading a Miſnomer or Want of Addition.

Finch. 363. 9 H. 5. 1. pl. 3.

ALthough a defendant may, by pleading in abatement, take advantage of a miſnomer when there is a miſtake in the writ or declaration, as to the name of baptiſm or (*a*) ſurname, yet in ſuch a plea he muſt ſet forth his right name, ſo as to give the plaintiff a better writ.

(*a*) That the ſafeſt way in criminal caſes, is to allow the party's plea of miſnomer, both as to his ſurname and as to his chriſtian name; for he that pleads miſnomer for either, muſt in the ſame plea ſet forth what his true name is, and then he concludes himſelf; and if the grand jury be not diſcharged, the indictment may preſently be amended by the grand jury, and returned according to the name he gives himſelf. 2 Hal. Hiſt. P. C. 176.—That the party accuſed may take advantage of the miſnomer, or want of addition, but yet he muſt plead over to the felony; but though ſuch plea be found for him, he is not to be diſcharged, but muſt be indicted over again; neither ſhall ſuch plea, if found againſt him, be peremptory, but he ſhall be tried on his plea in chief. 2 Hawk. P. C. c. 34.

Gouldſb. 86. Skin. 620. pl. 4. Salk. 6. pl. 15. 4 Mod. 347.

Alſo, he who pleads in abatement, muſt not only ſet forth his right name, but muſt alſo allege, that by ſuch name he was known and called at the time of the purchaſe of the writ.

Hal. Hiſt. P. C. 175.

He who will take advantage of the miſnomer of his chriſtian name, addition, or ſurname, muſt do it upon his arraignment, and the entry muſt be ſpecial, *viz. ſuper quo venit* Robertus Williams, *qui indictatus eſt per nomen* Johannis Williams, *& dicit quod ubi in indictamento ſupponitur quod quidam* Johannes Williams, *vi & armis*, &c. *Ipſius nomen eſt* Robertus *& non* Johannes; for if he ſhould ſay, *venit prædictus Johannes Williams*, he concludes himſelf, and cannot plead that his name is *Robert*.

Carth. 207. Tallent v. Germyn.

So, where the defendant pleaded miſnomer in abatement in this form, *& prædict. J. Germyn* (with an *n* at the end) *venit & defend., & dicit*, that his name is *Germy* (without an *n*) and not *Germyn prout, &c.*, and upon demurrer to this plea it was adjudged againſt him; for that he had admitted his name to be *Germyn*, by his appearing and making defence by that name; but that if he would have taken advantage of the miſnomer, he ſhould have pleaded in this manner, & Johannes Germy, *qui per nomen* J. Germyn *ſuperius implacitatur, venit & dicit quod*; for this default a *reſpondeas ouſter* was awarded.

Mich. 9 Geo. 2. in B. R. Humberſton v. Cotteral.

So, where the defendant was ſued by the name of *Edward Cotteral*, and pleaded in abatement that his name was *John*, but introduced his plea, and the aforeſaid —— *Cotteral* (leaving out his chriſtian name) comes and defends the force and injury, when, and ſo forth; it was held, that the defendant ſaying *& predict.* —— *Cotteral*, muſt be underſtood *& prædict. Edwardus Cotteral*, by which he confeſſes his name to be *Edward*; and if he would have taken advantage of the miſnomer, he ſhould have ſaid *& Johannes*, who was ſued by the name of *Edward*.

Trin. 10 Geo. 2. in B. R. Read v.

If there be a miſtake in the chriſtian name and ſurname, the defendant may take advantage of both, and his plea on that account ſhall not be held to be double; as, where trover was brought

brought againſt the defendant by the name of *Chriſtopher Mature*, and he pleaded in abatement, that his name was *John Metter*, and that he was known by that name; *abſque hoc*, that he was named by the name of *Chriſtopher Mature*; on demurrer to this plea, becauſe of duplicity, and becauſe no *venue* was laid where he was baptized, it was held, *1ſt*, That there being a miſtake in both names, the defendant could not take advantage thereof, in a better manner than he has done; for he is not bound to admit one of the names right, which if he did, he would not then give the plaintiff a better writ, the *prænomen* and *cognomen* being only one deſcription of the ſame perſon; and though there is no precedent, where miſnomer has been pleaded both in the chriſtian name and ſurname, yet that may be becauſe it is a matter that has rarely happened; and for this were cited 1 *Lutw.* 10. *Thom. Ent.* 1. 1 *Salk.* 6. *2dly*, That there was no neceſſity of laying a *venue*, this being a matter relating to the perſon, which muſt be tried where the action is laid; and for this were cited *Raſt. Ent.* 29. *Hern's Plead.* 9. 1 *Salk.* 6. 6 *Mod.* 115.

Mature. Caſes temp. Hardw. 286. S. C.

(G) Who may take Advantage thereof.

THE defendant, though his name is miſtaken, is not obliged to take (*a*) advantage of it; and therefore if he be empleaded by a wrong name, and afterwards empleaded by his right name, he may plead in bar the former judgment, and aver, that he is *una & eadem perſona*.

(*a*) J. Villars, who pretended himſelf to be Earl of Buckingham,

was arreſted by the name of J. Villars, armiger; and, on motion, the court gave him leave to put in bail, without joining in the recognizance, and thereby not eſtop himſelf. Salk. 3. pl. 7. pl. 17. 7 Mod. 38.

So, if a perſon be indicted and acquitted of a crime, and afterwards be indicted for the ſame offence, in which ſecond indictment the crime is deſcribed to be the ſame in ſubſtance, with ſome variation of the name, addition, *&c.*, he may make good the variance, by averring, that he was the ſame perſon meant in both.

2 Hawk. P. C. c. 35. § 3.

If a perſon killed be deſcribed by his proper name and ſurname in the firſt indictment, and by a different ſurname in the ſecond, ſuch variance may alſo be helped by an averment, that the perſon ſo differently named was one and the ſame perſon; to which it is adviſable to add, that he was known as well by the name in the firſt, as by that in the ſecond indictment.

2 Hawk. P. C. c. 35. § 3.

If a defendant appear *gratis*, and by attorney, to an information, he may plead a miſnomer in abatement, as well as if he had appeared in perſon; for if he be not the perſon intended, his plea may be rejected, and judgment ſigned by *nihil dicit*; but the attorney general, by accepting his plea, admits him to be the defendant, and ſhall not afterwards ſay, that it doth not appear but that the plea might be put in by a ſtranger.

2 Hawk. P. C. c. 34. § 3.

One

Lutw. 36. One defendant cannot plead miſnomer of his companion; for the other defendant may admit himſelf to be the perſon in the writ.

2 Hal. Hiſt. P. C. 177. So, if ſeveral perſons be indicted for one offence, miſnomer or want of addition of one, quaſheth the indictment only againſt him, and the reſt ſhall be put to anſwer; for they are in law as ſeveral indictments.

Monopoly.

(A) Monopoly, what it is, and how reſtrained by the Common Law.

(B) How reſtrained by Statute.

(A) Monopoly, what it is, and how reſtrained by the Common Law.

3 Inſt. 181. Noy, 182. (a) Monopoly and engroſſing differ only in this, that the firſt is by patent from the king, the other by act of the ſubject, between party and party; but are both equally injurious to trade, and the freedom of the ſubject, and therefore are equally reſtrained by the common law. Skin. 169.

A Monopoly is deſcribed by my Lord *Coke* to be an inſtitution or allowance by the king by his (a) grant, commiſſion or otherwiſe, to any perſon or perſons, bodies politick or corporate, of or for the ſole buying, ſelling, making, working, or uſing of any thing, whereby any perſon or perſons, bodies politick or corporate, are ſought to be reſtrained of any freedom or liberty they had before, or hindered in their lawful trade.

Hawk. P. C. c. 79. § 2. Townſend's Collection of Proceedings in Parliament, 244, 245. (b) And it is held to be further reſtrained by the common law, by ſubjecting thoſe who are guilty thereof to a fine and impriſonment for the offence, as being *malum in ſe*, and contrary to the ancient and fundamental laws of the kingdom; and it is ſaid, that there are precedents of proſecutions of this kind in former days. 3 Inſt. 181. 2 Inſt. 47. 61.

And

And upon this ground it hath been reſolved, that the king's grant to any particular corporation, of the ſole importation of any merchandize, is void, whether ſuch merchandize be prohibited by ſtatute or not. 2 Roll. Abr. 214. 3 Inſt. 182. 2 Inſt. 61.

Hence alſo it ſeems, that the king's charter, empowering particular perſons to trade to and from ſuch a place, is void, ſo far as it gives ſuch perſons an excluſive right of trading, and debarring all others. And it ſeems now agreed, that nothing can exclude a ſubject from trade, but an act of parliament. Raym. 489. 2 Chan. Ca. 165 Vern. 127. Sands v. Eaſt India Company. Skin. 165. pl. 2. 226. 234. 3 Mod. 126.

Alſo, it hath been adjudged, that the king's grant of the ſole making, importing, and ſelling of playing cards, is void; notwithſtanding the pretence, that the playing with them is a matter merely of pleaſure and recreation, and often much abuſed, and therefore proper to be reſtrained; for ſince the playing with them is, in itſelf, lawful and innocent, and the making of them an honeſt and laborious trade, there is no more reaſon why any ſubject ſhould be hindered from getting his livelihood by this than any other employment. 11 Co. 84. Moor, 671. Noy, 173. 2 Inſt. 47.

And for the like reaſons alſo it hath been reſolved, that the grant of the ſole engroſſing of wills and inventories in a ſpiritual court, or of the ſole making of bills, pleas, and writs in a court of law, to any particular perſon, is void. Vern. 120. 130. 10 Mod. 107. 131. 133. 2 Roll. Abr. 212. Jon. 231. 3 Mod 75.

But it ſeemeth clear, that the king may, for a reaſonable time, make a good grant to any one of the ſole uſe of any art invented, or firſt brought into the realm, by the grantee. Noy, 182. Hawk. P. C. c. 79. § 6.

Alſo, it ſeems to be the better opinion, that the king may grant to particular perſons the ſole uſe of ſome particular employments; (as of (*a*) printing the Holy Scriptures, and law books, &c.) whereof an unreſtrained liberty might be of dangerous conſequence to the publick. Mod. 256. 3 Keb. 792. 3 Mod. 75. and the authorities to the laſt paragraph but one.

(*a*) The reaſons hereof given are, that the invention of printing was new; that it concerned the ſtate, and was matter of publick care; that it was in the nature of a proclamation, and none could make proclamations but the king; that as to law-books, the king has the making of judges, ſerjeants, and officers of law; that they are printed in a particular language and character, with abreviations, &c. *Vide* 2 Chan. Ca. 67. Skin. 234.

(B) How reſtrained by the Statute.

BY the 21 *Jac.* 1. *c.* 3. it is declared and enacted, "That all "monopolies, and all commiſſions, grants, licences, charters "and letters patents to any perſon or perſons, bodies politick or "corporate whatſoever, of or for the ſole buying, ſelling, making, "working, or uſing of any thing within this realm, or *Wales*, or "of any other monopolies, and all proclamations, inhibitions, "reſtraints, warrants of aſſiſtance, and all other matters whatſo-"ever, any way tending to the inſtituting, ſtrengthening, fur-"thering, or countenancing of the ſame, or any of them, are "altogether contrary to the laws of this realm, and ſo are and "ſhall

" ſhall be utterly void, and of none effect, and in nowiſe to be " put in ure and execution."

And § 2. " That all perſons, bodies politick and corporate what- " ſoever, ſhall be diſabled and uncapable to have, uſe, exerciſe, or " put in ure any monopoly, or any ſuch commiſſion, grant or " licence, *&c.*, or other thing tending as aforeſaid, or any liberty, " power, or faculty, grounded or pretended to be grounded upon " them, or any of them."

(*a*) In the conſtruction hereof it is held by my Lord Coke, that all matters of this kind ought

And it is further declared and enacted, by § 3. " That all mo- " nopolies, and all ſuch commiſſions, grants, and licences, *&c.*, " and all other things tending as aforeſaid, and the force and " validity of them ought to be, and ſhall be examined, heard, " tried, and determined by and according to the (*a*) common laws " of this realm, and not otherwiſe."

to be tried in the courts of common law only; and not at the Council-table, or in the court of Chancery, or any other court of like nature. 3 Inſt. 182. But for this *vide* Juriſdiction of the Court of Chancery, tit. Courts and their Juriſdiction.

And it is further enacted, by § 4. " That if any perſon ſhall be " hindered, grieved, diſturbed, or diſquieted, or his goods or chat- " tels any way ſeized, attached, diſtrained, taken, carried away, or " detained by occaſion or pretext of any monopoly, or of any ſuch " commiſſion, grant, or licence, *&c.*, or other matter or thing " tending as aforeſaid, and will ſue to be relieved in any of the " premiſes, he ſhall have his remedy for the ſame at the common " law, by action grounded on the ſaid ſtatute, to be heard and " determined in the King's Bench, Common Pleas, or Exchequer, " againſt the party by whom he ſhall be ſo hindered or grieved, " *&c.*, or by whom his goods ſhall be ſo ſeized or attached, *&c.*, " wherein every ſuch perſon, which ſhall be ſo hindered or grieved, " *&c.*, or whoſe goods ſhall be ſo ſeized or attached, *&c.*, ſhall " recover three times ſo much as the damages which he ſuſtained " by means of ſuch hinderance, *&c.*, and double coſts; and in " ſuch ſuits, or for the ſtaying or delaying thereof, no eſſoin, pro- " tection, wager of law, aid-prayer, privilege, injunction, or " order of reſtraint, ſhall be in anywiſe prayed, granted, admitted, " or allowed, nor any more than one imparlance; and if any per- " ſon ſhall, after notice that the action depending is grounded " upon the ſaid ſtatute, cauſe or procure any action at the com- " mon law grounded thereon to be ſtaid or delayed before " judgment, by colour or means of any order, warrant, power, or " authority, ſave only of the court wherein ſuch action ſhall be " depending; or after judgment ſhall cauſe or procure the execu- " tion to be ſtaid or delayed by colour or means of any order, " warrant, prayer, or authority, ſave only by writ of error or " attaint, that then the ſaid perſon or perſons ſo offending ſhall " incur a *præmunire*."

3 Inſt. 183. It is ſaid, that the firſt branch of this laſt clauſe, relating to the delay of cauſes of this kind before judgment, not only extendeth to the Privy Council, Chancery, Exchequer-chamber, and the like, but alſo to thoſe who ſhall procure any warrant from the king for ſuch

ſuch purpoſe; and it is ſaid, that the latter branch, relating to the delaying of execution after judgment, extendeth even to the judges of the court where the cauſe is depending.

But it is provided, by § 6. "That no declaration, in the ſtatute "mentioned, ſhall extend to any letters patents, and grants of "privilege for the term of fourteen years, or under, of the ſole "working or making of any manner of (a) new manufactures "within this realm, to the true and firſt inventor and inventors "of ſuch manufactures, which others, at the time of making "ſuch letters patents and grants, ſhall not uſe; ſo as alſo they be "not contrary to the law, nor miſchievous to the ſtate, by raiſing "prices of commodities at home, or hurt of trade or generally "inconvenient; the ſaid fourteen years to be accounted from the "date of the firſt letters patent, or grant of ſuch privilege, but "that the ſame ſhould be of ſuch force, as they ſhould be if the "ſaid act had never been made, and of none other."

(a) Manufactures newly brought into the realm from beyond ſea are included, though they had been long practiſed there before; for the ſtatute ſpeaks of new manufactures within this realm, and was made to encourage new devices uſeful to the kingdom; and whether learned by travel or ſtudy, it is the ſame thing. 2 Salk. 447.

It hath been reſolved, that no new invention, concerning the working of any manufacture, is within the meaning of this exception, unleſs it be ſubſtantially new, and not barely an additional improvement of an old one. 3 Inſt. 184.

Alſo, it hath been holden, that a new invention to do as much work in a day by an engine, as formerly uſed to employ many hands, is not within the ſaid exception; becauſe it is inconvenient, in turning ſo many labouring men to idleneſs. 3 Inſt. 184.

Alſo, it ſeems clear, that no old manufacture, in uſe before, can be prohibited in any grant of the ſole uſe of any ſuch new invention. 3 Inſt. 184.

And it is farther provided, § 7. "That nothing in the ſaid act "contained ſhall extend to any grant or privilege, power or au-"thority whatſoever, before the ſaid act made, granted, allowed, "or confirmed by any act of parliament, ſo long as the ſame ſhall "continue in force."

Provided alſo, § 9. "That nothing in the ſaid act contained "ſhall be in anywiſe prejudicial to any city, borough, or town "corporate within this realm, concerning any grants, charters, or "letters-patent to them made, or concerning any cuſtom uſed by "or within them, or unto any corporations, companies, or fel-"lowſhips of any art, trade, occupation, or myſtery, or to any "companies or ſocieties of merchants within this realm, erected "for the maintenance, enlargement, or ordering of any trade or "merchandize, but that the ſame charters, cuſtoms, corporations, "&c. and their liberties and immunities, ſhall be of ſuch force "and effect, as they were before the making of the ſaid act, and "of none other; any thing before in the ſaid act contained to the "contrary in anywiſe notwithſtanding."

And it is further provided, § 10. "That nothing in the ſaid "act contained ſhall extend to any letters-patent, or grants of "privilege

" privilege concerning printing, nor to any commiſſion, grants, of " letters-patent concerning the digging, making, or compounding " of ſalt-petre, or gunpowder, or the caſting or making of " ordnance, or ſhot for ordnance; nor to any grant or letters- " patent of any office, erected before the making of the ſaid " ſtatute, and then in being and put in execution, other than ſuch " offices as had been decried by proclamation; but that all ſuch " grants, &c. ſhall be of the like force and effect, and no other, " as if the ſaid act had never been made."

But it is enacted, by 16 *Car.* 1. *c.* 21. "That it ſhall be lawful " for all perſons, as well ſtrangers as natural-born ſubjects, to " import any quantities of gunpowder whatſoever, paying ſuch " cuſtoms and duties for the ſame as by parliament ſhall be " limited; and that it ſhall be lawful for all his majeſty's ſubjects " of this realm of *England*, to make and ſell any quantities of " gunpowder at his pleaſure, and alſo to bring into this kingdom " any quantities of ſalt-petre, brimſtone, or any other materials " for the making of gunpowder; and that if any perſon ſhall put " in execution any letters-patent, proclamations, edict, act, " order, warrant, reſtraint, or other inhibition whatſoever, where- " by the importation of gunpowder, ſalt-petre, brimſtone, or other " the materials aforementioned, ſhall be any ways prohibited or " reſtrained, he ſhall incur a *præmunire*."

And it is further provided by the ſaid ſtatute of 21 *Jac.* 1. *c.* 3. § 11, 12. "That nothing in the ſaid act contained ſhall extend to " any commiſſion or grant concerning the digging, compounding, " or making of alum or alum mines, &c., nor concerning the " licenſing of the keeping of any tavern or ſelling of wines, to be " ſpent in the manſion-houſe, or other place in the tenure or oc- " cupation of the party ſelling the ſame; and a further proviſion " is made in the latter part of the ſtatute, for ſome particular " grants to particular corporations and perſons, as *Newcaſtle-upon-* " *Tine*," &c.

3 Inſt. 185. But it is ſaid, that the ſaid clauſe relating to alum was needleſs, becauſe all ſuch mines belong of courſe to the perſons in whoſe grounds they are, and therefore no privilege concerning them can be granted but in the king's own ground.

[See farther tit. "*Prerogative.*"]

END OF THE FOURTH VOLUME.

FH
MVSEVM
BRITANNICVM